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

DEON SOUTHERLAND,

Petitioner,

vs. NO: 15 WC 018580

FORD MOTOR COMPANY,

Respondent.

17IWCC0690

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 the reasonableness and necessity of medical services and timeliness of the utilization reviews, 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 finds that the medical services rendered Petitioner were reasonable and necessary. The Commission reviewed the utilization reviews submitted by Respondent and found the rationale stated in the various denials of treatment are not persuasive.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 2017 is hereby expanded as stated herein and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of past medical benefits for reasonable and necessary treatment by Suburban Orthopedics in the amount of

$276.00, by Metro Health Solutions in the amount of $10, 777.11, and by Adco Billing in the amount of $6,449.96 is affirmed. Respondent is entitled to a credit for all bills paid.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to stipulation of the parties Petitioner is entitled to 28 weeks of temporary total disability benefits at the rate of $440.76 per week. That total calculates to $12,341.28. The parties have stipulated that $11,042.19 has been paid in temporary total disability benefits. The difference is $1,299.09. Therefore, Petitioner is awarded the underpayment of $1,299.09 in temporary total disability benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to stipulation of the parties that Petitioner is entitled to 15% of the loss of use of the left hand and 15% loss of use of the right hand.

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

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

Bond for 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: NOV 1 - 2017
o-9/28/17
SM/msb
44

Stephen J. Mathis
Stephen J. Mathis

David L. Gore
David L. Gore

Deborah L. Simpson
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SOUTHERLAND, DEON
Employee/Petitioner

Case# **15WC018580**

FORD MOTOR CO
Employer/Respondent

17IWCC0690

On 4/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.91% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1747 SEIDMAN MARGULIS & FAIRMAN LLP
NANCY J SHEPARD
S CLARK ST SUITE 700
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
ROBERT LUEDKE
900 COMMERCE DR SUITE 300
OAK BROOK, IL 60523

17IWCC0690

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

Deon Southerland
Employee/Petitioner
v.
Ford Motor Co.
Employer/Respondent

Case # **15** WC **18580**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **February 27, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

17IWCC0690

On **February 15, 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 **$33,718.14**; the average weekly wage was **$661.14**.

On the date of accident, Petitioner was **45** years of age, *single* with **2** dependent children.

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

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

Respondent shall be given a credit of **$11,042.19** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11042.19**.

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 $440.76 /week for 28 weeks, commencing August 3, 2015 through February 14, 2016, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from August 3, 2015 through February 27, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $11,042.19 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $396.69/week for 28.5 weeks, because the injuries sustained caused the 15 % loss of the right hand, and additional permanent partial disability benefits of $396.69/week for 28.5 weeks, because the injuries sustained caused the15 % loss of the left hand, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $276.00 to Suburban Orthopaedics, $10,777.11 to Metro Health, and $6,449.96 to Adco Billing as provided in Sections 8(a) and 8.2 of the Act.

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

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

Signature of Arbitrator

April 4, 2017
Date

APR 4 - 2017

FACTS

The parties have stipulated that on February 15, 2013 Petitioner sustained injuries to both hands, that the injuries were causally related to Petitioner's repetitive assembly line work for Respondent, that Petitioner is entitled to 28 weeks of temporary total disability benefits, and that Petitioner is entitled to 15% loss of use of each hand. Petitioner claims that there has been an underpayment of temporary total disability benefits. Respondent disputes certain medical bills based upon utilization review reports.

TEMPORARY TOTAL DISABILITY

The parties have stipulated that petitioner's entitled to 28 weeks of temporary total disability benefits at the rate of $440.76 per week (AX1). That calculates to $12,341.28. The parties have stipulated that $11,042.19 has been paid in temporary total disability benefits (AX1). The difference is $1,299.09. Therefore, Petitioner is awarded the underpayment of $1,299.09 in temporary total disability benefits. Respondent is entitled to a credit for the $11,042.19 it has been paid.

MEDICAL

Petitioner testified that she had been employed as a production team member on the assembly line for Respondent for approximately four and one half years at the time of the injury. On February 15, 2013, she reported to plant medical for pain in her left wrist. She was given a cold compress and told to take ibuprofen. She followed up with plant medical several times through 2013 and 2014. On January 29, 2015, the doctor at plant medical recommended that Petitioner undergo an EMG/NCV test, which was done on February 5, 2015.That test showed evidence of moderate, right greater than left, carpal tunnel syndrome (PX2). Respondent

sent Petitioner for a Section 12 examination with Dr. Sonnenberg on March 19, 2015. He opined that the job duties had resulted in the development of bilateral carpal tunnel syndrome (PX2).

On July 1, 2015, Petitioner sought treatment with Dr. Freedberg at Suburban Orthopedics. Dr. Freedberg conducted an evaluation of her wrists, including X-rays. Dr. Freedberg diagnosed bilateral carpal tunnel syndrome that was causally related, and he recommended right carpal tunnel release surgery. Dr. Freedberg's records indicate that he prescribed medication for her pain (PX3). Petitioner testified that she took the medication and that the medication helped.

Respondent submitted a utilization review report dated January 10, 2017, regarding the July 1, 2015 X-rays (RX5). That January 10, 2017 utilization review did not certify the July 1, 2015 X-rays. It is noted that by January 10, 2017, Petitioner had undergone right hand carpal tunnel release surgery, on August 3, 2015, and left hand carpal tunnel release surgery on, November 2, 2015. She had returned to work on February 14, 2016.

The Arbitrator finds that 18 months was not timely for a retrospective utilization review of the X-rays. Therefore, those radiology bills are awarded.

On July 30, 2015, Dr. Freedberg prescribed topical pain cream. Respondent submitted a utilization review report dated May 19, 2016, regarding the July 30, 2015 topical pain cream prescription (RX1). That May 19, 2016 utilization review did not certify the July 30, 2015 topical pain cream prescription.

The Arbitrator finds that 9 months was not timely for a retrospective utilization review of the pain medication prescription. Therefore, those topical pain cream bills are awarded.

On July 30, 2015, Dr. Freedberg prescribed another topical pain cream. Respondent submitted a utilization review report dated January 10, 2017, regarding that July 30, 2015 topical pain cream prescription (RX4). That January 10, 2017 utilization review did not certify that July 30, 2015 prescription.

The Arbitrator finds that 17 months was not timely for a retrospective utilization review of that pain medication. Therefore, those topical pain cream bills are awarded.

On September 9, 2015, Dr. Freedberg again prescribed topical pain cream. Respondent submitted a utilization review report dated January 10, 2017, regarding the September 9, 2015 topical pain cream prescription (RX3). That January 10, 2017 utilization review did not certify the September 9, 2015 topical pain cream prescription.

The Arbitrator finds that 16 months was not timely for a retrospective utilization review of the pain medication. Therefore, those topical pain cream bills are awarded.

On October 29, 2015, Dr. Freedberg again prescribed topical pain cream. Respondent submitted a utilization review report dated May 19, 2016, regarding the October 29, 2015 topical pain cream prescription (RX2). That May 19, 2016 utilization review did not certify the October 29, 2015 topical pain cream prescription.

The Arbitrator finds that 7 months was not timely for a retrospective utilization review of the pain medication. Therefore, those topical pain cream bills are awarded.

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

KEVIN MURPHY,

Petitioner,

vs.

NO: 10 WC 45276

CITY OF DES PLAINES,

17IWCC0691

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On review of the evidence submitted at hearing the Commission finds that Petitioner sustained the loss of use of 2% of the person as a whole. Petitioner returned to work full-duty the shift following his injury and has lost no time from his employment following the injury. The Deputy Fire Chief of Operation for the Des Plaines Fire Department testified that he is not aware of any complaints petitioner has made concerning his neck or left shoulder since the 2009 work incident. This is in spite of the fact that the firefighters are required to engage in one hour of physical training, i.e. aerobic exercise or weight training on a daily basis. Additionally, Petitioner engages in outside employment with the NIPSTA Fire Academy, providing training for firefighters. Petitioner last sought treatment with Dr. Nixon in December 2009.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability to the extent of 2% loss of use of the person as a whole.

17IWCC0691

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: NOV 1 - 2017
o-10/19/17
SM/msb
44

Stephen J. Mathis

Deborah Simpson

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MURPHY, KEVIN
Employee/Petitioner

Case# **10WC045276**

CITY OF DES PLAINES
Employer/Respondent

17IWCC0691

On 3/15/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.91% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1747 SEIDMAN MARGULIS & FAIRMAN LLP
STEVEN SEIDMAN
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CHICAGO, IL 60603

0863 ANCEL GLINK
ROBERT K BUSH
140 S DEARBORN ST SUITE 600
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

17IWCC0691

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kevin Murphy
Employee/Petitioner

v.

City of Des Plaines
Employer/Respondent

Case # **10** WC **45276**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **December 27, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 10, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**73,788.00**; the average weekly wage was $**1,419.00**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **1** dependent child.

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 32.5 weeks, because the injuries sustained caused a 6.5% loss of use, person as a whole, pursuant to 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

March 15, 2017
Date

4823-1585-8751, v. 1

MAR 15 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Murphy, Petitioner, v. City of Des Plaines Fire Department, Respondent.	)	17IWCC0691 Case No. 10 WC 45276 Arbitrator Cronin

ARBITRATION DECISION

FINDINGS OF FACT:

On July 10, 2009, Petitioner was 29 years old, married with one dependent, and working for the City of Des Plaines Fire Department as a firefighter/paramedic. On that date, Petitioner was responding to an emergency call at a residence in Des Plaines, IL. Petitioner testified that he and a co-worker put a patient on a backboard. It was in the middle of the night. The ground had a slight slope and had dew on it. Because the patient was combative and shifted his weight on the backboard, Petitioner pulled up harder on the left side. A little while later, Petitioner felt tingling, numbness and pain in his arm and hand. He also noticed a loss of grip strength in his left hand. The parties have stipulated that the Petitioner's injury arose out of and in the course of his employment and that Petitioner timely reported the injury to Respondent.

After completing his shift, Petitioner went to Alexian Brothers Medical Group for examination and treatment of his injury. Records from Alexian Brothers indicate that Petitioner had pain, swelling and tenderness in his left shoulder and upper back. He was diagnosed with a sprain/strain of the left shoulder and cervical spine. Petitioner was directed to take Ibuprofen, apply cold and heat therapy and perform range of motion exercises. (PX 2)

Petitioner continued to experience left-sided upper extremity symptoms.

On July 20, 2009, Petitioner began treating with Dr. Robert Nixon at McHenry County Orthopedics in Crystal Lake. Petitioner reported that after he lifted a patient onto a backboard, he felt a pulling sensation, followed by pain and paresthesia in his left upper extremity. He rated his pain as 2 out of 10, and getting worse. He characterized the pain as aching and intermittent, and pain that wakes him from his sleep. He experiences a tingling sensation. Upon examination, Dr. Nixon found that Petitioner had some stiffness in his neck as well as some provocation of his symptoms in the left trapezius area. (PX 3)

At the August 10, 2009 follow-up visit, Petitioner reported that he continues to have symptoms that radiate down the length of his arm, as well as some weakness. Upon examination, Dr. Nixon found extension of the neck reproduces a radicular pattern that is limited. Dr. Nixon ordered an MRI of the cervical spine without contrast. Robert A. Breit, M.D., offered the following impression of the August 12, 2009 MR images:

1. Mild cervical spondylosis with mild right C3-C4 foraminal stenosis.
2. Small to moderate sized left paramedian disc herniation at C5-C6. (PX 3)

At the August 17, 2009 follow-up visit, Petitioner reported that his symptoms have changed over time. He has less pain and numbness, but continuing weakness in the left upper extremity. He does not have a gross localizing deficit, but has persistent symptoms. Dr. Nixon diagnosed Petitioner with a C5-6 disc herniation and left arm radiculopathy. Dr. Nixon prescribed a trial of traction. He also discussed the option of an injection, but did not recommend it at that time. (PX 3)

Petitioner continued to treat with Dr. Nixon with follow-up visits on September 9, 2009, October 9, 2009, November 13, 2009, and December 28, 2009. Throughout the treatment period, Dr. Nixon continued to recommend therapy and anti-inflammatory medication for treatment of the Petitioner's injuries. The treatment somewhat alleviated the Petitioner's symptoms. On December 28,

2009, Petitioner continued to report some stiffness in his neck and some tingling into his left arm that occurs. He denied any weakness or significant pain into his arm. (PX 3)

Petitioner's testimony regarding his job requirements indicates that he performs strenuous work. During an emergency call, Petitioner is required to wear heavy protective firefighting equipment, including a protective coat, air pack with mask, and helmet. In addition to working as a paramedic, as a firefighter the Petitioner must "throw" ladders so that firefighters may enter a building above the ground floor. Petitioner may also be required to carry hoses and extensions which can weigh up to 40 lbs. Finally, Petitioner may also be required to saw holes into the roof of a burning building to ventilate the fire. This requires the Petitioner to carry a circular saw up to the roof top.

Petitioner also testified as to both training and job requirements for cutting holes in roofs to ventilate a fire. This requires Petitioner, in full firefighting gear, to carry a 40-lb. circular saw up a ladder to a roof top. Petitioner then uses the circular saw to cut a hole "as large as possible" in the roof of a burning building to help ventilate the fire.

Although Petitioner returned to full-duty work shortly after his injury, he testified, and the medical records show, that he continued to experience pain in his left shoulder and arm, stiffness in his neck, and numbness, tingling and weakness.

Petitioner testified that he has experienced flare-ups of these symptoms. He experiences pain in his neck and a lack of flexibility. He has pain in his neck upon performing certain motions, such as rotating his neck counterclockwise while checking the blind spot in his car. Ever since 2009, Petitioner testified, while he is performing his work duties, he has experienced numbness and tingling in his left upper extremity. He continues to work through these symptoms. In order to alleviate these symptoms, Petitioner continues to perform the home exercises that his treating physician has prescribed.

Petitioner testified that prior to July of 2009, he had not experienced symptoms to his neck or left upper extremity.

Petitioner testified that since December of 2009, he has not visited Dr. Nixon or any other medical professional for complaints related to his neck or left shoulder.

Deputy Chief Pete Dyer of the Des Plaines Fire Department testified at the hearing. In addition to the testimony Petitioner gave about Petitioner's job duties and job performance, the Chief testified Petitioner is also required to participate in at least one hour of physical fitness training on every shift. The Chief had no reason to belief that Petitioner had not engaged in such physical training activities and Petitioner did not testify to the contrary. In addition, the Chief testified Petitioner had voluntarily sought secondary employment as a firefighter training officer for the Northeastern Illinois Fire Training Institute in Glenview.

Chief Dyer testified that Respondent's Exhibit 1 constituted the training log for Petitioner from October 2, 2013 through October 10, 2016 which sets out the daily, weekly and monthly activities for Petitioner during that time period. Chief Dyer also authenticated Respondent's Exhibit 2 being the Staff Activity Reports for the Petitioner from January 2, 2010 through April 22, 2015, the last date for which Respondent's attorney requested the City provide such documents. Both documents were admitted into evidence and show Petitioner's regular work and training assignments since the date of accident.

CONCLUSIONS OF LAW:

In support of his decision with regard to issue (L) "What is the nature and extent of the injury?", the Arbitrator concludes as follows:

Petitioner's accidental injury occurred before September 1, 2011, and as such, Section 8.1b(b) of the Act does not apply. In determining the extent of Petitioner's disability, the Arbitrator notes that during Petitioner's initial visit of July 20, 2009, Dr. Nixon observed that Petitioner was experiencing neck stiffness with motion, as well as pain and paresthesia into his left upper extremity. Dr. Nixon opined that Petitioner's symptoms could represent a disc injury. (PX 3) Dr. Nixon's hunch was

subsequently confirmed by Petitioner's cervical MR images of August 12, 2009, which Dr. Breit interpreted as showing a small to moderate sized disc herniation at C5-6 with compression of the thecal sac in the left C6 nerve roots. (PX 3) As of his final check-up with Dr. Nixon on December 28, 2009, Petitioner continued to complain of neck stiffness and tingling in his left arm, as well as one to two episodes of increased symptoms since his check-up in the prior month. (PX 3) Petitioner's final diagnosis was "C5-6 disc herniation and left arm radiculopathy." (PX 3)

Petitioner's work as a firefighter requires him to lift and carry heavy equipment, such as 40-pound circular saws and hoses that weigh 30 to 40 pounds even before water is put into them. Petitioner's work as a paramedic also requires Petitioner to be able to manually carry patients - - some of them overweight adult - - up and down flights of stairs on backboards without any mechanical assistance.

Following the accidental injury, Petitioner lost no time from work. Since the accident, he has continued to carry his out the full duties of a firefighter and a paramedic. He testified that he continues to experience flare-ups of his neck and upper extremity symptoms. He still makes use of the traction device prescribed to him by Dr. Nixon.

The Arbitrator notes that Petitioner never received an injection. Furthermore, it was never recommended to Petitioner that he undergo cervical disc surgery.

Petitioner testified that since December of 2009, he has not visited Dr. Nixon or any other medical professional for complaints related to his neck or left shoulder.

The Arbitrator recognizes that Petitioner was 29 years old at the time of accident and that he performs heavy-duty work as a firefighter/paramedic. However, the Arbitrator also considers RX 1, RX 2 and Chief Dyer's testimony that, post-accident, Petitioner voluntarily sought secondary employment as a firefighter training officer for the Northeastern Illinois Fire Training Institute in Glenview.

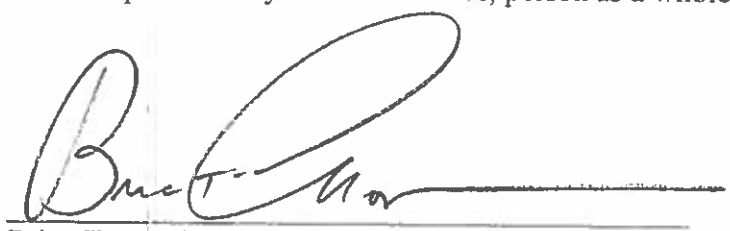
After carefully weighing the evidence, he Arbitrator finds that as a result of the July 10, 2009 accident, Petitioner has sustained a loss of use of his person as a whole to the extent 6.5%, pursuant to Section 8(d)2 of the Act.

The following decisions, for cases with dates of accident prior to September 1, 2011, further support this award:

In Robert Murillo v. City of Markham, 10 IWCC 0975, claimant was a 42-year-old firefighter who sustained an accident that caused a herniated cervical disc and right shoulder impingement. An MRI of the cervical spine revealed a right posterolateral protruded herniated disc/osteophyte complex at C5-6. Claimant received chiropractic care and 10 sessions of physical therapy for his neck injury. No injection for symptoms related to the cervical spine was given. He did not undergo cervical spine surgery, but did undergo right shoulder surgery. After treatment, claimant was given a full-duty release. The Commission awarded claimant permanency benefits of 5%, person as a whole (as well as 30% loss of use of the right arm for the shoulder injury).

In Nicholas Donato v. City of Chicago, 07 IWCC 0590, Petitioner was a 44-year-old truck driver who sustained an accident that caused a herniated cervical disc. An MRI of the cervical spine revealed a left paracentral disc herniation at C3-4 with disc material abutting the cord and a narrowing of the left neural foramen. Claimant lost no time from work and underwent a course of physical therapy. He did not receive an injection and there was no recommendation for surgery. He did not receive any medical care for this cervical disc injury after the course of physical therapy ended 4½ months post-accident. Claimant does not take any prescription medication for this injury, but does take Ibuprofen once a week when his neck pain increases. The flare-up of pain occurs mostly in the winter or when he exerts himself either at work, when exercising or when playing with his children. The Commission awarded claimant permanency benefits of 7.5%, person as a whole.

In Jeanette Harrison v. Fairplay Finer Foods, 12 IWCC 0389, claimant was a 41-year-old deli worker who sustained an accident that caused 2 herniated cervical discs. Approximately 3½ months after the initial accident, claimant sustained an aggravation of her cervical condition while at work. She received epidural steroid injections but did not undergo surgery. Following treatment, claimant was capable of performing full-duty work. At trial, she complained of stiffness in her right arm and electric shocks in her neck. She testified that her right hand still goes numb on a sporadic basis. Furthermore, claimant testified that her neck is stiff almost all the time. The Commission awarded claimant permanency benefits of 10%, person as a whole.



Brian T. Cronin
Arbitrator

3-15-2017
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH CREED,

Petitioner,

vs.

NO: 07 WC 53963

17IWCC0692

UNIVERSITY OF ILLINOIS AT 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 issue of permanent partial disability ("PPD"), and being advised of the facts and applicable law, modifies in part and affirms in part the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings, and arguments submitted by the parties.

The Arbitrator awarded 30% loss of the person as a whole for Petitioner's low back injury and 12% loss of the person as a whole for Petitioner's left shoulder condition under Section 8(d)2 of the Act. The Commission hereby modifies the Arbitrator's Decision only as it pertains to the award for the lumbar spine, finding instead that Petitioner is permanently partially disabled to the extent of 35% loss of the person as a whole. The remainder of the Arbitrator's Decision relative to the left shoulder is otherwise affirmed and adopted.

17IWCC0692

Following the September 20, 2007 work-related accident, Petitioner was diagnosed with lumbar degenerative disc disease, stenosis, and radiculopathy. For this injury, Petitioner underwent physical therapy, epidural injections, facet joint injections, medial branch blocks, radiofrequency neurotomy, and a four-level fusion with hardware. After completing work conditioning and a functional capacity evaluation in March 2012, Petitioner was released in December 2012 with permanent restrictions of no lifting greater than 20 pounds.

The Arbitrator noted Petitioner's permanent restrictions and Petitioner's age – 55 years old on the accident date. The Arbitrator found Petitioner's age significant as the amount of time "an injured worker will have to work with his injury/limitations is crucial." The Arbitrator further indicated that Petitioner had been working in an accommodated capacity with Respondent for approximately three years before he resigned.

The Commission finds that as a result of the undisputed work accident, Petitioner necessitated a four-level fusion with hardware. The Commission agrees with the Arbitrator that Petitioner's injuries were significant and his treatment was serious and extensive. Thus, based on the totality of the evidence, the Commission finds that additional PPD is required for Petitioner's lumbar spine, and modifies the Arbitrator's Decision to find the Petitioner to be permanently partially disabled to the extent of 35% loss of the person as a whole. The remainder of the Arbitrator's Decision relative to the left shoulder is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed April 25, 2017, is hereby modified as stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $372.91 per week for a total period of 235 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused 35% loss of the person as a whole (175 weeks) for Petitioner's low back injury, and 12% loss of the person as a whole (60 weeks) for Petitioner's left shoulder condition.

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.

17IWCC0692

No bond is required for 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: NOV 1 - 2017

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/pm
D: 10-24-17
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CREED, JOSEPH
Employee/Petitioner

Case# **07WC053963**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

17IWCC0692

On 4/25/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0391 THE HEALY LAW FIRM
DENNIS M LYNCH
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

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

2461 NYHAN BAMBRICK KINZIE & LOWRY
MOLLY H NARTONIS
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

0902 UNIVERSITY OF IL/CLAIMS MGMT
CHUCK HUTCHISON
1737 W POLK ST M/C 940 #B9
CHICAGO, IL 60612

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

APR 25 2017

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

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOSEPH CREED
Employee/Petitioner

Case # 07 WC 53963

v.

Consolidated cases:

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

17IWCC0692

An *Application for Adjustment 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 **January 10, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0692

On 9/20/2007, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $29,087.35; the average weekly wage was $559.37.

On the date of accident, Petitioner was 55 years of age, *married* with 2 dependent children.

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

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

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

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

ORDER

Permanent Partial Disability: Person as a whole (Section 8(d)2)

Respondent shall pay Petitioner permanent partial disability benefits of $372.91/week for 200 weeks, because the low back injuries sustained caused the 30% loss of the person as a whole (150 weeks) and the left shoulder injuries sustained caused the 12% loss of the person as a whole (60 weeks), as provided in Section 8(d)2 of the Act.

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

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

KSSteffen

Signature of Arbitrator Ketki Shroff Steffen

April 25, 2017

Date

PROCEDURAL HISTORY

This matter was tried before Arbitrator Gary Gale on January 10, 2017. The Parties have agreed to have the decision rendered by Arbitrator Ketki Steffen. Arbitrator Steffen has examined the transcript and submitted records and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Petitioner was 55 years of age at the time of work accident in October, 2010. (R 11) He had been employed as shipping and receiving clerk for the Respondent, University of Illinois, since 2000. (T. p. 10) His job duties included unloading trucks, making deliveries to various buildings and departments on campus, preparing outgoing shipments, as well as handling and filing freight documents. (T. p. 11) Petitioner testified the weights of the products he handled ranged up to 100 pounds. (T. p. 13)

The parties stipulated Petitioner sustained an accidental injury arising out of and in the course of his employment on September 20, 2007. (ArbX1) That day, he was assigned to unload a shipment of office furniture. (T. 14) Petitioner stated that he has had no issue with his low back or left shoulder. (T. p.14)

On the accident date, Petitioner was unloading a semi-truck. (T. p.14) Petitioner explained the items were not palletized but instead were stacked floor to ceiling, and the trailer floor was dusted with a sand mixture to ease the friction when sliding the cardboard boxes. (T. p.15) the accident occurred when Petitioner was moving file cabinets:

> And they had two-door file cabinets that weigh 90 pounds apiece stacked four high, which was over my height. So I had to stand on one box to get

> up high. When I was taking the box down, I went to turn and the box caught into my shoulder and I lost my balance and I dropped the box; and I jumped down.... (T. p. 15)

He had an onset of pain in his left shoulder and soreness in his back. (T. p.16) Petitioner reported the injury to his supervisor, Brian Gavaghan and completed an accident report. He was directed to University Health Services. (T. p. 17) Petitioner testified he followed up at University Health throughout his course of care, which appears to have been pursuant to University policy, but sought treatment from his primary care physician, Dr. Keith Mulki. (T. p. 17)

On September 26, 2007, Petitioner met with Dr. Mulki (PX 2, p.6) Petitioner reported a work injury on September 20, 2007 and complained of low back pain. (PX 2, p.6) Dr. Mulki recommended physical therapy. (PX 2, p.6)

Physical therapy commenced at Silver Cross Physical Rehabilitation & Performance Center on September 28, 2007. (PX 6, p.125) When Petitioner followed up with Dr. Mulki on October 17, 2007, he reported his back was feeling better but his left shoulder was still bothering him. (PX 2, p.4) Dr. Mulki administered a cortisone injection to the left shoulder, ordered continued physical therapy, and referred Petitioner to a pain clinic for a lumbar spine injection. (PX 2, p.4)

Pursuant to an order by Dr. Mauricio Morales, an MRI of the lumbar spine was done on October 25, 2007. The radiologist identified mild spinal stenosis at L4-5, primarily due to posterior ligamentous hypertrophy as well as a mild degree of disc bulging; some central bulging of the disc at L5-S1 without definitive nerve root involvement; and degeneration of the disc at L2-3 but without specific nerve root involvement or stenosis. (PX 3, p.12)

Thereafter Petitioner continued to follow-up with University Health Services and Dr. Mulki (PX 1; PX 2) These records show Petitioner underwent lumbar epidural steroid injections in November and December, receiving some temporary relief. Ultimately, on January 14, 2008, Dr. Mulki referred Petitioner to Dr. George DePhillips for evaluation of his continued low back pain. (PX 2, p.39)

On January 21, 2008, Petitioner consulted with Dr. DePhillips. Petitioner gave a consistent history of the work injury and complained of persistent pain in the lower back. On review of the MRI, Dr. DePhillips identified degenerative disc disease and disc bulging at L2-S1. Noting Petitioner's pain fit the L4-5 or L5-S1 level; Dr. DePhillips suspected discogenic pain most likely from L4-5 or L5-S1 or both. He recommended further workup with lumbar discography from L2-S1. (PX 3, p.15)

The discogram and post-discogram CT scan were completed on February 14, 2008. (PX 3, p.9-11) When Dr. DePhillips reviewed the discogram on March 3, 2008, he memorialized it revealed concordant pain at the L3-4, L4-5, and L5-S1 levels. Dr. DePhillips opined it would not be unreasonable to consider a spinal fusion L4-S1 but he recommended consideration of additional injections prior to moving forward with surgery. (PX 3, p.14)

On March 17, 2008, Dr. Carl Graf performed a Section 12 evaluation of Petitioner at Respondent's request. (RX 2, DepX4) Dr. Graf concluded Petitioner suffered a lumbar strain during the work accident which likely exacerbated his underlying degenerative condition. Given an apparent myofascial etiology to Petitioner's pain as well as what the doctor described as an inconclusive discogram, Dr. Graf disagreed with pursuing a two-level fusion. The doctor also disagreed with additional epidural steroid

injections, and instead recommended further therapy focusing on core strengthening. (RX 2, DepX4)

The dispute over treatment recommended was subsequently resolved and Respondent authorized surgery. Prior to proceeding, however, Petitioner wished to get a second opinion (T. 20), so he consulted with Dr. Michael Haak at Northwestern Medical Faculty Foundation on May 27, 2008. Petitioner described the work injury and complained of low back pain ranging from 4-7/10. (PX 4, p.9) Examination findings included tenderness in the lumbosacral junction, moderately diminished and painful range of motion, and straight leg raise was negative for radicular complaints but positive for low back pain. (PX 4, p.10) Dr. Haak diagnosed lumbago, lumbar degenerative disc disease, and a lumbar strain and opined the work injury caused a strain-type injury that exacerbated Petitioner's previously existing degenerative disc problem. (PX 4, p.10) Dr. Haak recommended facet injections at L4-5; if this intervention did not improve Petitioner's pain, surgical decompression at L3-S1 would be appropriate. (PX 4, p.10)

On June 13, 2008, Petitioner presented to Rehabilitation Institute of Chicago ("RIC") and Dr. Wesley Smeal performed bilateral facet joint injections at L4-5 and L5-S1. (PX 5, p.13) When Petitioner followed up with Dr. Haak on June 24, he reported significant relief following the injections; however, he thereafter had to handle a large delivery by himself and his pain returned to baseline. (PX 4, p.30) Dr. Haak recommended the pain specialist consider facet rhizotomies, ordered continued therapy, and refilled Petitioner's medications. (PX 4, p.31)

Petitioner returned to RIC on June 26, 2008 and Dr. Smeal performed a second set of injections at the L3-5 levels. (PX 5, p.12) On July 10, 2008, Petitioner followed up

at RIC and was evaluated by Dr. Joshua Rittenberg. Petitioner reported 85% improvement and stated he was doing well at work. (PX 5, p.18) Dr. Rittenberg advised Petitioner to return if his pain returned. (PX 5, p.19)

Petitioner next saw Dr. Haak on July 24, 2008, and again reported significant improvement, with pain at 1/10. (PX 4, p.37) Exam findings were essentially normal with only minor tenderness at the lumbosacral junction. (PX 4, p.37) Dr. Haak maintained Petitioner's restrictions and released him to return on an as needed basis. (PX 4, p.37)

On September 2, 2008, Petitioner returned to Dr. Haak and stated his pain had flared up to 5/10 for the past week. (PX4, p.43) As Petitioner's examination was unchanged, Dr. Haak recommended continuing with restricted duty and referred Petitioner for a physical medicine rehabilitation evaluation with Dr. Rittenberg, who had joined the practice at Northwestern. (PX 4, p.44)

The consultation with Dr. Rittenberg took place on October 3, 2008. Dr. Rittenberg noted Petitioner had a history of chronic axial low back pain; medial branch blocks and facet joint injections had provided good results but Petitioner's pain had since returned and Dr. Haak concluded Petitioner was not a surgical candidate. (PX 4, p.51) Given Petitioner's prior positive responses with injections, Dr. Rittenberg recommended a radiofrequency neurotomy which he anticipated would provide relief for up to a year. (PX 4, p.52)

The bilateral L3-5 radiofrequency neurotomy was performed on October 21, 2008 (PX 5, p.14-15), and when Petitioner followed up on December 3, 2008, he reported improved flexibility with full and pain-free range of motion. (PX 5, p.9) Petitioner was

advised to continue his home workout regimen, continue with restricted duty, and follow up as needed. (PX 5, p.9)

Over the next two months, Petitioner continued treatment at University Health Services and the records show his pain progressively worsened as he continued to work. (PX 1, p.96-103) Petitioner was ultimately referred back to Dr. Haak to discuss surgery as well as to the pain clinic for a pain management consultation.

On February 10, 2009, Petitioner was re-evaluated by Dr. Rittenberg. (PX 5, p.10-11) Petitioner reported his symptoms were unchanged, with pain rated at 5/10 exacerbated by walking, lifting and bending; Petitioner further stated he was still working full time and had not been able to get a transfer to a less physically demanding job. (PX 5, p.10) Dr. Rittenberg diagnosed chronic axial low back pain and multilevel lumbar degenerative disc disease with a prior history of positive discography at multiple levels and failed response to medial branch radiofrequency neurotomy. (PX 5, p.11) He adjusted Petitioner's medication in order to taper his Darvocet intake and directed Petitioner to follow up with Dr. Haak. (PX 5, p.11)

On April 23, 2009, Petitioner returned to Dr. Haak and stated his pain was significantly increased, up to 7-8/10. (PX 4, p.63) He continued to work with a light duty profile but stated his job on occasion exceeded his restrictions. (PX 4, p.63) Dr. Haak opined Petitioner was symptomatic primarily with mechanical low back pain due to facet disease and degenerative discs and concluded surgical intervention was appropriate; the doctor ordered an updated MRI and directed Petitioner to obtain pre-operative clearance. (PX 4, p.63) In the interim, Petitioner was to continue restricted duty. (PX 4, p.63)

Following the renewed surgical recommendation, Respondent sent Petitioner to Dr. Graf for a repeat Section 12 examination on June 1, 2009. Dr. Graf concluded the anticipated benefit of such a significant surgical intervention did not outweigh the risks and therefore did not feel Petitioner was a surgical candidate. Dr. Graf instead recommended releasing Petitioner to work within parameters established by a valid FCE. (RX 2, DepX5)

In order to resolve the dispute regarding treatment, the parties proceeded with the depositions of Dr. Haak (PX 8) and Dr. Graf (RX 2). Ultimately, Respondent authorized surgery (T. 22) and on June 28, 2010, Dr. Haak performed a L4-5, L5-S1 right-sided laminotomy with L4 and L5 foraminotomy; L4-5, L5-S1 subtotal discectomy; and L4-5, L5-S1 posterior lumbar fusion. (PX 9, p.7) Petitioner testified he had worked modified duty up to his lumbar surgery and thereafter began missing time from work. (T. 41) the parties stipulated all TTD and TPD benefits were paid. (ArbX1) Post-operatively, Petitioner remained off work and attended routine follow-up appointments with Dr. Haak. As of late September, Petitioner was directed to begin physical therapy. (PX 4, p.111)

Petitioner attended therapy at Silver Cross and the records note improved function. (PX 6) When Petitioner saw Dr. Haak on January 5, 2011, the doctor noted Petitioner was improving slowly but there had been a delay in authorization for continued therapy; Dr. Haak kept Petitioner off work and strongly recommended getting him back in therapy. (PX 4, p.125) Dr. Haak additionally documented Petitioner complained of left shoulder rotator cuff pain, which he noted was part of the original work injury, and recommended evaluation by a shoulder specialist. (PX 4, p.125)

Pursuant to Dr. Haak's referral, Petitioner consulted with Dr. Matthew Saltzman on January 13, 2011. Dr. Saltzman noted Petitioner, who is right-hand dominant, reported a three-year history of left shoulder problems; Petitioner described the September 20, 2007 incident, stating a piece of furniture fell directly on his shoulder, and complained of persistent pain since, which had worsened in the past two months. (PX 4, p.132) Examination findings included positive Neer and Hawkins' impingement signs, exquisite tenderness at the AC joint, and pain with cross-body adduction on the left. (PX 4, p.133) Dr. Saltzman's assessment was acromioclavicular arthritis, rotator cuff syndrome, and possible tendinosis or progressive full thickness rotator cuff tear. (PX 4, p.133) He recommended an MRI to evaluate the rotator cuff. (PX 4, p.133)

The left shoulder MRI was performed on February 21, 2011. The radiologist's impression was small nonspecific glenohumeral joint effusion; mild degeneration of the acromioclavicular joint; and small partial thickness tear of the anterior supraspinatus tendon at the insertion and mild reactive subcortical marrow edema in the greater tuberosity near the insertion of the supraspinatus tendon. (PX 4, p.140)

Petitioner followed up with Dr. Haak and attended physical therapy for his lumbar spine through spring of 2011. In March, an FCE was performed; this placed Petitioner at Medium work level and recommended work conditioning to upgrade his capabilities. (PX 4, p.169) Work conditioning was put on hold, however, due to Petitioner's shoulder complaints.

On April 12, 2011, Dr. Guido Marra performed a Section 12 evaluation of Petitioner's left shoulder at Respondent's request. After an examination and review of the MRI scans, Dr. Marra concluded Petitioner had impingement syndrome and AC joint

arthritis. (RX 3) As to causation, Dr. Marra noted Petitioner had complaints of pain at the time of the accident and received treatment intermittently thereafter, and while there was subsequent gap in treatment, this was associated with treatment of his lumbar spine; therefore, the doctor concluded Petitioner's left shoulder condition was causally related to the work injury. (RX 3) With respect to treatment, Dr. Marra stated if Petitioner had already failed conservative care with a cortisone injection then surgery was appropriate. (RX 3)

Petitioner followed up with Dr. Saltzman and on review of the MRI, Dr. Saltzman identified acromioclavicular arthritis, osteophyte formation at the AC joint, rotator cuff tendinosis, and some undersurface fraying and tearing of the supraspinatus and infraspinatus. (PX 4, p.193) The decision was made to proceed with surgical repair. (PX 4, p.193)

On September 19, 2011, Dr. Saltzman performed left shoulder arthroscopic distal clavicle excision, subacromial decompression with acromioplasty, and rotator cuff debridement. (PX 4, p.227) Petitioner thereafter remained off work and underwent physical therapy followed by work conditioning at ATI. (PX 7)

An FCE was completed on March 16, 2012. The test was valid and placed Petitioner at the Light to Medium Physical Demand Level, capable of occasionally lifting 50.6 pounds from desk to chair, 47.8 pounds chair to floor, and 25.8 pounds above shoulder. (PX 7, p.27) Petitioner's job as a shipping and receiving clerk is considered Medium and Petitioner's capabilities fell below this level. (PX 7, p.27)

On March 28, 2012, Petitioner returned to Dr. Haak to discuss his FCE. (RX 4) On exam, the doctor noted tenderness to palpation primarily in the lumbosacral junction

and reduced range of motion secondary to stiffness. (RX 4) After reviewing the individual capabilities noted on the FCE, Dr. Haak placed Petitioner at maximum medical improvement and released him to return to work at the Light to Medium level per the FCE, no lifting greater than 35 pounds average. (RX 4)

Petitioner tendered Dr. Haak's work status report to University Health System on April 2, 2012. (PX 1, p.41) The University physician noted the department had work within the restriction and Petitioner was to return to work "no lifting greater than 35 pounds on average overhead work with left arm not to exceed 15 pounds." (PX 1, p.41) Petitioner testified he returned to accommodate duty, working a full-time 40-hour per week schedule. (T. p. 25, 45)

On May 2, 2012, Petitioner followed up at University Health System. He stated his low back pain increased while at work but he was able to perform the essential job functions of his job within his current physical limitations. (PX 1, p.40)

The University Health System records show Petitioner continued to report increased low back pain over the next months. (PX 1, p.38-39) The notes further show in December of 2012, Dr. Haak imposed a permanent 20 pound lifting restriction. (PX 1, p.37)

On June 24, 2013, Petitioner reported to UHS after having been struck with a garbage can in the back. (PX1, p. 21). Petitioner was told to ice his back, continue Tramadol, continue restrictions of not lifting more than 20 pounds, and not to push or pull in excess of 50 pounds. (PX1, p. 22).

Petitioner returned to UHS on August 22, 2013. (PX1, p. 17). He had returned to baseline from the incident of June 24, 2013. (PX1, p. 17). He was returned to work

with permanent restrictions of 20 pounds lifting, 50 pounds pushing and pulling. (PX1, p. 18).

Petitioner followed-up with Dr. Mulki on November 20, 2013, reporting some numbness and burning in the left leg and back pain which was worse after working. (PX2, p. 29).

Petitioner returned to his primary care physician, Dr. Mulki, on January 22, 2014, having been told by his orthopedic surgeon to follow-up with Dr. Mulki concerning pain management. (PX2, p. 27). Dr. Mulki refilled his medications. (PX2, p. 27).

Petitioner presented to Dr. Mulki on August 7, 2014. (PX2, p. 25). He reported his back pain was the same and that Tramadol was helping. (PX2, p. 25).

Petitioner was seen by Dr. Mulki on September 23, 2015. (PX2, p. 15). He reported that his aches and pains were better now that he retired, but that he continued to take Tramadol 2-3 times a day. (PX2, p. 15).

On March 28, 2012, Petitioner presented to Dr. Haak and was given restrictions. (RX4). Petitioner then returned to work with Respondent in an accommodated fashion. (T. p. 25). Petitioner testified that when he returned to work, "they put me back on full duty. They did not alter my duties at all, per se. They very rarely gave me extra help. I still was forced to do everything I did before the injury." (T. p. 26). Petitioner testified that one of his duties was to push a cart of materials weighing 150 or 200 pounds for two half blocks between buildings. (T. 26).

Petitioner continued to experience pain and discomfort with his left shoulder and low back while working. (T. p. 27). Every day that Petitioner worked he would need to take pain medication and he continues to take medication to this day. (T. p. 27).

Petitioner tried to look for light duty jobs with Respondent, but none were available. (T. p. 28).

On June 24, 2015, Petitioner resigned in lieu of termination from his position with Respondent. (T. p. 28). He has not worked since that time. (T. p. 28). He has looked for other jobs, such as working at Jewel or retail outlets and working as a painter or mechanics helper, but could not get hired because of his weight restrictions. (T. p. 29, 31).

Petitioner continues to take Tramadol regularly, as prescribed by Dr. Mulki. (T. p. 31).

Petitioner suffers from other unrelated ailments, including being blind in his left eye, and Dupuytren's disease in both hands. (T. p. 29-30). He cannot stretch out all five fingers on either hand. (T. p. 30).

In terms of his current low back condition, Petitioner has restricted movement, cannot walk long distances, or sit for a long period of time. (T. p. 32). He cannot bend over to tie his shoes and he uses a device from Northwestern to put on his socks. (T. p. 33). He does not fish, ride in a boat, golf, bowl or throw horse shoes. (T. p. 32). He had to hire someone to mow his lawn and has hired a handyman to do things around the house. (T. p. 32-33).

He has trouble sleeping and gets up one or twice a night to walk around and stretch. (T. p. 34). He cannot sleep on his left shoulder and he cannot sleep on his stomach because of hardware in his back. (T. p. 35-36).

In order to alleviate his pain, he has tried to ride an exercise bike, but going to the gym was cost prohibitive. (T. p. 33). He takes hot baths or hot showers every day and uses a heating pad on occasion. (T. p. 34). He also uses a TENS unit. (T. p. 36).

In terms of his left shoulder, he does not have all of the motion he used to have and his shoulder is not as strong. (T. p. 36). He has difficulty lifting things above his shoulder. (T. p. 36). He has difficulty raking leaves, shoveling snow, and doing other repetitive motions. (T. p. 37). He has trouble carrying groceries. (T. p. 38). He cannot cut firewood. (T. p. 39).

On cross-examination, Petitioner confirmed he worked either part-time or an almost full capacity up until his lumbar spine surgery. He remained off work following the lumbar spine surgery until he was discharged following shoulder surgery. (T. 41) Petitioner has not returned to see Dr. Saltzman since he returned to work in April 2012 and has not returned to see Dr. Haak since December 2012. (T. 46-47)

Dr. Michael H. Haak

Petitioner presented the testimony of Dr. Michael H. Haak, his treating physician. (PX8). The deposition was taken on October 7, 2009. (PX8). Dr. Haak testified he is a board certified orthopedic spine surgeon, is associate director of the spine trauma service at Northwestern Hospital, and is an associate professor of orthopedic surgery at the Feinberg School of Medicine of Northwestern University. (PX8, p. 1-6). He previously worked as a spine surgeon for the U.S. Army. (PX8, p. 4-5). Dr. Haak opined that Petitioner's complaints were related to his accident at work on September 20, 2007. (PX8, p., 11-12, 14, 63-64). His subjective complaints were consistent with the objective findings on exam. (PX8, p. 14, 61). Dr. Haak recommended a fusion

surgery for Petitioner. Dr. Haak noted that this surgery would decrease Petitioner's pain, but would not make him pain free. (PX8, p. 28). The surgery would also make Petitioner's back stiffer. (PX8, p. 28). Dr. Haak opined that the surgery was necessary because of the work accident on September 20, 2007. (PX8, p. 29, 64). He never found any malingering or symptom magnification on the part of Petitioner. (PX8, p. 30).

Dr. Carl Graf

Respondent presented the testimony of Dr. Carl Graf, its §12 examiner. (RX2). The deposition was taken on January 8, 2010. (RX2). Respondent paid Dr. Graf $1500 for two §12 exams. (RX2, p. 43). Dr. Graf was paid an additional $1500 for his deposition. (RX2, p. 44). Before his examinations, Dr. Graf received extensive cover letters from Respondent's counsel. (RX2, p. 25). He did not review Petitioner's FCE prior to coming to his opinions. (RX2, p. 25).

Dr. Graf agreed that Petitioner was injured at work while unloading furniture. (Exhibit 4 to RX2, p. 9). Specifically, he had an "exacerbation of an underlying degenerative condition" and "his current complaints are causally related to the injury." (Exhibit 5 to RX2, p. 8).

Dr. Guido Marra

Respondent offered the report of Dr. Guideo Marra, its §12 examiner regarding Petitioner's left shoulder. (RX3). Dr. Marra diagnosed Petitioner with impingement syndrome and AC joint arthritis. (RX3). Dr. Marra opined that Petitioner's shoulder condition was related to his work accident. (RX3). Any "gap" in treatment was explained by his significant lumbar spine treatment. (RX3). Dr. Marra recommended a

cortisone injection, 4-6 weeks of physical therapy, and then surgery if conservative measure failed. (RX3).

CONCLUSIONS OF LAW

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

The work accident in this matter occurred on September 20, 2007. As such, Section 8.1b is inapplicable.

The accident is not at issue. Petitioner was injured when unloading a truck during his employment. The notice is not at issue. Petitioner notified his supervisor, Brian Gavaghan, who completed an accident report. (PX1) Petitioner injured his left shoulder and lumbar spine. At the time of this accident Petitioner was 55 years old and worked in a medium duty job as a shipping and receiving clerk.

Petitioner's treatment for the lumber spine began with physical therapy and pain management. Petitioner received epidural steroid injections, facet injections, medial branch blocks and radio frequency neurotomy. Although there was initial dispute over secondary treatment, specifically the surgery recommendation, and the parties resolved the issues and the Respondent authorized surgery On June 28, 2010, Petitioner underwent surgical repair for his low back performed by Dr. Haak at Northwestern. (PX9, p. 7-10). The surgery consisted of:

1) L4-L5, L5-S1 right sided laminotomy with L4 and L5 foraminotomy;
2) L4-L5, L5-S1 subtotal discectomy;
3) L4-L5, L5-S1 posterior lumbar interbody fusion with auto allograft bone;
4) right L4-L5 and L5-S1 insertion of prosethetic device concord cage with infuse bone morphogenic protein;
5) L2 to S1 pedicle instrumentation with click X system
6) L2 to S1 posterolateral fusion with auto allograft bone and infuse bone morphogenic protein.

(PX9, p. 7).

Petitioner then underwent Physical Therapy and work conditioning at Silver Cross Hospital from August 2010 to November 2010. (PX6, p. 20-45). An FCE evaluation was conducted which demonstrated Petitioner functions at the Light to Medium Physical capacity. His specific tolerances are occasional lift of 50.6 pounds from desk to chair, 47.8 pounds chair to floor, and 25.8 pounds above shoulder; the report reflects Petitioner has a decreased lifting tolerance at the left shoulder versus the right. (PX 7, p.27)

As to Petitioner's left shoulder injury, Petitioner who is right-hand dominant had a documented three-year history of left shoulder pain following his accident. Although accident and causal connection are not at issue, it should be noted that the accident was injury to both body parts was reported and documented. On January 13, 2011, Petitioner followed up with Dr. Saltzman for his shoulder injury. (PX4, p. 132). Dr. Saltzman noted that Petitioner had acromioclavicular arthritis and rotator cuff syndrome. (PX4, p.133). He recommended a new MRI and discussed surgical repair and recommended a new MRI. (PX4, p. 133). Respondent authorized the surgery and on September 19, 2011, Petitioner underwent left shoulder surgery consisting of 1) left shoulder arthroscopic distal clavicle excision; 2) left shoulder arthroscopic sub acromial decompression with acromioplasty, and 3) left shoulder arthroscopic rotator duff debridement. (PX4, p. 227)

After surgery Petitioner underwent physical therapy in October and November of 2011 at Silver Cross. (PX5, p. 25-29).

After treatment, an FCE was conducted and on March 28, 2012. Dr. Haak released Petitioner back to work. He place lifting restriction of no lifting greater than 35 pounds average. (RX 4)

April 1, 2012, Petitioner returned to restricted but reported that his pain increased with work. (T. 45) On December of 2012, Dr. Haak amended the lifting restriction to 20 pounds. (PX 1, p.37)

The Respondent provided accommodations and the Petitioner continued working for the respondent till June, 2015 (three years after accommodation and release). In June, 2015 Petitioner voluntarily resigned but testified that he did so in lieu of being terminated. (T. 28) Petitioner was approximately 62 years old at this time. He stated that he has looked for other jobs but is unable to find employment due to his lifting restrictions.

Petitioner testified that he continues to have pain and limitations due to his lower back and left shoulder. His other medical issues, unrelated to his work accident also cause him hardship. He takes Tramadol regularly for pain. (T. 31) He has trouble walking long distance or sitting for a long period. (T. 32) He cannot bend to tie his shoes and uses a special device for putting on his socks. He is also unable to fish, boat, golf, bowl or throw horse shoes. (T. 32) He uses the assistance of a handyman for household chores such as lawn moving. (T. 32-33)

Petitioner further testified that cannot sleep on his left side or his back due to his surgeries. (T. 35-36) He uses an exercise bike, heating pads and a TENS unit for his pain.

Specifically in regards to his left shoulder, Petitioner states that he had difficulty lifting items over his shoulder. (T. 36) He also has trouble with chores such as raking and shoveling that require repeated motion. (T. 37-38) He also has trouble with lifting his groceries (T. 39)

By way of analysis the Arbitrator notes that the accident and causation are not contested and both parties have expended a great deal of time, money and effort to reach resolution regarding several difficult issues such as the lumbar surgery authorization. The sole remaining issue is nature and extent of the case.

In support of her findings, the Arbitrator finds it noteworthy that Petitioner was 55 years of age at the time of the accident and was 62 years of age at the time of the hearing. Petitioner is right hand dominant and his surgery and injury are in the left shoulder. Respondent sought to accommodate their injured employee and although Petitioner states at length that his job duties did not change, the Arbitrator finds it relevant and revealing that Petitioner worked in this accommodated capacity for a fairly long time (3 years). The Arbitrator finds that Petitioner's departure from Respondent was voluntary. Although Petitioner testified at length about his difficulties at his job, the Arbitrator declines to postulate about the ethics/legality or fairness of this condition. This is not a proper issue for the Arbitrator to address although Petitioner's testimony regarding the difficulties he continued to experience are duly notes.

The Petitioner's low back and left shoulder injuries were significant. His outcome was good in the sense that Petitioner did not suffer setbacks from the medical procedures and he was able to return to return to full time, restricted employment. There is no evidence of loss of earnings and the Petitioner's testimony that he looked for new

employment is not corroborated. The Petitioner has and continues to suffer hardship in his daily personal life. The Arbitrator finds it reasonable that the complex surgical procedure as well as the defendant's age would cause limitations in this life. The Arbitrator is sympathetic and finds that the Petitioner is credible in his testimony that he is unable to do many things. However, the Arbitrator finds that relevant evidence that these limitations may also result from Petitioner's other medical conditions. Petitioner suffered from a detached retina in 1979 and cannot see out of his left eye. He also suffers from Dupuytren's disease which affects both hands and inhibits his ability to stretch out his fingers. (T. 29-30) The Arbitrator notes these conditions pre-date Petitioner's work injury and are not related to the work injury, and therefore have no impact on his permanent partial disability. It is also reasonable that Dupuytren's disease combined with the visual limitations can aggravate or limit the ability to do many of the daily chores or recreational activities such as boating. The injury is to the non-dominant left shoulder. The Arbitrator notes the same but does not discount the veracity or sincerity of Petitioner's testimony. In fact, it is evident that the Petitioner has a commendable work-ethic; he faithfully worked for his employer for many years and even returned back to work after his accident. There is no evidence of malingering or symptom magnification on the part of Petitioner. The Arbitrator finds him to be sincere and credible in describing his limitations.

The Arbitrator has also considered that Petitioner was returned back to full time work with restrictions, was accommodated and voluntarily left employment. The Arbitrator has given consideration to the extensive medical records and the FCE findings that support that Petitioner was capable of light to medium duty work on a full

time basis. The Arbitrator finds that the surgeries and medical treatment was serious and extensive. However, to make a finding comparable to cases where a Petitioner is limited to sedentary and part time work is not warranted. The factor of age is also a consideration because the calculation of how long an injured worker will have to work with his injury/limitations is crucial. The Petitioner in this case was 55 years old. The Arbitrator is not persuaded the Petitioner is in a comparable position to an individual who is only capable of sedentary, part time work or to a worker of a much younger age.

Based on the evidence, the Arbitrator finds Petitioner's low back injury resulted in a 30% loss of the use of a person and Petitioner's left shoulder injuries resulted in a 12% loss of the person as a whole.

KSSteffen
Signature of Arbitrator Ketki Shroff Steffen

April 25, 2017
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 SANGAMON	)	☐ 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

Tommy Graham,

Petitioner,

vs. NO: 09 WC 36014

Monterey Coal Company,

Respondent.

17IWCC0693

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 that arose out of and in the course of employment, causal connection, permanent partial disability, and evidentiary error, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 49 year old (now 58) employee of Respondent, who described his job as a coal miner. Petitioner is a high school graduate who attended one year at Harris-Stowe. Petitioner had worked in the coal mine for about 25 years; all underground. In addition to coal dust, Petitioner was regularly exposed to silica dust, roof bolting glue fumes, and diesel fumes. Petitioner last worked in the coal mine for Respondent about December 27, 2007. He was then an inside laborer and was exposed that day to coal dust. Petitioner last worked then as the mine closed; they were no longer cutting coal. Petitioner testified that was the last time he had any mining employment. After leaving the mine Petitioner worked as a para-transport van driver from 2010 until he was terminated about June 2013; Driving the van he made $14.03 per hour. That was the only job Petitioner held after leaving the mine. Petitioner had started working in coal mines in 1979 for Respondent and had only

worked as a coal miner for Respondent. He was hired as general inside laborer, loading materials, rock dusting, and shoveling on the belt. Dusting was coating the coal face to stop methane gas from spreading and accumulating. He stated every place you cut coal you have rock dust. He had done that at least twice per week; he noted that was a dusty job. Petitioner noted he was exposed to all the fine particles of dust coming out. The out take and intake always had dust. As a general inside laborer he carried supplies. He stated they first laid rails and rock dusted. He had shoveled on the belts a lot. Petitioner stated the belt was constantly running and they were shoveling coal onto the belt and that creates a dusty area itself as there is constant coal going by. Petitioner indicated that the coal rubbing on the rollers was a fire hazard and they had to get that out. He was an inside laborer for the 1st three years before he bid on mine #2 and did temporary scoop operator/supply person for about two years. Scooping is a real dust area, pushing the coal up to the face. The face is where the coal is cut. Petitioner did become a shuttle operator; that was going from the miner to the conveyor and back to the continuous miner machine. That was a very dusty area and he could make 75-100 trips back and forth per day. Petitioner stated that he did that for about 10 years. For a time, he was long wall utility man/supply person. That was cutting the face and that was a very dusty area cutting out a lot of coal at one time. Then he also did supply and brought supplies to the unit. Petitioner was a parts runner at the end; that was running diesel equipment underground. Petitioner was exposed to diesel fumes all of the time. Petitioner never was a roof bolter but he had to carry the glue to the bolter position; the glue tubes would break and the smell was very toxic.

- Petitioner testified that it was not too far after he was in the mine that he started noticing breathing problems at work; probably the first or second week. He indicated he was not then even at the face, he was just shoveling the belt then. He noticed the black particles when he blew his nose. Petitioner testified that the breathing problems deteriorated as time wore on; he indicated he had not thought of the long-term effects on his health. He indicated he started slowing down and could not do it after the mine. He testified it steadily got worse after he left the mine. He testified he could walk about a quarter mile before he started sweating and getting tired. He can probably walk about 2 flights of stairs before he has to stop and rest. Petitioner was not really taking any medications for it. He did use nasal spray and he was on a CPAP for breathing. Petitioner stated that he used to be an avid swimmer, he did laps; now, however, he can do one lap and has to stop and rest for 2-3 minutes. He indicated that riding a bike, running, anything strenuous, even cutting the grass, he has to stop after about a half hour. Petitioner indicated that he stops for 15+ minutes and then restarts. He has a push mower for his average sized lot.

- Petitioner testified that his family doctor is Dr. Melvin Butler who knew Petitioner was a miner. Petitioner stated the doctor would bring it up with him. Petitioner indicated that he would get a cold and then bad bronchitis, like clockwork, and the doctor thought it was due to the coal dust. He had been with that doctor about 10 years. Petitioner testified that he did smoke then, on and off, but he had not smoked in the past 2 years. He did use an E-cigarette, but not as much now. Petitioner has no cardiac issues or hypertension (HTN) or diabetes, He takes Viagra and he does use a CPAP machine. He does take Xarelto since he had developed a blood clot after a plane trip. Petitioner viewed PX 5 and identified it as

the bituminous wage agreement. Petitioner was an inside laborer when he left the mine. As of January 2016, Petitioner would have been earning $29.34 per hour.

The Commission finds that the Arbitrator weighed the evidence and testimony and found Dr. Tuteur's opinions more persuasive over those of Dr. Paul. The evidence supports that decision and the medical records support Dr. Tuteur's opinions over Dr. Paul. There does not appear to be any error, legal or evidentiary. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence and finds no legal or evidentiary errors (§1(d)-1(f)).

The Commission notes that there is no question Petitioner worked in underground coal mines since 1979 and was exposed to the various things, like coal dust, various fumes, silica, glues, etc. Contrary to what Petitioner told Dr. Paul, Petitioner had been a smoker since his mid-20's; 1+ pack per day. Petitioner last worked in the mine December 27, 2007. There is no indication of breathing issues in treating medical records (2009-2013, Dr. Butler) other than CPAP use for sleep apnea. Petitioner is overweight with hypertension. Records noted no shortness of breath or coughing complaints. Dr. Henry Smith, a B-reader, reviewed on July 21, 2009 the x-ray of July 1, 2009 and he noted Grade 2 films, slightly underexposed. p/s both mid to lower lung zones profusion 1/0. CWP. Dr. Paul (not a B-reader), Petitioner's examiner, interpreted CWP from x-ray. Dr. Paul opined Petitioner had COPD from the exposure (with the pulmonary function test) but he understood Petitioner was not a smoker per Petitioner's report to him. Dr. Paul indicated restrictive and/or obstructive lung disease or both. Dr. Tuteur, Respondent's examiner, found no evidence of CWP and testified Petitioner's COPD was due to smoking as primary cause. Dr. Shipley, a B-reader, found NO CWP on x-ray film, noted as Grade 2, of November 13, 2014. Dr. Tuteur's opinion appears more persuasive especially in light of the fact that Dr. Paul's opinion is partially based on his understanding Petitioner was not a smoker. Dr. Tuteur placed great weight on that for the obstructive lung disease. The preponderance of evidence further supports the opinions of Dr. Tuteur over those opinions of Dr. Paul. Petitioner's testimony is rebutted with evidence and with his reporting to Dr. Paul that he was not a smoker.

The Commission notes that the standard, as to a Petitioner's burden of proof for a causal connection, is to prove **'a'** cause. Dr. Tuteur's opinion that Petitioner's smoking was the primary cause of Petitioner's COPD carries no greater weight on that issue as Petitioner simply failed to meet his burden of proof. The evidence finds Petitioner failed to meet the burden of proving he suffered an occupational disease arising out of and in the course of his employment (not even breathing complaints to his primary doctor) and further failed to meet the burden of proving 'a' causal relationship between any employment exposure and his condition of ill-being. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein affirms and adopts the Arbitrator's finding that Petitioner failed to meet the burden of proving accident/occupational disease that arose out of and in the course of employment and, further, affirms and adopts the Arbitrator's finding that Petitioner failed to meet the burden of proving a causal connection to his current condition of ill-being from any such exposure/occupational disease.

17IWCC0693

The Commission, with the above findings that Petitioner failed to meet the burden of proving an occupational disease and 'a' causal connection, finds Petitioner's testimony of breathing issues not supported in medical records of even his primary care physician. Respondent mine closed December 2007 and Petitioner never returned to mining, or even tried. There is evidence of what Petitioner earned in subsequent years. While Petitioner's Dr. Paul opined, Petitioner could work light duty only, there is no evidence to say medically Petitioner was precluded from working heavy or medium duty work away from mining. Regardless, the above finding that Petitioner failed to meet the burden of proving occupational exposure/disease/injury and causal connection, renders the issue moot. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, herein, affirms and adopts the Arbitrator's finding as to denial of any and all Permanent partial disability benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 10, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: NOV 2 - 2017
0-9/7/17
DLG/jsf
045

David Gore

Stephen Mathis

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRAHAM, TOMMY
Employee/Petitioner

Case# **09WC036014**

MONTEREY COAL COMPANY
Employer/Respondent

17IWCC0693

On 2/10/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
620 E EDWARDS ST
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tommy Graham
Employee/Petitioner

v.

Monterey Coal Company
Employer/Respondent

Case # 09 WC 36014

Consolidated cases: N/A

17IWCC0693

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **1/12/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **12/27/07**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner was last exposed to the coal dust and fumes arising out of and in the course of employment.

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

Petitioner's current condition of ill being is not causally related to his occupational exposure.

In the year preceding the last date of exposure Petitioner earned **$45,539.87**; the average weekly wage was **$875.77**.

On the last date of exposure, Petitioner was **49** years of age, ***married*** with **0** dependent children.

ORDER

The claim for compensation is denied.

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

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

D. Dylan McCarty

Signature of Arbitrator

2/6/2017
Date

FEB 10 2017

The Petitioner was 58 years old at the time of the hearing. He graduated from high school and completed one year at Harris Stowe. Petitioner indicated he worked about 25 years as a coal miner, all of which was underground. His employment with Respondent began on February 5, 1979. His last day working for Respondent was December 27, 2007 when the mine closed. He was 49 years old at that time and was working as an inside laborer. He was exposed to coal dust on that date. Petitioner described the jobs he had with Respondent and the dust exposure. In addition to coal dust, he was exposed to roof bolting glue fumes, silica dust and diesel fumes. He started as a general inside laborer, which involved a lot of shoveling onto the belt. It also included rock dusting and loading materials. Rock dusting controls the methane gas. Petitioner also indicated this job could involve laying rails, setting up timber and building stoppings. He then was a scoop operator, which was hauling supplies to the units. The job also entailed scooping coal at the face after the miner was done. Petitioner then was a shuttle car operator for many years. He would go between the miner and the conveyor belt, carrying the coal. Petitioner was a long wall utilityman, supplying parts and equipment to the long wall. He was also a parts runner, driving a truck with parts and supplies. Petitioner talked about the diesel fumes at Mine #1. Petitioner was never a roof bolter but did transport the glue bolts. They would break and cause a toxic smell.

During his work at Respondent's Mine #2, there was a five or six month layoff in 1993. At that time, he trained for and became a black jack dealer. Mine #2 closed on 8/30/1996 and he was laid off. He drove a van for the Bi-State Development Agency until he was recalled to Respondent's Mine #1 in October of 2002. After that mine closed, he again obtained a job driving a van for the Bi-State Development Agency. That began in September, 2010 and ended in June of 2013. He was making $14.03 per hour. That is the only job he has had since the mine closed. The Petitioner reported to Dr. Tuteur that he was terminated as a van driver because of frequent motor vehicle accidents.

Petitioner testified that he first noticed breathing problems within the first week or two he was a coal miner. He noted black particles on the tissue after blowing his nose. Dr. Paul's report reflects shortness of breath with exertion starting about four years ago. Petitioner indicated his breathing has deteriorated since he first noticed problems, both while he was still working as a coal miner and since the mine closed. Petitioner testified he could probably walk a quarter of a mile before becoming short of breath. He said he could climb two flights of stairs before having to stop. Petitioner indicated he was not taking any breathing medications. He was given a nasal spray to help with his CPAP machine.

Petitioner indicated his breathing problems affect him in swimming, bicycling, and running. He said he cannot cut his whole yard without stopping. Petitioner testified that he smoked up until two years ago. He now is on the e-cigarette. Petitioner had a blood clot last June and is still on a blood thinner.

The Bituminous Wage Agreement reflects his classification would earn $29.34 per hour as of January of 2016.

Dr. Glennon Paul evaluated Petitioner in this case on October 13, 2009. The doctor obtained a history that the Petitioner had some shortness of breath with exertion. He also had a history that the Petitioner was never a cigarette smoker. With regard to the pulmonary function study, the doctor noted his disagreement with the interpretation made by the machine. The machine noted no obstructive lung defect based upon the FEV1/FVC ratio. Dr. Paul felt the Petitioner had obstructive airway disease along with restrictive airway disease. The doctor indicated there was mild to moderate obstruction and mild to moderate restriction. The Petitioner had no bronchial reactivity. On physical examination, the Petitioner had nasal congestion but otherwise everything was normal. Dr. Paul testified that the Petitioner had coal workers' pneumoconiosis. He also testified that Petitioner had obstructive lung disease from the coal mine environment. The doctor agreed that if the Petitioner did have a smoking history, that was significant, that would be a part of the obstructive problem. The doctor testified that Petitioner had restrictive lung disease from coal dust, coal workers' pneumoconiosis. The doctor indicated the Petitioner could not have further exposure to the environment of a coal mine without endangering his health

because of the diagnosis of coal workers' pneumoconiosis. Based upon the diagnoses of obstructive lung disease and restrictive disease, the Petitioner also could not have further exposure without endangering his health. Dr. Paul felt Petitioner had clinically significant pulmonary impairment in the form of pulmonary symptoms and complaints related to his coal workers' pneumoconiosis, or the obstructive airway disease, or both. The Petitioner had radiographic evidence of pulmonary impairment from coal dust inhalation. Petitioner also had physiologically significant pulmonary impairment as noted on pulmonary function testing, which was related to the coal mine environment. Dr. Paul felt Petitioner was totally disabled from coal mine employment on a permanent basis. The doctor thought he could do light work on a full time basis.

Dr. Paul indicated that coal workers' pneumoconiosis (CWP) involves a tissue reaction that can be called scarring or fibrosis. The scarring does not perform the function of normal healthy lung tissue. Therefore, with coal workers' pneumoconiosis, there is some impairment in the function of the lung at the site of the scarring whether it can be measured by pulmonary function study or not. It is possible to have lung disease with normal pulmonary function results. A person can be short of breath with normal pulmonary function results. Pulmonary function tests will reflect the type of abnormality and how severe it is, but not the etiology. A person can have CWP by x-ray but not have shortness of breath. A person can also have x-ray evidence of CWP and normal pulmonary function testing, normal blood gases and a normal physical examination of the chest.

In addition to coal mine dust, there are other exposures that can injure the lungs such as silica, diesel fumes, fumes from other petroleum products, smoke and fumes from high sulfur coal fires, smoke and fumes from electrical cable fires, fumes from the glues used in the roof bolting process, and welding fumes. COPD is an umbrella term for emphysema, chronic bronchitis, and asthma. The doctor noted that scarring in the lungs decreases the ability of the lungs to expand. In obstructive lung disease, the elasticity is gone. That can result in holes in the lungs. Obstructive lung disease can be multifactorial in origin. Inhalation of coal dust can result in shortness of breath and chronic cough. If a person has obstructive lung disease, the best medical practice is to avoid any further exposure to the agents that can cause or aggravate it. You can have chronic bronchitis and normal pulmonary function testing, normal blood gas testing and a normal physical examination of the chest. Anything that you inhale that is dusty can make chronic bronchitis worse.

The doctor noted that Petitioner was 60 to 70 pounds overweight. He thought that there was a good chance that Petitioner was out of shape or deconditioned. When seeing Petitioner, he was not under any treatment for any kind of pulmonary problem and was not taking any medication for a pulmonary problem. The doctor did not determine what was the cause of the nasal congestion. The doctor noted that he could not tell for sure from the pulmonary function studies whether it is a restrictive problem, an obstructive problem, or both. The doctor agreed that the total disability from the coal mine employment was because of the risk of the conditions diagnosed getting worse if he went back and had more exposure. It is a risk and not a guarantee. The doctor agreed that smoking is the number one cause of obstructive lung disease in the United States.

Dr. Peter Tuteur evaluated Petitioner for Respondent on November 13, 2014. Petitioner advised the doctor that he was limited by back pain with regard to walking and climbing stairs. He obtained a history that Petitioner began smoking cigarettes at age 26 and continued to smoke at the time of the evaluation. Petitioner indicated that he smoked about a pack a day. The Petitioner's carboxyhemoglobin level was 9.3, which is typical of a person who smokes about two packs a day. The doctor noted that the Petitioner was obese enough that he could feel short of breath with activities. With any level of activity, the doctor said that the more you weigh, the more you consume oxygen. Therefore, the Petitioner would be short of breath at levels of exercise where he would not be if he were a normal weight. The physical examination of the chest was normal. In reviewing chest x-ray films, Dr. Tuteur found no evidence of CWP. The pulmonary function study form indicates that the flow curves are not reproducible and that there was submaximal effort by the patient. The quantitative criteria for reproducibility is that the two best curves are within 5% of each other, which was not met here. The best values on the pulmonary function study were achieved before the administration of the bronchodilator. The best study

showed an FEV1 of 73% of predicted, which represented no worse than a mild obstructive abnormality. The doctor noted, however, that the values were invalid. The arterial blood gas study was normal at rest and showed a normal response to exercise. The oxygen saturation level was measured before, during and after exercise and was very normal. The total lung capacity was within the normal range and there was no evidence of any restrictive problem. The doctor felt Petitioner had the pulmonary capacity to perform coal mine employment or similar work. He found no evidence of coal workers' pneumoconiosis based upon the evaluation. The doctor also did not find evidence of any occupational lung disease. The doctor agreed that with the Petitioner still smoking cigarettes, he was at risk with regard to breathing problems, specifically obstructive problems.

Dr. Tuteur noted that with regard to the pulmonary function test, the Petitioner could do at least this well and possibly better. The doctor testified that Petitioner's chronic morning cough arose to the frequency that would be consistent with chronic bronchitis. The inhalation of coal mine dust can cause chronic bronchitis, which can result in obstructive lung disease. Dr. Tuteur testified that the COPD manifested by mild obstruction and chronic bronchitis is due to the chronic inhalation of tobacco smoke. The doctor noted that NIOSH attempted to identify the prevalence of x-ray evidence of CWP, which is the much more common phenomenon than COPD among coal miners. They found it in 4% of the miners. Dr. Tuteur testified that smoking is considered the number one cause of obstructive abnormalities, COPD, and chronic bronchitis. Smoking is consistent with air trapping. He noted that Petitioner's smoking was sufficient to cause an obstructive abnormality on a pulmonary function study. His smoking was sufficient to cause a decrease in the FVC and FEV1 if the pulmonary function study was valid. If Petitioner had put forth maximal effort, his FVC and FEV1 could be within the normal range. If that happened, there might be no evidence of any obstructive abnormality on a pulmonary function study.

Dr. Henry Smith, a B-reader, reviewed chest x-ray films taken on 7/01/09 and found them to be positive for CWP in a 1/0 profusion. Dr. Ralph Shipley, a B-reader, reviewed chest x-ray films taken on 11/13/14 and found those films to show no evidence of coal workers' pneumoconiosis. The medical records from Dr. Butler appear to run from May 4, 2006 to September 5, 2013. The initial office note indicated that the patient was doing well. The last office note also indicates that the patient is doing well. It appears that on three occasions the Petitioner complained of coughing, congestion and a sore throat. Those were indicated in office visits dated March 27, 2007, September 30, 2010 and December 11, 2012.

The Arbitrator notes that Dr. Tuteur performed a more extensive evaluation of Petitioner than Dr. Paul. This included an arterial blood gas study at rest and with exercise and an oxygen saturation test which included measurements before, during and after exercise. The results of the studies were all normal. Dr. Paul obtained a history that Petitioner was never a smoker. The Petitioner advised Dr. Tuteur that he smoked a pack a day for about 30 years and he testified at arbitration to having a smoking history. On the pulmonary function study, the carboxyhemoglobin level was consistent with somebody smoking nearly two packs a day. The spirometric portion of the pulmonary function study Petitioner performed at Dr. Tuteur's exam was invalid because of a submaximal effort by the Petitioner. The doctor noted that at worst, the Petitioner had a mild obstructive abnormality which would not restrict him from working. If he had performed the test with a maximal effort, the diminished values could be normal so that there may not be an obstructive abnormality at all. Dr. Paul was not sure if Petitioner's pulmonary function test showed a restrictive abnormality, an obstructive abnormality, or both. Both Dr. Paul and Dr. Tuteur had a negative physical examination of Petitioner's chest. The Arbitrator notes that this seems to be consistent with the medical records from Dr. Butler. Dr. Tuteur noted no evidence of coal workers' pneumoconiosis or any occupational lung disease. The Arbitrator further notes that the medical records from Dr. Butler do not reflect any ongoing problem the Petitioner had with his lungs or breathing. Petitioner was apparently not referred to any pulmonary specialist for any problems. The Arbitrator also notes that Petitioner testified that he was not taking any breathing medications at the time of the hearing, consistent with the medical records and the reports and what he told Dr. Tuteur and Dr. Paul. Although Petitioner testified that he noticed breathing problems soon after beginning work as a coal miner and that those problems have deteriorated since, the Arbitrator does not see evidence in the ongoing treatment records of any complaints with

regard to shortness of breath. Further, Dr. Paul's report suggests shortness of breath complaints for four years, with the exam taking place in October of 2009.

The Petitioner failed to prove by a preponderance of the evidence that he suffers from CWP. Two B-readers examined chest films and came up with different diagnoses. Two internal medicine specialists reviewed films and came up with conflicting opinions as to the existence of the disease. The Petitioner has the burden of proof and failed to maintain his burden.

The Petitioner also failed to prove by a preponderance of the evidence that his chronic bronchitis was causally related to his exposures in the mine. While exposures in the mine could cause the condition, it is equally as likely that the Petitioner's long history of smoking could have caused the condition.

Based upon the weight of the evidence here, the Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that he has developed an occupational lung disease as a result of his employment with Respondent. The claim for benefits is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GENE GILLIAM,

Petitioner,

vs. NO: 16 WC 00634

GENERAL CABLE,

Respondent.

17IWCC0694

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 accident, causal connection, medical expenses, temporary total disability and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was hired by Respondent to work on the jacket line. His duties included loading and unloading reels and doing cut overs. A reel is 90 inches and can weigh between 10-15,000 pounds. He worked with 4 reels a night. He had to roll each reel into position to be held by pins. The reels are taller than Petitioner. He then bent the serve wires back to remove the plastic coating, cut the center core wire out and then twisted wires together to make splices. He used hand held cable cutters and a PVC cutter, although when he first started they used a straight blade knife. He worked 7 days a week every other weekend from 2007 to 2010. 12 hour shifts and a lot of overtime.

2. In 2010 Petitioner drove a forklift for Respondent. It has 4 levers and a steering knob. Due to the rubber tires, there is a lot of vibration while operating the truck. Additionally, if he drives outdoors, there are a lot of rocks in the parking lot, causing more vibration. While driving the truck, Petitioner initially still had to roll reels with his hand. Eventually he was able to roll the reels with his truck. He also occasionally serviced forklift trucks.

3. On March 18, 2015 Petitioner presented to Family Medical Center with complaints of left elbow discomfort and tenderness at the lateral epicondyle. He was diagnosed with elbow pain.

4. On March 23, 2015 Petitioner bid for, and received the Shipping DC cuts job. He bid for this job because he was having issues with his arms and wanted to get off of the truck. In Shipping DC, Petitioner was required to use the truck to put the reel in place, but after that he and a coworker manually pulled the cable to the reel, tied the cable to the reel, layered it to the length requested by a customer. He used a traverse (a tool shaped like bicycle handlebars) to help layer the reel. The wider the cable, the more force necessary to layer it. Sometimes it would take the full weight of Petitioner's body to guide the traverse. Some jerking would occur while operating it as well. In Shipping DC, Petitioner also uses a nail gun for nailing 5 inch nails through 4 by 4's, a vibrating tool used to cut insulation and a drill that is an actual cable cutter that is used on the cable. He uses tools on nearly every job duty, and also loads and unloads trucks.

5. Petitioner, who had some hand and arm issues prior to working in Shipping DC, eventually noticed his hand and arm issues worsened when he moved to Shipping DC. Eventually, as symptoms progressed to include hand and elbow numbness, Petitioner underwent bilateral nerve conduction studies. By December 2015 he was diagnosed with bilateral carpal tunnel syndrome. An orthopedic surgeon, Dr. Brown, recommended surgery and opined that the need for surgery was job related.

6. Petitioner received a second opinion from Dr. Mall, who recommended splints and braces for one month, which did not help. Petitioner had pain and tingling which woke him up at night. His symptoms were worse at night than they were at work.

7. Petitioner underwent bilateral carpal tunnel surgeries on February 16, 2016 and March 1, 2016. He experienced relief after the surgeries. He has soreness in his palms along the incisions and numbness in his forearm to his elbow. He takes Tylenol when necessary. He has a loss of strength and endurance in his hands as well as his elbows.

8. Respondent's Facilities Manager recorded videos depicting all of the job duties Petitioner undertook, but omitted depicting the use of the traverse in the Shipping DC department.

9. Dr. Mall reviewed the videos and opined that Petitioner's injuries were causally related

to his work duties. He noted that the videos appeared to depict a lot of grip strength and grabbing while dealing with reels.

10. In March 2016 Dr. Strecker, Respondent's §12 physician, diagnosed Petitioner with bilateral carpal and cubital tunnel syndromes. He opined that Petitioner's job duties contributed to his conditions based on his job history. However, after viewing the video depicting the work activities, he changed his opinion and found no temporal relationship between Petitioner's work duties and his conditions, stating that the flexion required to cause cubital tunnel while driving a fork truck would be an unnatural position unless the steering wheel was almost in the drivers face.

11. Upon further examination. Dr. Strecker admitted to previously testifying that forklift driving with significant vibration was a contributing factor to carpal and cubital tunnel. This is in stark contrast to the testimony mentioned in paragraph 10 above. Dr. Strecker also admitted that he was unaware if Petitioner's fork truck caused vibration and had no knowledge of the flexion required to drive the fork truck.

12. Although surgical intervention decreased Petitioner's symptoms, he still suffers from tenderness and soreness when pushing off from his palms, as well as elbow numbness.

Upon review, the Commission affirms the Arbitrator's findings regarding accident, causal connection, medical expenses and temporary total disability.

The Commission, however, views the evidence slightly different than does the Arbitrator regarding the permanent partial disability award. No American Medical Association rating was offered by either party. The Commission notes that Petitioner continues to work for Respondent, and that the demands of the job will likely effect his permanent condition in the future. The Commission also takes into account that Petitioner was relatively young at the time of accident (46 years of age), but was given a full duty release, thus there is no evidence of a loss of future earnings capacity. Based on the above factors, the Commission finds that Petitioner's level of impairment equates to a 10% loss of use of both hands and both arms.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $570.61 per week for a period of 6-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $513.55 per week for a period of 91.6 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 10% loss of use of Petitioner's bilateral hands and arms.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner any and all unpaid and related medical expenses, per the fee schedule, and shall provide documentation of fee schedule payment calculations to Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

17IWCC0694

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, under group medical, for which credit may be allowed. Respondent shall hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,900.00. 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: NOV 2 - 2017
O: 9/7/17
DLG/wde
45

David L. Gore

Stephen Mathis

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GILLIAM, GENE
Employee/Petitioner

Case# **16WC000634**

GENERAL CABLE
Employer/Respondent

17IWCC0694

On 2/2/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

17IWCC0694

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

Gene Gilliam
Employee/Petitioner

v.

General Cable
Employer/Respondent

Case # **16** WC **634**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Herrin**, on **November 15, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 16, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$44,507.32**; the average weekly wage was **$855.91**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$3,559.36** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in other benefits for which credit may be allowed under Section 8(j) of the Act.

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

ORDER

Respondent shall pay for medical services **as set forth in Petitioner's Exhibit 1** as provided in Sections 8(a) and 8.2 of the Act as stipulated to by the parties at the time of arbitration. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses **as set forth in Petitioner's Exhibit 1** according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all bills paid under its group medical plan for which credit may be allowed under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$570.61**/week for **6 6/7** weeks, **for the timeframe of February 16, 2016 through April 4, 2016,** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$3,559.36** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in other benefits for which credit may be allowed under Section 8(j) of the Act.

Respondent shall pay Petitioner the sum of **$513.55/week** for a period of **55.375 weeks**, as provided in **Section 8(e)** of the Act, because the injuries sustained caused **5% loss of use of the left hand** (*i.e.*, **9.5 weeks**), **7.5% loss of use of the right hand** (*i.e.*, **14.25 weeks**), **5% loss of use of the left arm** (*i.e.*, **12.65 weeks**) **and 7.5% loss of use of the right arm** (*i.e.*, **18.975 weeks**).

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

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

Melinda M. Rose-Sullivan

Signature of Arbitrator

2/1/17
Date

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FEB 2 - 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Gene Gilliam
Employee/Petitioner

Case # 16 WC 634

v.

Consolidated cases: N/A

General Cable
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he is currently employed by Respondent, where he has worked for 9 ½ years. He testified that he has held different jobs while working for Respondent, and that when he was hired he was hired in on the jacket line where he worked for about three years. He testified that his job duties included loading and unloading reels and doing "cut-overs." He testified that most of the reels were 90-inch reels that were pretty tall and weighed 10,000-15,000 pounds. He testified that when working on the jacket line, they did a cut-over every 30 minutes. He testified that a "cut-over" involved getting certain lengths of wire that were ordered by the customer, and that they would then send the wire to the cabler. He testified that the reel got to the jacket line by fork truck, and that they rolled it in order to line it up with pins to go in the center in order to pick it up. He testified that when loading it onto the machine, he would have to push it in and get the pins lined up. He testified that when it was loaded onto the machine, they would bend the serve wires back and cut the center core wire out in order to make splices. He testified that the wire depicted in the video was one of the smaller cables that he worked with.

Petitioner testified that the jacket was the plastic coating that went on the outside of the wire. He testified that he would have to strip the end of the cable to make a reel-to-reel splice by cutting the center core out to make a loop, and then strip the jacket to get the measurements. He testified that they used hand-held cable cutters and a PVC cutter, and that when he first started he used a straight-blade knife. He testified that he would use the knives and cutters every 30 minutes while working on the jacket line. He testified that while the machine was loading, he would have to go back, unload his empty reel and then load a full reel. He testified that the empty reel weighed 200-300 pounds, and that he sometimes would have to physically move the reel and roll it out with his hands and arms. He testified that he would also have to move the loaded 10,000-15,000 pound reels as well with his hands and arms, and that he would have to move about 4 reels per night.

Petitioner testified that he worked the second shift, and that on the jacket line there were three operators and three helpers during the second shift but that when he was there, there were two operators and two helpers on the second shift. He testified that he usually worked every other weekend and had a lot of overtime because there were only two of them when he worked on the jacket line.

Petitioner testified that in 20101 he no longer worked on the jacket line and that he then drove a forklift. He testified that it had hard rubber tires, and had four levers and a "suicide" knob on steering wheel which allowed him to turn the steering wheel with one hand. He testified that there was vibration in the operation of the fork truck, and that a lot of the vibration was due to the hard rubber tires. He

testified that if he had to drive through the rock parking lot to get a reel, it bounced him around in the fork truck. He testified that when he first started driving, they would move the master reels by hand and that they had a bar to use on the flange of the wheel, but that they then got to the point where they rolled them out with the forks. He testified that he also serviced the machines while he worked on the fork truck.

Petitioner testified that he left operating the fork truck in March of 2015, at which point he moved to shipping/DC cuts. He testified that he bid on the job because he was having issues with his arms and thought if he got off the truck, it might help. He testified that in DC shipping, they took master reels and cut customer lengths to be shipped out. He testified that they would start by operating the fork truck to get the master reel and wooden reels. He testified that if there was nothing on the take-up, then you had to manually pull the cable to the take-up reel which took two people to do while using his hands and arms to manually pull the reel and pull the cable to the other end. He testified that once it was tied to the wooden reel, he would have to layer wind across the wheel it to keep it even. He testified that the guide shown on the video was called a traverse, and that what he used in DC shipping was more like bike handlebars and was manually operated. He testified that the wider the reel, the harder it was to use. He testified that it got to the point where they put a big piece of foam on one of the bars so that they could use their body to help push it over. He testified that if it was a narrower cable it would take less effort, and that if it was larger it would take more effort. He testified that when he first started in DC shipping, he would manually guide the wire for the whole 8 hours, but that he does not only stay on that machine anymore.

Petitioner testified that he uses hand tools and vibrating tools including an air-powered nail gun, and that he has to nail 4x4s on the flatbed trucks and also build pallets. He testified that he uses a vibrating tool for cutting insulation, and that they use a drill that is a cable cutter for cut-overs. He testified that they also have an impact gun as well. He testified that he uses hand or vibrating tools on almost every job duty. He testified that he also uses a sledgehammer as well as rope for various things, including making splices to tie one cable to another. He testified that they will also hammer staples to the sides of reels to hold the ends.

Petitioner testified that when he left the fork truck job and went to DC shipping, he noticed that his hands and arms got worse. He testified that he first talked to a doctor about his symptoms in his upper extremities in March of 2015 when he switched jobs. He testified that Dr. Eubanks was his primary care physician in Pinckneyville, and that she ordered an x-ray of his elbow. He testified that Dr. Eubanks said she could not see anything on the x-rays. He testified that he continued to work in DC shipping, and that in November of 2015 he returned to Dr. Eubanks for a wellness check. He testified that he talked to Dr. Eubanks about his continued issues, and that she then ordered nerve conduction studies. He testified that he underwent the studies on two separate dates.

Petitioner testified that after the nerve conduction studies were performed, Dr. Eubanks sent him to Dr. Brown. He testified that he saw Dr. Brown on December 16, 2015, and that he told him he would need surgery and thought it was work-related. He testified that after his visit with Dr. Brown, he advised his employer that he had been diagnosed with carpal tunnel syndrome and that it was work-related. He testified that he gave notice to Krista Nollman and Chad Shiner, and that they stated that there was nothing there that he could get it from and that they would fight him all the way. He testified that Mr. Shiner said he needed to get a second opinion, and that he sought it from Dr. Mall. He testified that Dr. Mall reviewed his nerve conduction studies and gave him splints and braces to wear for almost a month, but they did not help and he eventually had surgery.

Petitioner testified that before surgery, the symptoms in his upper extremities included pain and tingling and that it woke him up at night. He testified that his hands and arms would go to sleep. He testified that he would also have some symptoms while at work including a tingling sensation, but they would not go to sleep as bad as they did at night.

Petitioner testified that when he first presented to Drs. Eubanks, Brown, Mall and Strecker, he described his job duties in a candid and forthright way. He testified that after surgery, his condition improved. He testified that his hands did not go to sleep anymore, that they were still a little tender but that they were better than before. He testified that he has soreness in the palms of his hands if he pushes himself to get up off the floor. He testified that he has numbness from his elbow to about 3-4 inches down his forearm, and that when he experiences tenderness, he takes Tylenol and does this 1-2 times per week.

Petitioner testified that he has had a little loss of strength or endurance. He testified that his hands and elbows tire out quicker. He testified that his employer directed him to see Dr. Strecker, and that the time spent with the doctor was 10-15 minutes. He testified that he reported to him his job duties.

On cross examination, Petitioner agreed that he started working for Respondent in 2007 and that he worked the jacket line for about three years. He agreed that at the end of the three years, he did not have any symptoms nor did he have any treatment. He agreed that in 2010, he began driving a fork truck. He testified that in addition to driving the fork truck, he had to roll the reels out which involved pushing and pulling. He agreed that he began working the DC position in March of 2015 and that he had to bid for the job.

On cross examination, Petitioner agreed that he has not seen a doctor since he was released, that he did not have any appointments scheduled in the future, that he was doing his regular job and that he was released without restrictions.

Chad Shiner was called as an adverse witness by Petitioner at the time of arbitration. He testified that he is the environmental health and safety facilities manager in DuQuoin, and that he has held the position for 5½ years. He testified that his job duties include managing the health and safety of 200+ employees, and that he reports to the plant manager.

Mr. Shiner testified that he was familiar with Petitioner and agreed that he heard Petitioner's testimony. He testified that he was not Petitioner's direct supervisor. He testified that he was not employed by Respondent when Petitioner was hired, and that he started working for Respondent in 2008 in Jackson, Tennessee. He testified that in 2011, he moved to the DuQuoin facility.

Mr. Shiner testified that he was unaware of whether Petitioner worked overtime but believed Petitioner's position worked overtime. When asked if Petitioner was a good employee, Mr. Shiner testified that he had no dealings with him. He testified that he spent 10-15 minutes observing Petitioner so he understood the work load. He denied having performed the job with Petitioner. He denied ever having done any jobs with Petitioner.

Mr. Shiner testified that he did not ask Petitioner to get a second opinion when he reported the claim. He testified that he did not discuss Petitioner's treatment. He did not have an explanation for the target reel time noted on the Jacket Line Runsheet (*i.e.*, PX14). He testified that Respondent ran a variety of different products, that there was a constant change-over, and that the workers may do two cut- overs in a shift. He testified that the videos were made at his request and that he filmed them. He agreed that the video did not show the manual traverse.

Mr. Shiner agreed that Petitioner's job duties varied. He agreed that while on the jacket line, Petitioner had to pull heavy cable. He testified that hand cutters were used to cut smaller cables. He agreed that the written job description was accurate. He further testified, however, that it did not describe how often or how many times one did a specific job.

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The Medical Records List was entered into evidence at the time of arbitration as Petitioner's Exhibit 2.

The medical records of Family Medical Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on March 18, 2015 for an annual exam and to establish care. It was noted that Petitioner had a past history of smoking and quit in 2002. It was noted that Petitioner had full range of motion with some discomfort on the left elbow and tenderness at the lateral epicondyle. The assessment included elbow pain, and it was noted that Petitioner was recommended to undergo a left elbow x-ray. At the time of the November 5, 2015 visit, it was noted that Petitioner complained of right elbow pain. It was noted that the initial onset was six months ago, and that the precipitating event seemed to be overuse or repetitive activity. It was noted that Petitioner's pain radiated to the thumb, and that associated symptoms included numbness in the thumb. It was noted that the right elbow exam elicited pain at the medial and lateral epicondyle. The assessment was that of elbow pain, and Petitioner was recommended to undergo an EMG and nerve conduction study. (PX3).

The medical records of Pinckneyville Community Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner underwent x-rays of the left elbow on March 19, 2015 which were interpreted as negative. The history noted was that of left elbow pain with no known injury. (PX4).

The medical records of Dr. Sawar were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner underwent a right-sided EMG/nerve conduction study on November 23, 2015 with a noted history of complaints of numbness and tingling in both hands, right more than left. The conclusions were noted to be that of electrodiagnostic evidence of severe right median mononeuropathy at the wrist (*i.e.*, carpal tunnel syndrome) without active denervation; no electrodiagnostic evidence of right ulnar mononeuropathy or cervical radiculopathy. The records reflect that Petitioner also underwent a left-sided EMG/nerve conduction study on December 11, 2015 with a noted history of complaints of numbness and tingling of the left hand. The conclusions were noted to be that of electrodiagnostic evidence of mild left median mononeuropathy at the wrist (*i.e.*, carpal tunnel syndrome) without active denervation; no electrodiagnostic evidence of left ulnar mononeuropathy or cervical radiculopathy. (PX5).

The medical records of Orthopaedic Institute of Southern Illinois were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner was seen on December 16, 2015 for evaluation of right greater than left, but both hand numbness, forearm pain and elbow pain. It was noted that Petitioner stated that this had been going on since March 2015, and that he started noticing some numbness in the thumb, index finger, middle finger and some aching in the forearm. It was noted that Petitioner stated it had become progressively worse since that time and was now waking him up at night. It was noted that Petitioner was placed in a night splint about a week ago, but stated that it was not making any significant improvement. It was noted that Petitioner went for a nerve conduction study back in March which showed severe right carpal tunnel syndrome, and that he more recently went for a left nerve conduction study but the results were not available. It was noted that Petitioner started showing some signs of weakness in the right hand and was dropping things at times, and that he had the numbness and radiating pain into the forearms. It was noted that Dr. Brown's impression was that of several carpal tunnel syndrome of the right wrist and moderate carpal tunnel syndrome of the left wrist, and right lateral epicondylitis, traumatic. A carpal tunnel release was recommended and Petitioner was referred to Dr. Young for further evaluation and surgical management. (PX6).

The medical records of Dr. Nathan Mall were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner was seen on December 28, 2015 for bilateral

hand complaints. It was noted that Petitioner had been employed by Respondent for eight years and that he stated that he started having some symptoms of pain in his elbows in March while he was working driving a forklift. It was noted that about 4-5 months ago, Petitioner began waking up at night with numbness into his thumbs but also mostly in the ulnar innervated fingers, and that he felt numbness in the lateral aspect of his hand, forearm and into his pinky and ring fingers bilaterally. It was noted that Petitioner worked in the shipping department and worked with a lot of cables, and that he stated that they took a master reel and then cut multiple reels from this for customer orders. It was noted that Petitioner stated that he had to strip the cables using a knife/cable stripper, which required squeezing and turning this in a circle, and that he had to peel off the installation layer 10-15 times per day. It was noted that Petitioner did a lot of pulling and also had to load the trucks and nail down 4x4s, and that when his symptoms began, he was driving a forklift which required him to keep his elbows in a flexed position and there was vibration associated with this. The assessment was that of bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome, mild. Petitioner was recommended to use an ulnar nerve night brace as well as wrist splinting for his carpal tunnel. It was noted that Petitioner's job duties driving a forklift could easily cause cubital tunnel syndrome with keeping his elbows in a flexed position with vibrational effects to the bilateral upper extremities. It was noted that Petitioner's job duties of squeezing and grasping the stripper tool and gripping and grabbing the cables and pulling on them would require force through the wrists and could produce carpal tunnel syndrome. It was noted that Dr. Mall thought Petitioner's carpal tunnel syndrome was mild in terms of its clinical significance and the cubital tunnel syndrome was more severe. It was noted that Petitioner would continue full duty work. (PX7).

The records of Dr. Mall reflect that Petitioner was seen on January 25, 2016, at which time it was noted that he continued to have significant symptoms into the ulnar distribution as well as some mild numbness into the thumbs on occasion. It was noted that Petitioner felt that the night brace had helped somewhat, but he still had decreased grip strength. It was noted that Petitioner also continued to have numbness and tingling in his ulnar digits. The assessment was that of (1) bilateral cubital tunnel syndrome; (2) bilateral carpal tunnel syndrome. It was noted that Dr. Mall believed that Petitioner had failed conservative treatment consisting of wrist bracing, anti-inflammatory medications and work modifications, and that he recommended right-sided and left-sided carpal and cubital tunnel releases with possible ulnar nerve transpositions depending on the stability of the ulnar nerve following decompression. Petitioner was issued a work slip, allowing him to return to full duty. Work slips were also issued on February 16, 2016, February 29, 2016, March 1, 2016 and March 7, 2016, taking Petitioner completely off work. (PX7).

The records of Dr. Mall reflect that Petitioner was seen on March 7, 2016 for follow-up of his bilateral carpal and cubital tunnel syndrome. It was noted that Petitioner was doing well and had minimal complaints. It was noted that Petitioner was recommended to undergo physical therapy. At the time of the April 5, 2016 visit, it was noted that Petitioner had an excellent result, had done some physical therapy and felt that he was very determined to return back to work. It was noted that Petitioner felt very good, no longer had any numbness or tingling in his hands and his pain symptoms had improved. It was noted that Petitioner brought additional records with him, including a supplemental report by Dr. Strecker regarding a video. It was noted that Petitioner indicated that he worked for Respondent at least 40 hours per week and oftentimes more like 60 hours per week, and that this would leave little time for him and his auto detailing shop. It was noted that Dr. Mall was of the opinion that Petitioner's forklift operation and cable activities in which he was forcefully gripping the cables in a repetitive manner would at the very least aggravate underlying carpal and cubital syndrome if not be the causative and prevailing factor in the causation of the conditions. (PX7).

The medical records of Orthopedic Ambulatory Surgery Center of Chesterfield were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The records reflect that Petitioner underwent (1) right carpal tunnel release and (2) right cubital tunnel decompression ulnar nerve transposition on

February 16, 2016 for pre- and post-operative diagnoses of right carpal tunnel syndrome and right cubital tunnel syndrome. The records also reflect that Petitioner underwent (1) left carpal tunnel release and (2) left ulnar nerve transposition following ulnar nerve decompression on March 1, 2016 for pre- and post-operative diagnoses of left carpal and cubital tunnel syndrome. (PX8).

The medical records of K&S Medical were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The records reflect that Petitioner was issued a Certificate of Medical Necessity and Letter of Medical Necessity/Written Prescription for a DVT/Intermittent Pneumatic Compression Device on February 16, 2016 and March 1, 2016. (PX9).

The medical records of DuQuoin Health Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 10. The records reflect that Petitioner underwent an Outpatient Physical Therapy Evaluation on March 1, 2016 for a diagnosis of bilateral carpal tunnel syndrome/ulnar transposition. Petitioner underwent physical therapy for the timeframe of March 12, 2016 through March 31, 2016. (PX10).

The IME of Dr. William Strecker dated March 2, 2016 was entered into evidence at the time of arbitration as Petitioner's Exhibit 11. The report noted that Petitioner was seen on March 2, 2016 for a chief complaint of numbness and tingling in both arms. It was noted that Petitioner was employed by Respondent as a warehouseman and forklift truck driver, and that for slightly over a year he had had numbness and tingling to both hands, right greater than left, associated with night pain. It was noted that Petitioner stated that his pre-operative pain and paresthesias seemed to be completely relieved, and that he denied any cervical pain or endocrinopathy. It was noted that Petitioner had been employed by Respondent for nine years, that his job duties during that time had varied, that he had worked on the jacket line having to pull heavy cable, that he used hand cutters to cut large cables for approximately three years, that he would load reels of cable having to pull on it and that he also did some forklift truck driving. It was noted that Dr. Strecker opined that Petitioner's diagnoses were that of bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, and that to date the care and treatment Petitioner received had been reasonable and necessary. It was noted that based on Petitioner's history of manually stripping and pulling large cable wires, having to load cables into reels and having done this over the course of years, Dr. Strecker felt that his job duties were a contributing factor to both his carpal tunnel as well as his cubital tunnel and the need for his treatment.

The transcript of the deposition of Dr. Mall was entered into evidence at the time of arbitration as Petitioner's Exhibit 12. Dr. Mall testified that he is an orthopedic surgeon and is board-certified in orthopedic surgery and independent medical examinations. (PX12).

Dr. Mall testified that occupational risk factors that can cause or contribute to carpal and cubital tunnel syndrome include any kind of gripping or grabbing, specifically heavy gripping and grabbing; things like typing was worse when the wrist was in a flexed or extended position; having the elbow in a flexed position throughout the day was very problematic; and vibrational activities. He testified that non-occupational factors or hobbies that could lead to the development or aggravation of those conditions included obesity, diabetes, thyroid conditions and age and gender, which were less well-recognized. He testified that as to hobbies, he was interested in what the wrist was doing in the activity more than what the actual hobby was. (PX12).

Dr. Mall testified that he first saw Petitioner on December 20, 2015, at which time he gave a history that about March or so he started having some pain in his elbows as well as a few months after that having numbness and tingling symptoms into his thumb, ring finger and pinkie finger. He testified that Petitioner reported that when he first started noticing a lot of the elbow symptoms, he was doing a lot of time on a fork lift. He testified that Petitioner also described some of the activities at Respondent when

he was basically having to strip cables, cut the cables, load them onto a master wheel and the need for him to do this several times per day. He testified that Petitioner had to do some pulling and tugging of those reels or of the cables associated with those reels, that driving the forklift kept his elbows in a flexed position and that he also had to do some loading of trucks and nailing of 4x4s. He testified that Petitioner mentioned that he enjoyed going fishing on occasion, but nowhere near the amount of time that he was working for General Cable. He testified that Petitioner reported that he worked between 40-60 hours per week. (PX12).

Dr. Mall testified that he did not have a good idea about the size of the cables that Petitioner was describing until he saw the video. He testified that the person in the video that he saw was using one of the smaller cables and it seemed like he was putting a lot of grip strength through that. He testified that the video showed an automated cable stripper which still required you to hold it and rotate the wrist around with forceful gripping, and that having to load the cable onto the reel required a lot of gripping and grabbing. He testified that on physical examination, Petitioner had a positive flexion compression test at the elbows, a positive Tinel's in his left elbow and a negative on the right elbow, a positive flexion compression test at the wrist on both the left and right sides and a negative Tinel's at the wrist on that date. He testified that the nerve conduction studies demonstrated bilateral carpal tunnel syndrome and that the ulnar nerves did not look quite normal but did not reach the diagnostic criteria for cubital tunnel syndrome. He testified that he felt that Petitioner had bilateral carpal and cubital tunnel syndrome. He testified that he gave Petitioner some night braces to wear as well as wrist splints. He testified that he believed that Petitioner's job duties at least aggravated his bilateral carpal and cubital tunnel syndromes and likely caused them. He testified that Petitioner did not have any of the other risk factors for the development of these conditions. (PX12).

Dr. Mall testified that he saw Petitioner again after he had attempted the conservative splinting and bracing and that it helped him somewhat, but Petitioner still felt like he was having reduced grip strength and continued to have numbness and tingling into the thumbs on occasion and into the ulnar distribution as well. He testified that based on Petitioner's continued symptoms without any dramatic improvement, surgery was recommended. He testified that the right carpal tunnel release and right cubital tunnel decompression was performed on February 16, 2016 and then the same surgery was performed on the left on March 1, 2016. He testified that post-operatively, Petitioner did very well and noted basically immediate improvement in his symptoms with no longer having any numbness into his thumb or ulnar fingers. He testified that when he saw Petitioner in April, he was doing excellent, really had no symptoms, felt that he was stronger and was ready to return back to work. (PX12).

On cross examination, Dr. Mall testified that Petitioner was released to full duty work on April 5, 2016 and was placed at maximum medical improvement. He agreed that Petitioner reported that he worked for Respondent for eight years, and that he did not believe that he did the same job constantly over the eight-year period. When asked to say how long Petitioner did a particular job and what it consisted of, Dr. Mall responded that he did not have the exact dates of all of the different jobs that he did. He agreed that Petitioner did not use a lot of hand tools to torque or twist, but further testified that forceful gripping was just as bad as using the hand tools. (PX12).

Petitioner's Earnings Statements were entered into evidence at the time of arbitration as Petitioner's Exhibit 13. The Jacket Line Runsheet was entered into evidence at the time of arbitration as Petitioner's Exhibit 14. The Teamcare Letter dated August 8, 2016 was entered into evidence at the time of arbitration as Petitioner's Exhibit 15.

The DC/Shipping Job Description was entered into evidence at the time of arbitration as Petitioner's Exhibit 16. The description mentioned requirements including, among others, operating fork trucks, hand-held power tools and rewinder machines; properly operating all rewinder machines in the

department to perform cuts to length or parallel operations, as required; being able to use hand-held RF scanner on incoming metal reels; and moving reels from staging areas to payoffs. (PX16).

The Dr. Strecker Intake Form was entered into evidence at the time of arbitration as Petitioner's Exhibit 17. The description of job duties as provided by Petitioner included that of fork truck driver; nail 4x4 down to flat beds; load cable reels; manually layer cable onto small reels; strip ends of cable and tie off ends of cable. The hand or power tools used were noted to include wire cutter, drill and nail gun, and that he would use them 4-8 hours. (PX17).

The transcript of the deposition of Dr. Strecker was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Strecker testified that he is an orthopedic surgeon and is board-certified in orthopedic surgery. (RX1).

Dr. Strecker testified that he performed a Section 12 examination on March 2, 2016. He testified that Petitioner gave a history of having been employed by Respondent both as a warehouseman and a forklift driver, and that he reported that for over a year he had numbness and tingling to both of his hands, right greater than left, which was associated with night pain. He testified that Petitioner indicated that his pre-operative pain and numbness and tingling seemed to be completely relieved, and that he denied having any prior cervical problems and denied any type of endocrinopathy prior to all of this. He testified that Petitioner told him that he was employed by Respondent for nine years and that his job duties varied, that he had worked on the jacket line pulling heavy cable, that he used hand cutters to cut large cable (which he did for three years), that he loaded reels of cable and had to pull on it, and that he also did some forklift driving in the warehouse. He testified that Petitioner reported that his job duties varied and that he did what he was told to do. (RX1).

Dr. Strecker testified that Petitioner's evaluation was somewhat limited because he was recently post-op but as to the right upper extremity, his elbow had near normal range of motion and his incision appeared to be healing well without any signs of inflammation or infection. He testified that he could not elicit a Tinel's over his ulnar nerve and that as to his hand, Petitioner had a well-healed palmar incision, his wrist range of motion was good as was his finger range of motion, and that his two-point sensation was normal to all of his fingers. (RX1).

Dr. Strecker testified that he felt that Petitioner's job duties were a contributing factor to his bilateral carpal tunnel and cubital tunnel syndromes based on the history that Petitioner gave him. He testified that he authored a second report after he was notified that the employer took issue with what he had said. He testified that he was given a flash drive with a video, and that he was also given the history that Petitioner had not performed any strenuous activities on the jacket line since May 24, 2010. He testified that Petitioner reported that he had to feed the cable into a reel, but the employer reported that he did that for five minutes per day, and that he was also given a history that Petitioner had an auto detailing shop on the side. He testified that Petitioner did not give him any specifics about that, and did not tell him that he had a second job. He testified that based on the fact that Petitioner was not doing the job duties that he explained for five years before he had an onset of symptoms, he then changed his opinion and indicated that there was no temporal relationship between his job duties and his findings of carpal and cubital tunnel. He agreed that he based his opinion on the fact that Petitioner told him that he had to manually strip and pull large cables, and that Petitioner never explained to him that he was only doing it five minutes a day. (RX1).

Dr. Strecker testified that according to the information sent to him, Petitioner was mostly driving the forklift and that this was the majority of his job now. He testified that driving a forklift did not entail the type of motions that could cause repetitive-type trauma injuries. He testified that elbow flexion was associated with cubital tunnel, and that studies showed that it had to be a hyperflexed state (*i.e.*, 105

degrees or greater) for prolonged periods of time. He testified that depending upon the body habitus of a patient, he thought that it would be quite unnatural to have to keep your elbows flexed greater than a right angle driving a forklift unless the steering wheel was literally almost in your face. He testified that he felt that Petitioner's job duties did not cause, contribute or aggravate the carpal or cubital tunnel conditions. (RX1).

On cross examination, Dr. Strecker admitted that he recently retired from the active practice of orthopedics. He agreed that fishing would not be a causative factor in Petitioner's current condition of ill-being. He agreed that Petitioner indicated on his paperwork that he believed that his hands and arms were injured by repetitive motion that occurred over time, and that he also listed for his current occupation a warehouseman at General Cable. He agreed that Petitioner indicated in a list of physical movements that he was required to perform that he was a fork truck driver and that he nailed 4x4's down to flatbeds, that he loaded cable reels, that he manually layered cable onto small reels, that he stripped off ends of cable and that he tied off ends of cable. He agreed that Petitioner indicated that he also used wire cutters, drills and nail guns, and that he spent 4-8 hours of his employment using wire cutters, drills or nail guns. He agreed that this job description was given when he found Petitioner's employment to be causative. (RX1).

On cross examination, Dr. Strecker agreed that Petitioner told him that his job duties at times had varied, and that he explained to him his work on the jacket line having to pull heavy cable. He testified that on the video the worker manipulated the cable and that the machine pushed it as he started it on the reel. He agreed that the individual pulled it over to load it. He testified that the reference to using hand cutters to cut large cables for approximately three years was part of his job, but that he did not know when that was. He testified that it was his impression that Petitioner continued to use hand cutters and that he was always using them as part of working on the jacket line. He agreed that Petitioner indicated that he loaded reels of cable by having to pull on it. (RX1).

On cross examination, Dr. Strecker agreed that he had testified in the past that forklift driving, if there was significant vibration, was a contributing factor to carpal and cubital tunnel. He agreed that he testified that significant flexion would be a contributing factor to cubital tunnel syndrome. He admitted that he had no information as to whether Petitioner's fork truck vibrated. He admitted that he had no knowledge as to the flexion required in Petitioner's elbows while fork truck driving. He agreed that in the Illinois Form 45, it was noted that Petitioner's occupation at the time the claim was reported was that of a forklift driver. (RX1).

On cross examination, Dr. Strecker agreed that he did not have reason to suspect that Petitioner was malingering, faking or magnifying his symptoms. He agreed that if the arbitrator found that Petitioner did enough forceful, repetitive activity through the day with his hand, he would agree that it was causally connected but that if the arbitrator found that Petitioner did things five minutes a day as Mr. Shiner indicated in his March 16, 2016 letter, then it would not be connected. (RX1).

On redirect, Dr. Strecker testified that Petitioner did not tell him how many times a day he pulled cable and that he did not describe the wire cutters to him, but only said that he had to use large hand cutters. (RX1).

The USB Hard Drive with Job Videos was entered into evidence at the time of arbitration as Respondent's Exhibit 2.

CONCLUSIONS OF LAW

With respect to disputed issues (C) and (F), given the commonality of facts and evidence relative to both issues, the Arbitrator addresses those jointly.

The Arbitrator finds that Petitioner has met his burden of proving that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on December 16, 2015, and that his current condition of ill-being is causally related to his work activities for Respondent.

In so concluding that Petitioner's carpal tunnel and cubital tunnel syndromes in his bilateral hands and arms is related to his work activities, the Arbitrator finds Petitioner to be a credible witness on his own behalf. The Arbitrator acknowledges that both Dr. Mall and Dr. Strecker found Petitioner to be honest and forthright. (PX12; RX1). The Arbitrator notes that Petitioner's description of his job duties was consistent throughout his medical records and substantiated by Respondent's documentation, and reflected intensive upper extremity usage. (PX3; PX6; PX7; PX11; PX14; PX16). Having reviewed and considered the evidence as a whole, the Arbitrator finds Dr. Mall's causation opinion to be persuasive and further notes that even Dr. Strecker acknowledged that if Petitioner's description of his job duties was indeed correct, then Petitioner's job duties would be a causative factor in Petitioner's development of his bilateral carpal and cubital tunnel syndromes. (RX1).

The Arbitrator finds that Petitioner's job duties are sufficiently repetitive or cumulative to support a finding of causation for both the carpal and cubital tunnel syndrome conditions. Petitioner's job description and his own testimony demonstrated that his job duties were forceful and required frequent gripping, and that there was vibration in the operation of the fork truck. As a result thereof, the Arbitrator finds that the job duties as described by Petitioner at the time of arbitration -- which involved gripping and grasping of objects and tools, forceful motions with the arms, and use of tools with varying degrees of force -- were sufficient to cause or aggravate both the carpal tunnel syndrome and cubital tunnel syndrome condition in both of his upper extremities.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has met his burden of proving that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on December 16, 2015, and that his current condition of ill-being is causally related to his work activities.

With respect to disputed issue (J) pertaining to necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment to his bilateral hands and arms was reasonable, necessary, and causally related to his work accident of December 16, 2015. As a result, the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits from February 16, 2016 through April 4, 2016. (AX1). Related thereto, the Arbitrator notes that Dr. Mall testified that the right carpal tunnel release and right cubital tunnel decompression was performed on February 16, 2016 and then the same surgery was performed on the left on March 1, 2016. Dr. Mall agreed on cross examination that Petitioner was released to full duty work on April 5, 2016. (PX12). The Arbitrator further notes that work slips were also issued on February 16, 2016, February 29, 2016, March 1, 2016 and March 7, 2016, taking Petitioner completely off work. (PX7). Therefore, the Arbitrator finds that Respondent shall pay

temporary total disability benefits for a period of 6 6/7 weeks, addressing the timeframe of February 16, 2016 through April 4, 2016, given the Arbitrator's findings with respect to disputed issues (C) and (F).

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 in this matter. As a result thereof, the Arbitrator gives no weight to this factor.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner continues to work for Respondent. The Arbitrator finds that the nature and demands of his position will likely have some affect on his permanent partial disability and, as such, the Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 46 years old on his date of accident. Given the relatively younger age of Petitioner and the fact that his treating physician, Dr. Mall, gave him a full duty/no restriction release, 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 Petitioner continues to work for Respondent and was given a full duty release by his treating physician, Dr. Mall. There was no evidence proffered at arbitration to demonstrate that this 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 after surgery, his condition improved. Petitioner testified that his hands did not go to sleep anymore, that they were still a little tender but that they were better than before. Petitioner testified that he has soreness in the palms of his hands if he pushes himself to get up off the floor. He further testified that he has numbness from his elbow to about 3-4 inches down his forearm, and that when he experiences tenderness, he takes Tylenol. At his final office visit with Dr. Mall on April 5, 2016, it was noted that Petitioner had an excellent result, had done some physical therapy and felt that he was very determined to return back to work. It was noted that Petitioner felt very good, no longer had any numbness or tingling in his hands and his pain symptoms had improved. (PX7). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration, namely his continued complaints and purported limitations, were somewhat corroborated by his treating records at the conclusion of his treatment with Dr. Mall. The Arbitrator accordingly places lesser 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 7.5% loss of use of the right hand, 5% loss of use of the left hand, 7.5% loss of use of the right arm and 5% loss of use of the left arm under Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FASCIA EDWARDS,

Petitioner,

vs.

NO: 10 WC 21292
10 WC 21293

STATE OF ILLINOIS, ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION,

Respondent.

17IWCC0695

DECISION AND OPINION ON §19H/§8A PETITION

A §19H/8A Petition having been filed by Petitioner's attorney herein and due notice given, this cause came before Commissioner Gore on June 6, 2017. The Commission having jurisdiction over the persons and subject matter, and after being advised in the premise, finds:

1. Petitioner suffered work-related accidents on June 10, 2009 and June 22, 2009, while lifting large stacks of binders. After trial, the Arbitrator found causation and awarded temporary total disability benefits for 46-1/7 weeks, $5,650.44 in medical expenses and a 10% loss of use of Petitioner's person as a whole under §8(d)(2) of the Act.

2. Subsequent to the Arbitration ruling, an appeal was filed and the Commission affirmed the Arbitrator's ruling.

3. Since that time, Petitioner has been treating with Dr. Tudoriu once or twice monthly. Dr. Tudoriu was attempting to determine the cause of Petitioner's symptoms of radiating pain down to her feet.

4. Petitioner testified that she feels terrible and has intense pain all day every day. She has trouble sleeping, walking, performing household chores, exercising, engaging in sexual intercourse and traversing stairs.

5. Petitioner underwent physical therapy, but stated that her condition "reversed" and she began having severe pain to the point that she could not walk or sit down for even ten minutes.

6. A May 31, 2012 MRI revealed multilevel degenerative changes which were essentially stable when compared to the MRI of June 30, 2009.

7. 2014 medical records of Dr. Tudoriu indicate that Petitioner has low back pain flare-ups whenever she is stressed.

The Commission notes that no Statement of Exceptions in support of the Petition was filed by Petitioner, which leaves the Commission in a position of having to speculate the relief sought by Petitioner. Instead of doing so, the Commission chooses to rely only on the facts presented to render its' Decision.

Although Petitioner testified that her pain post-arbitration has become consistently excruciating, medical records indicate that her pain only increases in times of stress. Petitioner's testimony of increased symptomatology is also contradicted by the May 2012 lumbar MRI, which revealed findings which were essentially stable when compared to the 2009 lumbar MRI findings.

With a lack of new objective evidence of a material change in Petitioner's condition, the Commission denies Petitioner's §19h/§8a Petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent is not liable for any additional medical expenses or workers' compensation benefits in relation to her 2009 work-related accidents.

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.

NOV 2 - 2017

DATED:
DLG/wde
Disc.: 9/28/17
45

David L. Gore

Stephen Mathis

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alfonso Lopez,

Petitioner,

vs.

NO: 14 WC 28392

17IWCC0696

Derrig Concrete, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 26, 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.

17IWCC0696

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 $2,500.00. 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: NOV 3 - 2017
TJT:yl
o 10/24/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

LOPEZ, ALFONSO
Employee/Petitioner

Case# **14WC028392**

DERRIG CONCRETE INC
Employer/Respondent

17IWCC0696

On 5/26/2016, 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:

1747 SEIDMAN MARGULIS & FAIRMAN LLP
STEVEN J SEIDMAN
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
JACLYN D JEDNACHOWSKI
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CHICAGO, IL 60606

17IWCC0696

A Lopez v Derrig Concrete, Inc. 14 WC 028932

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

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

Alfonso Lopez
Employee/Petitioner

Case # 14 WC 028932

v.

Derrig Concrete, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Jeffrey Huebsch, Arbitrator of the Commission, in the city of Chicago, on 12/3/15. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

L. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☒ TTD

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

N. ☐ Is Respondent due any credit?

O. ☒ Other Nature and Extent

A Lopez v Derrig Concrete, Inc. 14 WC 028932

FINDINGS

On the date of accident, 7-25-14, 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, in part,** causally related to the accident.

In the year preceding the injury, Petitioner earned $36,334.48; the average weekly wage was $698.74.

On the date of accident, Petitioner was 34 years of age, **married**, with 2 children under 18.

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

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

Respondent shall be given a credit of $16,037.87 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $16,037.87. The Parties agreed that Petitioner was entitled to TTD from July 26, 2014 through February 28, 2015 and that all such benefits had been paid.

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

ORDER

Respondent shall pay **reasonable and necessary medical services,** pursuant to the Medical Fee Schedule, of $, as provided in §§8(a) and 8.2 of the Act and as is set forth below. Respondent shall be given a credit for all bills paid.

Respondent shall authorize and pay for the conservative care recommended by Dr. McNally for Petitioner's cervical spine related treatment, along with all related services.

Respondent shall pay Petitioner **temporary total disability benefits of $465.83/week for 39-4/7 weeks,** beginning **March 1, 2015 through December 3, 2015,** as provided in **Section 8(b) of the Act.**

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

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 of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 26, 2016

Date

MAY 26 2016

FINDINGS OF FACT

Petitioner testified via a Spanish/English interpreter.

Petitioner was employed by Respondent as a cement mason. He worked with concrete. His job duties included carrying and installing panels weighing 80 to 100 pounds. He regularly worked at heights.

Petitioner is a Type II diabetic. He is right handed. Prior to July 25, 2014, he never had medical treatment for his neck, arms or wrists.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on July 25, 2014. Petitioner was working on the ground floor at 2713 North Lakewood in Chicago, installing a brace for an elevator that was going to be installed in the building's basement. He fell head-first down 9 feet onto the bottom of the elevator shaft. Petitioner landed on his head. After landing, he noticed that he couldn't move. His arms and legs were numb.

Petitioner was transported to the emergency room by Chicago Fire Department ambulance. Petitioner was fitted with a cervical collar, placed on a long spine board where he was immobilized with spider straps, and transported to Advocate Illinois Masonic Hospital.
(PX2, PX13)

Petitioner was admitted to the Emergency Department, with his visit reason listed as "Trauma - major." Petitioner's medical history was noted: "Fell 9ft off scaffolding at a construction site hitting his head on a metal pole." Petitioner complained of left arm pain, left shoulder pain, right chest pain, and pain bilaterally in his wrists over the scaphoid region. On examination, Dr. Rebeca Rico noted that Petitioner had a 4 cm stellate forehead laceration, bilateral abdominal tenderness along the costal margins, bilateral decreased digit flexion and extension in his hands, bilateral tenderness in his wrists, decreased range of motion, left shoulder dysesthesia, and right anatomical snuff box tenderness. Dr. Rico performed a repair of the laceration on Petitioner's forehead. Petitioner underwent CT scans of his head, cervical spine, and thoracic spine, which did not reveal acute process. He then underwent a cervical spine MRI, which showed a 3mm posterior osteophyte complex and posterior bulging disc causing a mild mass effect on the anterior thecal sac with flattening of the anterior surface of the spinal cord at C3-C4, with slight anterior edema at that level; mild posterior bulging of the disc at C4-5; posterior bulging disc at T2-T3 with questionable anterior cord edema; and mild posterior bulging disc osteophyte complex also noted at T3-T4 to the right of the midline. Petitioner was diagnosed with a head injury and spinal cord compression secondary to bulging disks. (PX2)

Later that day, Petitioner was seen by Dr. John Song for a neurosurgery consultation. Dr. Song reviewed Petitioner's history, noting that Petitioner was briefly quadriplegic and unable to move his extremities for 10 minutes before gradually improving, as well as suffering sensory loss, which had also gradually improved. Petitioner complained of weakness in his wrists, allodynia in his arms, and numbness in his hands and feet. He complained of bilateral upper extremity pain on movement. Dr. Song diagnosed Petitioner with traumatic cervical myelopathy secondary to a traumatic disc herniation at the C4-5 level. He opined that Petitioner did not have severe neurological deficits at that time and, therefore, did not require emergency surgery, but that Petitioner would need spinal decompression and steroids before he could be discharged. (PX2)

On July 26, 2014, a surgical critical care progress note stated that Petitioner's paresthesia was improving. Dr. Rico diagnosed Petitioner with disc bulging C3-C5. Dr. Song opined that Petitioner's strength was improving, and stated that he should continue to wear a cervical collar at all times, including past discharge, and that he should continue to take Dexamethasone. He cleared Petitioner to begin physical therapy. (PX2)

The following day, July 27, 2014, Dr. Song began to wean Petitioner off steroids. Dr. Richard Fanta stated that the steroids were meant to address the edema in Petitioner's spinal cord; he noted that Petitioner was to be seen by an orthopedic doctor for his continuing tenderness and bilateral snuff box pain. Petitioner was taking Norco for pain. Petitioner remained at Advocate Illinois Masonic Hospital until July 28 2014, when he was discharged with instructions to follow up at Advocate's Trauma Outpatient Center. (PX2)

Petitioner's testimony regarding this admission was a little confusing (underwent emergency surgery by Dr. Song, not discharged until August 12, 2014) but the errors were cleared up and the treatment at Masonic was as is set forth above. The Arbitrator does not ascribe the inaccuracies to any intent to deceive. Petitioner at trial presented as a little confused and unsophisticated.

Petitioner first presented to the Illinois Masonic Trauma Outpatient Center on July 31, 2014. At this time, Petitioner was taking Norco and Colace; he reported that he was still experiencing bilateral wrist pain, as well as pain in his back while sleeping. (PX2)

Petitioner continued treating at the Trauma Outpatient Center until August 12, 2014. On August 12, 2014, Petitioner underwent a neurologic exam by Dr. Song. Petitioner complained that his hands were still weak and somewhat numb, but slightly better relative to when he was in the ER. He complained of mid-back pain. Dr. Song noted that Petitioner remained in a rigid cervical collar; on examination, Petitioner was able to perform full range of motion with all extremities, but experienced bilateral upper extremity pain on movement. Dr. Song diagnosed Petitioner with cervical myelopathy and a traumatic C4-5 disc herniation. He stated that Petitioner had exhibited great improvement in his spinal cord injury, but that he had mild/moderate stenosis at C3-4 and that further accidents could cause him permanent paralysis. Dr. Song discussed performing an anterior cervical discectomy and fusion at C3-4 with Petitioner, informing Petitioner that he would be off of work for at least 3 months post-surgery. Dr. Song opted to keep Petitioner off of work "for at least 3 months," and anticipated starting PT and OT. An x-ray of Petitioner's cervical spine was performed with an eye toward removing the cervical collar. The x-ray did not disclose evidence of definite fracture, compression deformity, or gross AP alignment abnormality. (PX5)

Petitioner next came under the care of Dr. Howard Freedberg at Suburban Orthopaedics on August 27, 2014. Petitioner was referred to Dr. Freedberg by his attorney. Petitioner related the history of injury (albeit a fall of 3 to 7 feet, head first) ; he complained of pain in his neck radiating bilaterally down his arms, numbness and tingling in all of his finger tips, limited range of motion in his neck, and increased incidence of headaches. Dr. Freedberg ordered an MRI of Petitioner's cervical spine, and instructed Petitioner to remain in a neck brace until the MRI could be performed. (PX6)

On September 2, 2014, Petitioner underwent a cervical spine MRI at Suburban MRI. The MRI disclosed a small focus of hyperintense T2 signal within the right aspect of the spinal cord at C3-C4, indicative of possible acute cord edema; multilevel cervical spondylosis and degenerative disc disease; and a disc end osteophyte complex at C3-C4 causing mild biforaminal narrowing and mild central spinal stenosis. (PX6)

On September 8, 2014, Petitioner returned to Dr. Freedberg complaining of neck pain, numbness in his hands and feet, constant pain in his shoulders, occasional headaches at 4/10, a painful sensation when water contacted his skin, and skin peeling that occurred whenever he washed his hands or feet. Dr. Freedberg diagnosed Petitioner with cervical radiculitis, kept Petitioner off work and referred Petitioner to Dr. Thomas McNally. (PX6)

Petitioner first presented to Dr. McNally the following day, on September 9, 2014, for a spinal surgical evaluation. Petitioner related his history of injury (this time the head first fall was 7 to 9 feet), as well as his treatment by Dr. Song. Petitioner denied injury to his cervical spine prior to July 25, 2014, and denied any cervical spine treatment prior to that date. Petitioner stated that he had worn the hard cervical collar continuously since the injury, even in bed and in the shower. Petitioner complained of constant pain in his cervical spine, more pronounced on the left side, 5/10 at the time of the examination, radiating into his upper extremities bilaterally with numbness; bilateral upper extremity burning and numbness; numbness of the hands bilaterally; a cutting sensation in his skin when water impacts his arm in the shower; and limited range of motion. Petitioner reported an increase in his pain with standing, walking, and bending. He reported that he would wake up 3-4 times a night, and that he could walk no longer than 20 minutes at a time. On examination, Dr. McNally noted limited cervical range of motion and positive Hoffman's signs bilaterally, with reduced strength in the right upper extremity and reduced reflexes bilaterally in both his arms and legs. Dr. McNally reviewed the cervical MRI of September 2, 2014--he stated: "My independent reading is basically the same as the official report, except I would say the stenosis at C3-4 is much worse than mild." Dr. McNally diagnosed Petitioner with cervical spinal stenosis, cervical spondylosis with myelopathy, cervical disc degeneration, cervical radiculopathy, paresthesia, muscle weakness and abnormal reflex. (PX6)

Dr. McNally charted that the neurologic deficits of myelomalacia are known to progress over time without surgical intervention, and that the prognosis for recovery of those deficits after they occur is worse the further the deficits are allowed to progress. After losing the ability to walk, for instance, the chances of walking again are very slim. He stated that regained neurological function after a successful decompression occurs only about 50% of the time. Dr. McNally recommended that Petitioner undergo surgery to decompress and stabilize his cervical spine so as to halt the progression of neurological deficits; specifically, he recommended an anterior cervical discectomy and fusion with structural allograft and instrumentation at C3-4. Dr. McNally ordered an EMG/NCS test as well. (PX6)

That same day, on September 9, 2014, Petitioner underwent an EMG/NCS test, which demonstrated mild bilateral active cervical C5-C6 radiculopathy, as well as left C7 cervical radiculopathy. Denervating potentials were identified on EMG without concomitant reinnervation, suggestive of an acute to sub-acute process. (PX10)

Petitioner underwent the recommended surgery on September 12, 2014 at Alexian Brothers Medical Center. The procedure was: 1.) Decompression at C3-4 with discectomy; 2.) C3-C4 fusion; 3.) Allograft bone graft; 4.) Autograft bone graft; and 5.) Instrumentation. (PX6)

Petitioner returned to Dr. McNally for follow-up on October 7, 2014. After Petitioner's cervical fusion, he was feeling a little better. He was wearing his neck brace; he stated that his progress was slow, but he had seen progression in terms of his walking and activity level. However, he continued to have certain symptoms that were present before the surgery, including bilateral upper extremity achiness, frequent numbness and tingling of his palms and fingertips bilaterally (except for his ring and pinky fingers), a feeling of "hot temperature" in his feet bilaterally, and an occasional burning sensation from the back-right portion of his head radiating posteriorly down to his lower-right back. Dr. McNally examined Petitioner, and once again found

reduced reflexes in his extremities and a positive Hoffman's sign bilaterally. He reviewed Petitioner's EMG/NCS results from September 9, 2014. Dr. McNally did not change Petitioner's diagnosis. He recommended that Petitioner stop wearing a collar after two weeks, and for now to wear it only when out of the home. He refilled petitioner's Norco prescription, prescribed him Nortriptyline, and kept Petitioner off work with instructions to return in one month. (PX6)

On November 11, 2014, Petitioner returned to Dr. McNally for follow-up. Petitioner reported that on his way to Suburban Orthopaedics on that day, his wife lost control of their truck and they went over a curb. There was no damage; the car simply went off the road. Petitioner sustained no new pain or injury from the experience, and his family was fine. Petitioner's complaints remained similar to his complaints during prior visits: neck pain at 4/10, radiating bilaterally; and tingling of his upper extremities bilaterally into his hands. Petitioner had discontinued use of the cervical collar after two weeks, as instructed. Petitioner reported that he was increasing his daily physical activity, as Dr. McNally had recommended. Petitioner was walking on a regular basis for 20 minutes maximum, and would attempt to walk around the grocery store or the mall for 40-60 minutes. He reported issues with his knees when going up and down stairs, and that he experienced elbow pain when reaching overhead for more than one minute or so. Dr. McNally referred Petitioner back to Dr. Freedberg for evaluation of his elbows, knees, and shoulders, as well as to solicit Dr. Freedberg's opinion on when Petitioner would be okay to undergo physical therapy. Dr. McNally kept Petitioner off work, with instructions to return in one month. (PX6)

On November 19, 2014, Petitioner returned to Dr. Freedberg, complaining of bilateral shoulder, elbow, and knee pain. He reported that he had recovered most of his mobility, but that he still experienced a lot of stiffness and achiness in those joints. Dr. Freedberg determined that Petitioner was suffering from bilateral shoulder bursitis/tendonitis, and bilateral elbow brachioradialis tendinitis. Dr. Freedberg kept Petitioner off work and ordered physical therapy near his home. (PX6)

Petitioner returned to Dr. McNally on December 16, 2014. He had started physical therapy, and he reported that mobility in his neck had improved, but that his neck pain had increased. Petitioner reported that pain was originating in his neck and radiating upward to his occipital bone, then wrapping around the sides of his head bilaterally. Petitioner reported that he had developed severe bilateral arm pain, with a feeling like he was being cut in his anterior forearms, since he started lifting 2-5 pound weights in physical therapy one week prior. He had also begun to experience right heel pain. Petitioner requested a second opinion, apparently not agreeing with Dr. Freedberg's care recommendations. Dr. McNally ordered Petitioner to proceed with physical therapy. He referred Petitioner to Dr. Chhadia for evaluation of his knees and upper extremities, and to Dr. Dmitry Novoseletsky for interventional pain management. He kept Petitioner off work. (PX6)

On December 26, 2014, Petitioner completed a course of physical therapy at ATI Physical Therapy and was discharged. (PX8) It was noted that Petitioner had improved his range of motion, strength, and mobility; however, Petitioner continued to face impairments resulting from limited range of motion, reduced strength, and pain:

> These deficits limit patient's ability to perform these tasks: Climbing ladders, Lifting from floor, Lifting overhead, Pulling/pushing tasks, Using heavy machinery/power tools. Prior to injury, patient worked as a Construction Worker that requires a PDL of HEAVY (DOT 869.664-014). He is currently performing at a PDL of LIGHT (lifting 10-15 pounds occasionally): he is able to perform curl to press with 8#, lift and carry 30#, push/pull 70#. Patient is currently Not working: Temporarily and totally disabled. (PX8)

Petitioner was then enrolled in a work hardening program. (PX8)

Petitioner began work hardening on December 29, 2014, and completed the program on January 18, 2015. By the end of the program, he had progressed to being able to work at a medium physical demand level, with a floor to chair lift of 70 pounds, an overhead press of 24 pounds, and a lift-and-carry of 50 pounds. It was again noted that Petitioner was employed as a construction worker, which is considered a heavy physical demand level position (with occasional lifting of 100 pounds). (PX8)

Petitioner returned to Dr. McNally on February 17, 2015. Petitioner reported that his request to see the doctors that Dr. McNally had referred him to during his previous visit was denied pending an examination by Respondent's Section 12 examiner. Petitioner had completed his work conditioning at ATI physical therapy; his cervical pain continued, but was reduced to 2-3/10 at the time of examination. He reported difficulty lying down at bed time, and having to constantly shift positions due to neck pain. He reported that he continued to have bilateral numbness and radiating pain at 5-7/10 into his hands. He stated that he had difficulty lifting more than 20 pounds on each arm. Petitioner's heel pain had improved. Dr. McNally noted that while Petitioner had completed work conditioning with the ability to work medium duty, his job required him to work heavy duty. Dr. McNally opined that from a spinal surgery perspective, petitioner was doing well, and that his continuing pain, numbness, and tingling were likely related to stenosis below the level targeted by his surgery. Dr. McNally opined that Petitioner's forearm pain was in a C6 distribution bilaterally, and that extension of the decompression and fusion to C4-5 and C5-6 might be required to address it. Dr. McNally ordered an updated closed MRI of Petitioner's cervical spine, and instructed him to remain off work until it could be completed. (PX6)

On February 23, 2015, Petitioner was examined by Respondent's Section 12 examiner, Dr. Kevin Walsh. (RX3) In his letter of March 1, 2015, Dr. Walsh stated that Petitioner's "diagnosis is status post cervical spine decompression and fusion with resolution of any signs of a cervical myelopathy or a radiculopathy." He opined that Petitioner's ongoing complaints were in no need of medical intervention, that there was no objective evidence of cervical radiculopathy, and that Petitioner could return to work full duty as a laborer, without restrictions. (RX3)

Dr. Walsh repeated these opinions, in his letter of August 30, 2015, after reviewing more recent medical records, including Dr. Lopez's records objectively demonstrating chronic C5 radiculopathy through an EMG test. (RX4) Dr. Walsh stated: "[t]he EMG study shows only a chronic C5 radiculopathy and no evidence of bilateral radiculopathy or a radiculopathy at more than 1 level." Additional surgical intervention for the neck is not reasonable or necessary. (RX4)

Petitioner presented to Dr. Dmitry Novoseletsky on May 29, 2015 on referral from Dr. McNally. Petitioner complained of neck pain as well as bilateral shoulder and arm pain. Dr. Novoseletsky performed one of two cervical medial branch block procedures to help determine whether Petitioner would be a good candidate for radiofrequency neurotomy of the nerves at those levels. Dr. Novoseletsky performed the second cervical medial branch block procedure on June 16, 2015. (PX6)

Petitioner returned to Dr. McNally on June 23, 2015 complaining of neck pain and pain bilaterally in his shoulders and arms. Dr. McNally believed that Petitioner's radiculopathy was in a C6 distribution, noting that there was significant crossover between the symptoms of cervical radiculopathy and shoulder pathology. Dr. McNally re-referred Petitioner to Dr. Chhadia for evaluation of his extremities, to be followed by an FCE. (PX6)

Petitioner returned to Dr. Novoseletsky on June 26, 2015, complaining of neck pain and upper extremity pain bilaterally. Petitioner stated that 25% of his pain was in his neck, and 75% of his pain was manifesting in his arms. Petitioner reported that the cervical medial branch block procedure produced 80% relief of his neck pain on the side of injection within 30 minutes of the injection, and that the relief lasted for 8 hours. The pain then returned to baseline. Another branch block was done on July 7, 2015 and a RF Neurotomy was done on August 4, 2015. (PX6, PX7)

Petitioner had several follow up visits with Dr. Novoseletsky and Dr. Chhadia. MRI studies of Petitioner's shoulders revealed torn RTC findings, along with arthritis. (PX7) Dr. Chhadia was treating Petitioner for knee pain, shoulder pain and carpal tunnel syndrome. Dr. McNally continues to keep Petitioner off work. Dr. McNally has not offered Petitioner the expanded fusion procedure that he noted as a possibility. (PX7)

Both Dr. McNally and Dr. Walsh testified via evidence deposition.

At Dr. Walsh's deposition of October 8, 2015, Dr. Walsh testified that he has not performed a cervical fusion in more than 10 years. (RX5, 37) He stated that he had no way of knowing whether he had received all of Petitioner's medical records. (RX5, 25) Dr. Walsh further testified that, during the examination of February 23, 2015, Petitioner had denied experiencing any neck pain prior to his accident, but that Dr. Walsh had nonetheless written "He failed to indicate whether he has had any previous experiences of neck pain." (RX5, 28) Dr. Walsh testified that other than having diabetes, Petitioner's medical history prior to his accident was negative. (RX5, 29) He opined that, more likely than not, Petitioner's myelomalacia, bilateral wrist pain, left arm pain, left shoulder pain, right chest pain, abdominal pain along the costal margins bilaterally, sensory loss, and numbness in his hands and feet were more likely than not causally related to his fall. (RX5, 31)

Myelomalacia is an edema of the spinal cord. (RX5, 32) Dr. Walsh opined that this was demonstrated at C3-4 on the MRI obtained at Advocate Illinois Masonic Hospital. (RX5, 32) Dr. Walsh opined that no evidence exists to establish injury to Petitioner's cervical spine at C4-C5 or C5-C6 as a result of the fall. (RX5, 18) Dr. Walsh testified that signs and symptoms indicating nerve root impingement at multiple levels would indicate an injury to multiple levels of the spine. (RX5, 34) For a patient who had sustained an injury to C4-5 or C5-6, Dr. Walsh would expect nerve root impingement at those levels to produce right or left-sided weakness, abnormal reflexes, numbness and tingling in the distribution of the nerve corresponding to that level. (RX5, 34) A patient with such an injury would also complain of radiating pain--for an injury to C6, the pain would radiate to the thumb and index digit, C5 would be to the forearm, and C3 would be to the shoulder. (RX5, 35)

Dr. Walsh testified that during the Section 12 examination, Petitioner had limited range of motion in his cervical spine and numbness at the tips of his digits, but opined that there were "no objective abnormalities." (RX5, 11-12) He opined that Petitioner had reached maximum medical improvement as of the date of his Section 12 examination. (RX5, 14)

At his deposition of July 10, 2015, Dr. McNally opined to a reasonable degree of medical and orthopedic certainty that Petitioner's medical condition and injuries were caused by his workplace fall. (PX12, 16) He testified that the basis of this opinion was that "[t]he patient did not have symptoms before. He had a fall from a significant height and onset of symptoms after that fall." (PX12, 16)

Dr. McNally testified that Petitioner's pain did not increase after the truck he was a passenger in went over a curb on November 11, 2014:

> "The history that we have on that day was on the way here, his wife lost control of their truck while driving. They went over the curb. He denies any new pain or injury, and he states that his family is fine. They all denied pain."(PX12, 41)

Dr. McNally testified that although new pain complaints arose weeks later, they occurred shortly after Petitioner started physical therapy and not right after the truck went over a curb. (PX12, 42)

On November 4, 2015, Petitioner returned to Dr. Alfredo Lopez for an updated EMG/NCS test. Dr. Lopez opined that the test showed evidence of chronic bilateral C5-6 cervical radiculopathy with acute features on the right side, as well as mild bilateral carpal tunnel syndrome. (PX10)

Petitioner last saw Dr. McNally and Suburban Orthopaedics about a month-and-a-half to two months prior to the arbitration hearing. As of that time, Dr. McNally had prescribed additional treatment for Petitioner. Petitioner is willing to undergo Dr. McNally's proposed treatment.

On the date of hearing, Petitioner described continuing problems with various areas of his body, including a sensation like being stabbed with pins in his neck whenever he moves his neck. He testified that whenever he touches himself, he experiences pain in both shoulders as though he was being cut with a blade. He has similar pain in both arms, extending all the way down to his wrists. These upper extremity complaints are similar to the allodynia complaints that were noted at Masonic and at the first visit with Dr. McNally.

Petitioner testified that his strength is 20 to 30 percent of what it was prior to his accident. He can currently lift 10 to 15 pounds. For his job duties with Respondent, Petitioner was required to carry and install panels weighing 80 to 100 pounds each. Petitioner now spends his days at home; other than that, he takes his kids to school and picks them up. For the entirety of Petitioner's treatment, from his initial visit to the present day, it has been the recommendation of both Dr. Freedberg and/or Dr. McNally that Petitioner remain off work. (PX12, 16.) There was no evidence of any job offer at the medium duty work capacity that Petitioner was once thought capable of performing or at the full duty that Dr. Walsh has released Petitioner to.

The Parties stipulated that Petitioner was temporarily and totally disabled as a result of this accident from July 26, 2014 through February 28, 2015 and that all TTD benfits for that time had been paid. Petitioner asserts that he has also been temporarily and totally disabled from March 1, 2015 to the present. No TTD benefits have been paid to Petitioner since March 1, 2015.

No Utilization Review evidence was submitted.

Respondent claimed that nature and extent was properly in issue, as Dr. Walsh had found Petitioner to be at MMI from his work-related injuries.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

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

This is a complicated medical case. Petitioner suffered a severe spinal injury when he fell 9 feet, head first, landing in an elevator shaft. Petitioner's testimony that he had quadriplegia immediately after the fall is believed by the Arbitrator and is supported by the sequalae of the injury. He had significant neck and upper extremity findings, including allodynia in the emergency room. The condition continues with some improvement/resolution, but Petitioner is not yet at MMI.

The Arbitrator finds that Petitioner's current condition of ill-being (status post fall with traumatically induced herniated disc at C4-5 and myelomacia leading to myelopathy and stenosis at C3-4, necessitating the surgical procedure by Dr. McNally to attempt to stabilize Petitioner's cervical spine (C3-4 ACDF with allograft, autograft and instrumentation) and continued conservative care regarding the cervical spine and upper extremities) to be causally related to the accidental injuries suffered on July 24, 2014. The Arbitrator bases this finding on the testimony of Petitioner, the medical records and the credible and persuasive opinions of Dr. McNally.

The Arbitrator further finds that Petitioner's current condition of ill-being regarding his knees, bilateral shoulder RTC and OA pathology and carpal tunnel syndrome are not causally related to the injury.

Dr. Walsh's opinion that Petitioner is at MMI for the injuries sustained and that the myelopathy and cervical radiculopathy have resolved post the fusion procedure is not persuasive.

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

Petitioner claimed certain medical expenses at trial, and it was agreed that Respondent would be entitled to a credit for all bills paid. Consistent with the Arbitrator's findings regarding causal connection, above, the following bills are awarded:

- Advocate Illinois Masonic MC: $49,069.00
  (DOS: 7/25/14-8/12/2014)
- Chicago Fire Dept.: $ 1,092.00
  (DOS: 7/25/14)
- Advocate Medical Group: $ 105.00
  (DOS: 7/25/14-8/12/14)
- Suburban Orthopaedics: $ 3,559.00
  (PX6)

• Suburban Orthopaedics: (PX7) No bills for shoulder and UE treatment by Dr. Chhaddia are awarded.	$ 9,240.00
• Dr. Alfredo M. Lopez/Alivio, Etc.: (DOS: 9/9/14 and 11/5/15)	$ 4,680.00
• Ashton Surgery: (DOS: 6/16/15-8/4/15)	$16,899.34
• Oak Brook Anesthesiologists, Ltd.: (DOS: 6/16/15-8/4/15)	$ 2,750.00
TOTAL:	**$ 87,394.34**

K. Prospective Medical

Continued conservative treatment regarding Petitioner's cervical related condition, as ordered by Dr. McNally is appropriate and the same is found to be reasonable and necessary to cure or relieve the effects of the injuries sustained. Respondent is ordered to approve and pay for same and all related charges, in accordance with §§8(a) and 8.2 of the Act.

The Arbitrator makes no ruling regarding the possible extension of the cervical fusion to C4-5 and C5-6 at this time.

Petitioner's shoulder, knee and carpal tunnel conditions are not causally related to the injury and Respondent shall have no liability to provide for treatment regarding these conditions.

L. What temporary benefits are in dispute?

The Parties stipulated that Petitioner was temporarily and totally disabled as a result of this accident from July 26, 2014 through February 28, 2015, and that Petitioner was paid TTD benefits for this period. Petitioner asserts that he has also been temporarily and totally disabled from March 1, 2015 to the present. No TTD benefits have been paid to Petitioner since March 1, 2015.

Respondent's sole basis for arguing that Petitioner is not due TTD after March 1, 2015 stems from its assertion that Petitioner's current condition of ill-being is not causally related to his workplace injury of July 25, 2014 (relying on Dr. Walsh's opinions on causation, MMI and return to work). For the reasons discussed in Section F above, however, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his workplace injury of July 25, 2014. Petitioner has not yet reached MMI for the injuries suffered in the accident. Therefore, Petitioner is owed TTD benefits. See: Interstate Scaffolding, Inc. v. The Illinois Workers' Compensation Commission, 236 Ill.2d 132 (2010)

Beginning March 1, 2015, Petitioner was authorized off work for 39 and 5/7 weeks (from March 1, 2015 to December 3, 2015) by Dr. McNally. Petitioner's Average Weekly Wage during the year prior to the accident was $698.74 and the Parties stipulated to a TTD rate of $465.83. Therefore, Respondent shall pay Petitioner TTD benefits totaling $18,433.36 (39 and 4/7 weeks x $465.83).

O. What is the nature and extent of Petitioner's injuries?

Based upon the Arbitrator's findings above regarding causation and prospective medical treatment, Petitioner is not yet at MMI and it is not appropriate to determine PPD at this time.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Groark,

Petitioner,

vs. NO: 14 WC 19525

17IWCC0697

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 8, 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.

17IWCC0697

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: NOV 3 - 2017
TJT:yl
o 10/24/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GROARK, ROBERT
Employee/Petitioner

Case# **14WC019525**

CITY OF CHICAGO
Employer/Respondent

17IWCC0697

On 4/8/2016, 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 0.38% 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:

5669 ALEKSY & BELCHER
ALEX TILLEY-SAKS
350 N LASALLE ST SUITE 750
CHICAGO, IL 60654

0010 CITY OF CHICAGO
ELIZABETH MANNION
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

17IWCC0697

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Robert Groark
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **14** WC **19525**

Consolidated cases: **D/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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **03/17/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0697

FINDINGS

On **05/14/14**, 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. However, for the reasons set forth in the attached decision, the Arbitrator does not view the accident, as alleged, to be a significant cause of Petitioner's condition of ill-being. The Arbitrator amends the Application on its face to allege repetitive trauma injuries manifesting on May 15, 2014, the date of Petitioner's initial visit to Dr. Labana. The Arbitrator makes these amendments to conform to the proofs and pursuant to case law. Caterillar Tractor Co. v. Industrial Commission, 215 Ill.App.3d 229 (4th Dist. 1991). The Arbitrator finds that Petitioner established a causal connection between the truck mechanic duties he performed for Respondent and his repetitive trauma injuries, i.e., his bilateral carpal tunnel syndrome.

Timely notice ***was*** given to Respondent.

In the year preceding the injury, Petitioner earned **$91,224.98**; the average weekly wage was **$1,754.33**.

On May 15, 2014, the manifestation date, Petitioner was **60** 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 **$46,450.23** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$46,450.23**.

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

ORDER

Respondent shall pay *reasonable and necessary medical expenses* of **$204**, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner *temporary total disability benefits* of **$1,169.55**/week for **39-6/7** weeks, commencing **08/21/2014** through **05/26/2015**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$46,450.23** for temporary total disability benefits that were paid prior to trial.

Petitioner established permanency equivalent to 12.5% loss of use of each hand. The net recovery as to the left hand is 5% loss because Respondent is entitled to a credit of **7.5%** loss of use of that hand based on a prior award (RX 1). Permanency is to be calculated at the maximum applicable rate of $721.66 per week.

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

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

Molly C Mason

Signature of Arbitrator

4/7/16
Date

APR 8 - 2016

Robert Groark v. City of Chicago
14 WC 19525

17IWCC0697

Summary of Disputed Issues

Petitioner, a longtime heavy equipment mechanic for Respondent's fleet maintenance division, alleges a work accident of May 14, 2014 contributing to bilateral carpal tunnel syndrome and the need for bilateral carpal tunnel releases. Petitioner claims unpaid and unreimbursed medical expenses, temporary total disability and permanency. Respondent disputes accident and causal connection as well as liability for the claimed benefits. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified that, as of his claimed accident of May 14, 2014, he had worked as a heavy equipment mechanic for Respondent for 22 years. His job title is "machinist." T. 11. He maintains and repairs large vehicles such as garbage trucks, chippers, towers and salt spreaders. He uses very heavy tools, including air impact guns, wrenches and sledgehammers. He testified his use of these tools "tore up" his hands "pretty well." T. 11-12.

Petitioner acknowledged he was aware he had carpal tunnel syndrome before May 14, 2014. T. 34. Records in RX 4 reflect Petitioner complained of bilateral hand stiffness to Dr. Karen Spurgash on November 14, 2013. The doctor, who is affiliated with Bone and Joint Physicians, described Petitioner as having "mechanic's hands." RX 4. She referred him to Dr. Phyllis Bonaminio, a rheumatologist. Petitioner saw Dr. Bonaminio on December 9, 2013, with the doctor noting complaints of "severe bilateral hand and foot pain with numbness and tingling" and a history of neck surgery and alcohol usage. The doctor prescribed upper and lower extremity EMG/NCV testing and rheumatoid arthritis screening. She did not comment on causation. RX 4. The arthritis screening, performed on December 18, 2013, was negative. Dr. Charuk performed the upper extremity testing on December 19, 2013. He noted Petitioner's occupation but did not comment on etiology. He recommended a carpal tunnel injection and nighttime splints. RX 4. The testing demonstrated mild/moderate right and moderate/severe left carpal tunnel syndrome. RX 4. Dr. Charuk conducted the lower extremity testing on January 23, 2014. He described the results as negative. He injected Depo-Medrol and Lidocaine into both carpal tunnels. RX 4. On January 29, 2014, Dr. Bonaminio reviewed the positive upper extremity EMG results and noted that the injections provided minimal relief. She discussed various treatment options, including medication, injections, bracing and surgery, with Petitioner. She described Petitioner as "adamant about not having surgery at this time." She started Petitioner on Amitriptyline and prescribed cock-up wrist splints. She did not comment on etiology. RX 4. On April 30, 2014, Petitioner returned to Dr. Bonaminio and reported that the Amitriptyline was effective. The doctor increased the dosage to 40 mg and referred Petitioner to Dr. Labana, an orthopedic surgeon, for carpal tunnel injections. She did not comment on etiology. RX 4.

Petitioner testified that, on May 14, 2014, he was using a 2-inch wrench while working on a hydraulic leak in the back of a truck. He had to apply force to the wrench and "gave a good yank." He felt sharp pain in his right hand. The pain extended up his right forearm. He dropped the wrench and grabbed his right hand with his left hand in an effort to calm the hand down. The hand was "definitely worse" after the accident. T. 12-13.

Petitioner testified that, within about an hour of the accident, he reported the accident to his foreman, Tom Dillard. [At the conclusion of the hearing, Respondent took notice out of dispute. Arb Exh 1.] T. 13-14.

Petitioner testified he saw a hand specialist, Dr. Labana, the following day, May 15, 2014. T. 15, 17. Petitioner testified he described his truck mechanic job and vibratory tool usage to Dr. Labana. T. 16.

Dr. Labana's note of May 15, 2014 reflects a referral from Dr. Bonaminio. The doctor noted that Petitioner complained of bilateral hand pain, tingling and numbness of one year's duration. He indicated that the numbness and tingling was in the "classical median nerve sensory distribution." He noted grip weakness. He described Petitioner as right-handed.

Dr. Labana noted the previous bilateral EMG/NCV testing and steroid injection.

On bilateral hand examination, Dr. Labana noted a full and painless range of motion, no instability, a moderately positive Phalen's sign and a moderately positive Tinel's sign at the wrist. He diagnosed carpal tunnel syndrome. He recommended activity modification and braces to be worn at night.

Dr. Labana addressed causation as follows:

> "Pt has bilateral CTS. He is a mechanic and uses vibratory tools at work. He feels this is related to his work and I agree. He should be under workers' compensation. "

Dr. Labana instructed Petitioner to return in two weeks. PX 1.

Petitioner testified that Dr. Labana diagnosed bilateral carpal tunnel syndrome and told him his job caused this condition. Petitioner further testified that Dr. Labana allowed him to continue working. T. 17.

Petitioner also saw Dr. Spurgash on May 15, 2014. T. 15. The doctor's note of that date reflects a past history of various medical conditions, including carpal tunnel syndrome, with the doctor indicating that Petitioner was "now" seeing a specialist, Dr. Labana, for this condition. The doctor prescribed various medications and directed Petitioner to return in four months. PX 2.

Petitioner returned to Dr. Labana on May 30, 2014. The doctor again noted complaints of tingling and numbness. PX 1.

Petitioner saw Dr. Labana again on June 10, 2014. The doctor's note of this date describes Petitioner's chief complaint as follows: "WC f/u (B) hand pain, tingling, numbness. DOI 5/14/14." The doctor also noted a complaint of right elbow pain. The doctor's examination findings were unchanged. He injected Petitioner's right carpal tunnel with Celestone and Lidocaine. He recommended home exercises and directed Petitioner to follow up in four weeks. He released Petitioner to full duty. He indicated he communicated with Dr. Bonaminio and an adjuster, Daniel Celestino, concerning his findings and recommendations. PX 1.

Petitioner returned to Dr. Labana on July 17, 2014. The doctor injected Petitioner's left carpal tunnel and right elbow with Celestone and Lidocaine. He prescribed home exercises and allowed Petitioner to continue full duty. PX 1.

Petitioner next saw Dr. Labana on August 21, 2014. The doctor's examination findings were unchanged. He described Petitioner as having continuing carpal tunnel syndrome, left worse than right. He noted that Petitioner "wants left release." He recommended that a left carpal tunnel release be scheduled. He imposed work restrictions of no lifting over 5 pounds, no repetitive grasping, minimal typing and use of a splint/sling. PX 1. T. 19.

Petitioner testified he made Respondent aware of Dr. Labana's restrictions and was told he could not be accommodated. T. 19. He stayed off work beginning August 21, 2014 and did not resume working for Respondent until May 27, 2015. T. 19.

Dr. Labana performed a left open carpal tunnel release at Ingalls Memorial Hospital on October 10, 2014. PX 3. T. 20. Three days later, the doctor saw Petitioner in his office. He indicated Petitioner was "doing well." He prescribed home exercises and released Petitioner to light duty with no use of the affected extremity and use of a splint. PX 1.

At the next visit, on November 3, 2014, Dr. Labana noted that the surgical incision was healing normally. He recommended home exercises and released Petitioner to work with no lifting over 5 pounds and splint usage as needed. PX 1. Petitioner testified Respondent was not able to accommodate these restrictions. T. 21.

On December 1, 2014, Dr. Labana re-examined Petitioner and indicated that a right carpal tunnel release should be scheduled. He released Petitioner to work with no lifting over 10 pounds with the left hand, no repetitive grasping with either hand and use of splints/braces as needed for both hands. PX 1.

Petitioner also saw Dr. Spurgash on December 1, 2014. T. 21. In her note of that date, the doctor indicated that Petitioner was continuing to see Dr. Labana for carpal tunnel syndrome and was still off work. She also noted that Petitioner had recently seen Dr. Bonamino for bilateral hand pain and had been started on Amitriptyline. PX 2.

Dr. Labana performed a right open carpal tunnel release at Ingalls Memorial Hospital on February 6, 2015. PX 3. Three days later, he saw Petitioner in his office. He described Petitioner as "doing well." He prescribed home exercises and directed Petitioner to return in two weeks. He released Petitioner to work with no driving, no use of the affected extremity and splint usage. PX 1.

On February 24, 2015, Dr. Labana noted that the surgical incision was healing well and that thenar function appeared intact. He recommended home exercises and directed Petitioner to return in three weeks. He released Petitioner to work with no use of the affected extremity and splint usage as needed. PX 1.

At the next visit, on March 24, 2015, Dr. Labana recommended that Petitioner undergo work conditioning before returning to work. He released Petitioner to work with no lifting over 5 pounds with the right arm, no repetitive grasping and splint usage as needed. PX 1.

Petitioner testified he underwent work hardening at ATI between March 31 and May 6, 2015. T. 23. In a discharge report dated May 8, 2015, therapist Kevin Rynne, ATC noted that Petitioner appeared functional but was still reporting "hand pain with prolonged lifting/carrying greater than 20 pounds and repetitive gripping that puts pressure on the incision." He described Petitioner as compliant and putting forth a diligent effort on a daily basis. He described Petitioner's mechanic job as a heavy physical demand level position with occasional lifting of 100 pounds. He indicated Petitioner had achieved this level. PX 4.

Petitioner testified he last saw Dr. Labana on May 26, 2015. In his note of that date, the doctor indicated that Petitioner was "doing well" and that Petitioner "requested full release." He released Petitioner to full duty as of the following day, May 27, 2015. PX 1. T. 23.

Petitioner testified he resumed his regular work duties on May 27, 2015. He further testified he received workers' compensation benefits during the entire time he was off work. T. 24. [The parties agree Respondent paid temporary total disability benefits in the amount of $46,450.23.]

Petitioner testified he still experiences considerable pain when turning a doorknob, pulling a wrench and signing his name. His hand symptoms affect his primary hobby, fishing. He has lost three fishing poles (along with hooked fish) due to grip weakness. He has also dropped hammers and wrenches at work. T. 24-25.

Petitioner identified PX 5 as a $6,908.37 bill from Ingalls Memorial Hospital. He believes this bill is unpaid. T. 25. The bill lists various charges in connection with the right carpal tunnel release of February 6, 2015. It reflects a workers' compensation adjustment of $6,023.23 and a balance of $6,908.37.

Petitioner testified he paid $75.00 out of pocket to both Bone and Joint Physicians and Premier Orthopedics. He was never reimbursed for these payments. T. 26-27.

Petitioner testified he has never received any type of Medicare benefits. T. 27.

Under cross-examination, Petitioner testified that PX 5, the Ingalls bill, is dated March 23, 2015. He is not aware of any payments having been made toward this bill since that date. He has not checked with the hospital. T. 28. He continues to perform his regular mechanic job for Respondent. T. 28. He first began working for Respondent in June 1992. T. 28. If he chose to retire at the present time, he would be eligible for a pension. T. 28-29. Before he started working for Respondent, he was off work for a while. Before that, he worked as a union carpenter for six years, performing various construction-related tasks. While he was a carpenter, he used electrically powered tools, including saws. T. 28-31.

Petitioner testified he believes it is the May 14, 2014 accident that caused his injuries. T. 31-32. The foreman to whom he reported the accident is now retired. He completed a report after the accident. He has a copy of the report at home. T. 31-32.

Petitioner acknowledged he was aware he had carpal tunnel syndrome before the May 14, 2014 accident. His records are correct if they show that bilateral carpal tunnel syndrome was diagnosed in January 2014. T. 35. Dr. Bonaminio did not recommend surgery at that time. He saw Dr. Bonaminio at Dr. Spurgash's referral. He did not report anything to Respondent until May 2014. If Dr. Bonaminio's note of April 30, 2014 shows he wanted to avoid surgery due to work issues, that note is correct. T. 36.

Petitioner acknowledged filing other workers' compensation claims in the past. He previously obtained an award of 7.5% loss of use of the left hand. He received this award in connection with a left hand infection that required surgery. He never saw Dr. Labana before May 15, 2014. On that date, he told Dr. Labana about the work he does and his use of vibratory tools. He probably used the term "vibratory tools" in talking with the doctor. He mentioned the use of such tools to his doctors before the work accident. He told Dr. Labana he had been diagnosed with carpal tunnel syndrome. He also told Dr. Labana about his bilateral foot numbness. He is not diabetic and does not smoke. T. 39.

Petitioner acknowledged he has seen Dr. Spurgash for conditions other than carpal tunnel syndrome. Those conditions include high blood pressure. T. 41.

Petitioner testified he was not able to find receipts for the out of pocket payments he is claiming. T. 43.

Petitioner testified he works from 7 AM to 3:30 PM, Monday through Friday. He takes a break at 9 AM and lunch at 11 AM. T. 43-44. He performs various duties and uses various kinds of tools. The duration of each assignment varies, depending on the work that is involved. T. 44. He does not receive a pre-set list of assigned tasks. He inspects each job before beginning and after he is finished. T. 45.

Petitioner testified he has not seen any provider for his hands since May 2015. He has no upcoming appointments for his hands. T. 45.

Petitioner testified he tries to go fishing every weekend. He still attempts to fish, despite having lost three poles. T. 47.

Petitioner denied having any serious hand re-injury at work or outside of work since he resumed full duty. T. 47. His hands still bother him. T. 48.

On redirect, Petitioner testified it was not until after his claimed May 14, 2014 accident that a doctor imposed restrictions on him. T. 48. He saw Dr. Spurgash on May 15, 2014 because of the accident. T. 49.

Under re-cross, Petitioner acknowledged he could not remember when he made the May 15, 2014 appointment with Dr. Spurgash. T. 50.

No witnesses testified on behalf of Respondent.

Respondent offered into evidence, with no objection from Petitioner, the following exhibits: 1) a Commission main frame print-out showing the previous award for 7.5% loss of use of the left hand (RX 1); 2) a print-out of medical and indemnity payments (RX 2); 3) billing- and payment-related documents concerning the surgery Petitioner underwent at Ingalls Memorial Hospital on February 6, 2015; and 4) records from Bone and Joint Physicians (RX 4).

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure with Respondent weighs in his favor, credibility-wise. Petitioner's testimony concerning his mechanic duties and vibratory tool usage was detailed and credible.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on May 14, 2014 arising out of and in the course of his employment? Did Petitioner establish a causal connection between the accident and his claimed bilateral carpal tunnel syndrome condition of ill-being?

Petitioner testified that the wrench-related event of May 14, 2014 occurred during a normal shift while he was performing his typical mechanic duties. No one contradicted his testimony that he experienced right hand and forearm pain that day after "yanking" a wrench during a repair job.

The May 14, 2014 event clearly qualifies as an "accident," as that term is used in the Act, with the physical structure of Petitioner's right hand giving way due to the stress of work. The event apparently also resulted in increased right hand symptoms but the Arbitrator does not view it as playing a significant role in Petitioner's claimed condition, i.e., carpal tunnel syndrome, which affects both hands. The Arbitrator views that condition as stemming from the repetitive nature of Petitioner's work duties, based on Dr. Labana's causation opinion, which was not rebutted. In reliance on Caterpillar Tractor Company v. Industrial Commission, 215 Ill.App.3d 229 (4th Dist. 1991), the Arbitrator amends the theory of recovery from specific to repetitive trauma. In Caterpillar, the Court held that, because "proceedings in workers' compensation cases are informal and are designed to expedite and to achieve a right result," the Commission is not limited to the specific theory presented and must instead decide a claim on its merits, 215 Ill.App.3d at 239. [Also see David Henson v. State of Illinois, 2008 Ill. Work. Comp. LEXIS 401, in which a unanimous Commission amended the Application on its face to allege specific rather than repetitive trauma.] The Arbitrator also amends the date of accident/manifestation from May 14 to May 15, 2014, the date on which Dr. Labana confirmed the diagnosis of carpal tunnel syndrome and causally related that condition to Petitioner's mechanic duties. The Arbitrator makes these amendments to conform to the proofs. The Arbitrator views May 15, 2014 as an appropriate manifestation date based on the "reasonable person" standard set forth in Durand v. Industrial Commission, 224 Ill.2d 53 (2006). There is no evidence indicating any physician told Petitioner before May 15, 2014 that his bilateral carpal tunnel syndrome stemmed from his work. RX 1.

The Arbitrator also notes that, as of the March 17, 2016 hearing, the statute of limitations had not expired on the repetitive trauma claim.

In making these amendments, the Arbitrator has given consideration to Respondent's due process rights. The Arbitrator notes that Respondent's counsel cross-examined Petitioner extensively concerning the nature of his mechanic duties, the type of tools he used, the treatment he underwent prior to the claimed accident, his other medical conditions and the employment he engaged in prior to being hired by Respondent in 1992. Respondent's counsel in no way limited her inquiry to questions concerning the wrench incident.

Respondent stipulated to receiving timely notice of the alleged May 14, 2015 accident. Arb Exh 1. The Arbitrator notes that, by June 10, 2014 (within 45 days of either May 14th or May 15th), Dr. Labana was noting coverage by Coventry (the workers' compensation carrier identified in Respondent's exhibits) and was communicating with an adjuster. PX 1. Moreover, Petitioner never alleged an injury involving only his right hand. His Application, filed on June 9, 2014, alleged injuries to both hands and arms.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from August 21, 2014 (the day Dr. Labana recommended a left-sided carpal tunnel release and imposed restrictions) through May 26, 2015 (the day Dr. Labana released him to full duty). Respondent disputes this claim based on its accident and causation defenses. The parties agree Respondent paid $46,450.23 in temporary total disability benefits prior to the hearing. Arb Exh 1.

The Arbitrator, having previously amended the Application to conform to the proofs and having found that Petitioner established a compensable repetitive trauma claim manifesting on May 15, 2014, awards Petitioner temporary total disability benefits from August 21, 2014 through May 26, 2015, with Respondent receiving credit for the stipulated payment. The Arbitrator finds that Petitioner's causally related bilateral carpal tunnel syndrome condition of ill-being became unstable when Dr. Labana recommended surgery. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). The Arbitrator also notes there is no evidence contradicting Petitioner's testimony that Respondent was unable to accommodate Dr. Labana's various restrictions.

Is Petitioner entitled to reasonable and necessary medical expenses?

At the hearing, Petitioner claimed a balance of $6,908.37 from Ingalls Memorial Hospital relating to the right carpal tunnel release of February 6, 2015. The total bill for this date of service was $12,931.60. [Interestingly, the left carpal tunnel release bill of October 10, 2014 was fully satisfied by workers' compensation by the end of 2014. PX 5.] Respondent offered into evidence a document showing an allowance of $8,801.53 and a "BR" reduction of $4,076.07 on the February 6, 2015 bill. The Arbitrator awards Petitioner the remaining balance of $54.00 ($12,931.60 minus $12,877.60).

Petitioner also seeks reimbursement of two $75.00 payments he claims to have made to Bone & Joint Physicians and Premier Orthopaedic & Hand Center. Petitioner introduced into evidence detailed ledgers from these providers. The ledger from Premier documents one $35.00 check payment and four cash payments, each in the amount of $10.00. Each of these payments is coded "P," indicating a "private payment."

While Petitioner acknowledged he does not have receipts for the foregoing payments, the Arbitrator views the ledgers as confirming his testimony. The Arbitrator awards Petitioner reimbursement of his out of pocket payments totaling $150.00.

What is the nature and extent of the injury?

This is a post-amendatory case, since the manifestation date, as amended, falls after September 1, 2011. Accordingly, the Arbitrator gives consideration to the factors set forth in Section 8.1b of the Act in determining permanency. With respect to the first enumerated factor, any AMA impairment rating, the Arbitrator notes that neither party offered a rating into evidence. As for the second and third factors, the claimant's occupation and age at the time of injury, the Arbitrator notes Petitioner is a machinist, or truck mechanic, who was 60 years old as of the manifestation date. The Arbitrator views Petitioner as an older individual who is approaching the end of his work life. With respect to the fourth factor, "the employee's future earning capacity," there is no evidence indicating that Petitioner's bilateral carpal tunnel syndrome will affect his future earnings. Petitioner returned to full duty in late May 2015, following the right carpal tunnel release, and did not claim any reduction of wages. As for

the fifth factor, evidence of disability corroborated by the treating medical records, the Arbitrator notes the positive EMG, Dr. Labana's findings and operative reports and the work conditioning discharge note.

Having considered all of the foregoing, as well as Petitioner's credible testimony concerning his persistent post-operative symptoms, the Arbitrator awards permanency equivalent to 12.5% loss of use of each hand, with the award on the left hand reduced by 7.5% due to Respondent's credit for the previous award in 2013. RX 1. The award on the right hand is equivalent to 25.625 weeks. The net award on the left hand is 5%, which is equivalent to 10.25 weeks. The Arbitrator awards permanency at the maximum applicable rate of $721.66 per week.

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

Gordon Woods,

Petitioner,

vs. NO: 14WC005108

Fedex Freight Corp.,

Respondent.

17IWCC0698

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, permanent partial disability, penalties and attorney's 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 October 19, 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 $27,879.00. 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: NOV 3 - 2017
MJB/bm
o-1024/17
052

Michael J. Brennan

Kevin W. Lamborn

17IWCC0698

DISSENT

To be compensable under the Act, a claimant's work-related accident must be a causative factor in his condition of ill-being, but it need not be the sole or primary cause. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d at 193, 205, 797 N.E.2d 665, 673 (2003). "Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Vogel v. Illinois Workers' Compensation Commission*, 354 Ill.App.3d 780, 786, 821 N.E.2d 807, 812, 290 Ill.Dec. 495 (2005). Where a claimant suffers a second injury due to treatment for the first work-related injury, the chain of causation is not broken. *International Harvester v. Industrial Commission*, 46 Ill.2d 238, 245, 263 N.E.2d 49, 53 (1970).

In such cases, it has been held that the Commission should apply a "but-for" test to determine whether a subsequent injury is causally related to the initial workplace injury. This test requires the trier of fact to determine whether the subsequent injury "was caused by an [e]vent which would not have occurred had it not been for the original injury." *International Harvester*, 46 Ill.2d at 245, 263 N.E.2d at 53. This test "extend[s] to cases where the event immediately causing the second injury was not itself caused by the first injury, yet but for the first injury, the second event would not have been injurious." *Id.* At 245, 263 N.E.2d at 53-54. Indeed, the supreme court in *International Harvester* noted that "[c]lear illustrations of this chain of causation" include "cases where a second injury occurs due to treatment for the first." *Id.*

In the present case, while the therapy records may not specifically document the incident regarding the left shoulder, Mr. Woods' credible testimony (that he felt a "pop" in his left shoulder during therapy), as well as the chain of events, support his claim that he suffered a left shoulder injury during post-operative therapy for his accepted right shoulder injury. Since Petitioner would not have been in therapy "but for" the undisputed injury involving his opposite shoulder, he would not have been placed in a position to injure and/or aggravate his left shoulder. Furthermore, even though Petitioner had suffered a previous injury to his left shoulder in 2009 or 2010, the record shows that he returned to full duty work in 2010, performing his regular duties as a city truck driver for Respondent, and continued to work in this capacity up through the date of accident.

Based on the above, I believe Petitioner proved by a preponderance of the credible evidence that his left shoulder condition was causally related to the accident of July 29, 2015, and therefore would find the left shoulder injury compensable. And for that reason I respectfully dissent.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WOODS, GORDON
Employee/Petitioner

Case# **14WC005108**

FEDEX FREIGHT CORP
Employer/Respondent

17IWCC0698

On 10/19/2016, 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:

2234 CHEPOV & SCOTT LLC.
MASHA A CHEPOV
5440 N CUMBERLAND AVESUITE 150
CHICAGO, IL 60656

1401 SCOPELITIS GARVIN LIGHT ET AL
GREGORY AHERN
30 W MONROE ST SUITE 600
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

Gordon Woods
Employee/Petitioner
v.
FedEx Freight Corp.
Employer/Respondent

Case # 14 WC 05108

17IWCC0698

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **3/11/2016 and 8/3/2016**. 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. ☒ 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 _____

17IWCC0698

FINDINGS

On **7/29/2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$51,222.73**; the average weekly wage was **$1,081.21**.

On the date of accident, Petitioner was **56** years of age, *single* with **0** dependent children.

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

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

To date, Respondent has paid all TTD owed regarding Petitioner's right shoulder condition, per the stipulation of the Parties.

Respondent is entitled to a credit of **$12,767.06**, for lost time benefits paid regarding Petitioner's left shoulder condition, under Section 8(j) of the Act

ORDER

Petitioner failed to prove a causal connection between the injuries of July 29, 2013 and his current condition of ill-being regarding his left shoulder. As such, Petitioner's claim for left shoulder related medical expenses, TTD and PPD is denied.

Respondent shall pay **Petitioner permanent partial disability benefits of $648.73 per week for 62.5 weeks, because the injuries sustained caused the 12 1/2% loss of the person as a whole**, as provided in **Section 8(d)2 of the Act.**

Petitioner's claim for Penalties and Attorney's Fees is denied.

Respondent shall pay Petitioner the compensation benefits that have accrued from 7/29/2013 through 8/3/2016, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

October 19, 2016
Date

OCT 19 2016

FINDINGS OF FACT

The primary issue in dispute in this matter is whether Petitioner's left shoulder condition (necessitating surgical repair in February of 2014) is causally related to the accidental injury of July 29, 2013 that Petitioner suffered while working for Respondent. Respondent agreed that Petitioner sustained a work related right shoulder injury on July 29, 2013 and agreed that Petitioner's right shoulder condition of ill-being was causally related to the injury. The ancillary issues of medical expenses, TTD, the nature and extent of any injury to the left shoulder, along with the issue of Penalties need determination only if causation regarding the left shoulder is found.

Petitioner was employed by Respondent as a city truck driver. He worked for a predecessor company and Respondent for 18 years. In addition to driving, Petitioner would load and unload freight on occasion. He would use a pallet jack or a 2wheel cart and lift or grab objects overhead a lot.

Petitioner testified that he had injured his left shoulder at work in 2010. He eventually underwent surgery by Dr. David Hoffman in June of 2010. The medical bills were put through group and Petitioner was paid short term disability for about three months lost time. He had no problems with his left shoulder after he returned to work. He had no subsequent injuries to his left shoulder before July 29, 2013. He had no injuries to his right shoulder before July 29, 2013. He was able to do his job without pain.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of Petitioner's employment by Respondent on July 29, 2013. Petitioner was setting a dock plate and he felt a pop and pain in his right shoulder. The accident was reported and an accident report was completed. Petitioner was sent to Respondent's clinic.

Petitioner had treatment at Alexian Brothers Medical Group on July 29, 2013 and July 30, 2013. The diagnosis was right shoulder strain. Medication and light duty work was prescribed. Petitioner was given an orthopedic referral on July 30, 2013. (Px 1)

Petitioner worked light duty for Respondent, doing paperwork.

Petitioner then began treatment with Dr. Mark Bowen, an orthopedic surgeon, on August 5, 2013. An MRI of the right shoulder was performed and it revealed a moderate sized full-thickness rotator cuff tear. Surgery was offered to Petitioner and was performed on September 17, 2013 at Skokie Hospital. The procedure was: right shoulder arthroscopy with debridement of the superior labrum, subacromial decompression and acromioplasty, excision of distal clavicle spur and rotator cuff repair. (Px 2, 3, 4)

Petitioner wore a sling for six weeks and then began PT. While Petitioner was in PT, he worked light duty jobs for Respondent.

Petitioner testified that when he began PT, his left shoulder was okay. As he participated in PT, both shoulders were hurting. In the second week of January of 2014, Petitioner felt a pop in his left shoulder. He told his therapist, Lori. The therapist told him to stop performing the move that caused the pain and to reduce his HEP exercises. At this time, Petitioner was performing HEP every other day (on the non-PT days). As he did the wall slide at home, he noted that his left arm bothered him. It was sore. About 5 days later, he began experiencing a clicking in his left shoulder. He told the therapist and she advised him to change his HEP. (Px 5)

The PT records for January of 2014 do not document a specific injury to the left shoulder or Petitioner reporting that he felt a pop in his left shoulder doing a wall slide exercise. They do show a benign left shoulder exam at the initial evaluation of November 19, 2013. On January 7, 2014, it was noted that Petitioner engaged in snow shoveling and primarily used his left arm. Petitioner testified that he mostly pushed the snow. On January 16, 2014, it was noted that Petitioner's right shoulder was good – almost better than the left shoulder. The PT Progress Report for 11/19/13 to 1/21/14 demonstrates benign findings for the left shoulder. On January 28, 2014 it is noted that Petitioner experiences left shoulder pain with overhead activities. The therapist posited that perhaps Petitioner's left upper extremity irritation was due to too much HEP, or too much overhead therapy exercises. (Px 5)

Petitioner was seen by Dr. Bowen on February 3, 2014. The history given to a PAC was: "Left shoulder pain since 1 week ago. No trauma or injury. Hears and feels popping. Doing PT for right shoulder. Noticed left shoulder pain with daily activity recently and some ROM exercises in PT." Dr. Bowen noted that the right shoulder was asymptomatic now, but during the course of therapy the patient noticed more symptoms on the left. He had a RTC repair 4 years ago and was asymptomatic until doing more intense strengthening in therapy for the right shoulder. There was no history of a specific event or "pop" in therapy in mid January. Petitioner testified that he gave Dr. Bowen a history of the left shoulder injury in therapy. Some weakness was noted and Dr. Bowen ordered a left shoulder MRI to rule out a recurrent RTC tear. (Px 2)

The MRI was performed on February 4, 2014. It was said to show a RTC tear, without interval change from a March, 2010 study. Post surgical changes were, of course, noted. (Px 3, Rx 2)

Dr. Bowen offered Petitioner surgery on his left shoulder and it was performed on February 14, 2014. The procedure was: Left shoulder arthroscopy with chondroplasty and debridement of glenohumeral joint, subacromial decompression and acromioplasty and rotator cuff repair. The Preoperative History and Physical authored by Dr. Oberoi references that Petitioner experienced increasing pain in his right shoulder during therapy and elected to have surgical repair. Happily, Dr. Oberoi was not the surgeon and Dr. Bowen operated on the correct (left) arm. (Px 4)

Petitioner underwent PT and had continued follow-up visits with Dr. Bowen through August 27, 2014. Dr. Bowen released Petitioner regarding the right shoulder as of March 10, 2014. Decreased range of motion in the left shoulder and fatigue of the muscles with strength testing was noted in August of 2014. Strength testing was good. Dr. Bowen thought that Petitioner could return to work as a truck driver, but doing any lifting. Petitioner talked Dr. Bowen into providing a full duty release, so that he could return to work. (Px 2, 5)

Respondent has provided Petitioner with a no lifting driving position and he has worked consistently since being released as of August 28, 2014. He drives from dock to dock. He does not touch freight. He makes the same wages or better, as compared to before the accident. Dr. Bowen suggested that Petitioner avoid overhead lifting with either arm. Petitioner was told not to lift more than 20 pounds with the left arm. The right arm did not have a weight limit.

Petitioner was paid Long Term Disability benefits for lost time after March 5, 2014, for which Respondent is entitled to a §8(j) credit. Petitioner's medical bills for his left shoulder were paid by group and Petitioner paid some out of pocket.

Petitioner was sent to Dr. Prestin Wolin for a §12 exam at Respondent's request. Petitioner was seen by Dr. Wolin on December 29, 2015. Petitioner testified that he attempted to show Dr. Wolin how he hurt his left shoulder in therapy, but the doctor did not pay much attention to his demonstration. Dr. Wolin reviewed

medical records and authored 2 reports. Dr. Wolin believes that the medical records do not document any injury of the left shoulder in therapy and the left shoulder condition is not causally related to the July, 2013 injury. (Rx 6)

Petitioner experiences pain in his shoulders at work and at home. He limits his lifting as recommended by Dr. Bowen. He takes Advil and aspirin several times a week for his complaints. His outside work activities are limited. He ices his shoulders nightly. His left shoulder hurts more than the right.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

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

Petitioner's current condition of ill-being regarding his right shoulder (status post rotator cuff tear with surgical repair) is causally related to the injury of July 29, 2013, based upon the testimony of Petitioner and the medical records.

Petitioner's current condition of ill-being regarding his left shoulder is not causally related to the injury, or any event that took place in therapy in January of 2014. Petitioner's testimony was of a specific event that occurred in therapy, where he felt a "pop" in his left shoulder. This is not supported by the therapy records. Therapists routinely ask patients "how are you doing" and routinely chart alterations in comfort. If Petitioner had reported a pop in his left shoulder while doing a stretch to the therapist, it would have been charted. Petitioner testified that he gave Dr. Bowen a history of the injury in PT. This is not supported by Dr. Bowen's records. The Arbitrator notes that Petitioner was able to describe the dock plate injury of July 29, 2013 to his medical providers.

Dr. Wolin's opinion on causation is persuasive and comports with the medical records. The chain of events cannot be used in this case where Petitioner's testimony does not comport with the histories documented in the medical records. Petitioner's left shoulder condition is not causally related to the injury.

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

Petitioner's claimed bills are for services related to the left shoulder and are denied based upon the Arbitrator's finding regarding causation, above.

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

The Parties agreed that all TTD regarding Petitioner's right shoulder condition has been paid. Petitioner's claim for TTD regarding the left shoulder condition is denied based upon the Arbitrator's finding above regarding the issue of causation.

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

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

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

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

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

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. Thus, this factor is given no weight in determining PPD.

With regard to subsection (ii) of §8.1b(b), the Arbitrator notes that Petitioner has returned to work as a city truck driver for Respondent. He only drives and does not touch freight. This factor is given some weight in determining PPD.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. This factor is given some weight in determining PPD because Petitioner will have to lives with the effects of the injury for some time and he will have limitations in overhead lifting.

With regard to subsection (iv) of §8.1b(b), the Arbitrator notes that Petitioner may have trouble getting other employment as a result of his right shoulder injury. This factor is given some weight in determining PPD.

With regard to subsection (v) of §8.1b(b), the Arbitrator notes that Petitioner has a good result regarding his right shoulder injury. He has subjective complaints which are consistent with Dr. Bowen's records and the PT records. This factor is given some weight in determining PPD.

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 ½ % loss of use of a person as a whole, pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's claim for Penalties is denied. Respondent's disputes in this case were in good faith, especially when the Arbitrator's finding regarding causation, above, is considered.

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

Rocco Wlodarek,

Petitioner,

17IWCC0699

vs.

NO: 15 WC 27025

University of Illinois at Chicago,
Department of Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of average weekly wage and penalties and fees and being advised of the facts and law, modifies the Decision of the Arbitrator on the issue of average weekly wage as stated below, corrects a clerical error, and otherwise affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of 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).

Both parties offered documentary evidence of Petitioner's earnings for slightly different 52-week periods preceding the accident. Petitioner testified that he was paid an hourly wage, and worked overtime hours most weeks. The Arbitrator calculated Petitioner's base pay at $67,137.60. The Arbitrator then added Petitioner's overtime earnings to the base pay and used that sum to calculate the average weekly wage. On review, Respondent argues that the Arbitrator erred in including overtime earnings in the average weekly wage calculation.

The Petitioner has the burden of proving the average weekly wage. The Act explicitly excludes overtime from average weekly wage calculations and Illinois courts have found only limited exceptions for overtime that is mandatory or part of the regularly scheduled work week. The evidence shows that Petitioner worked a significant amount of overtime. Based on the Petitioner's testimony, the Arbitrator found that all the overtime was mandatory and could be used in the average weekly wage calculation. For the reasons set forth below, we disagree.

Petitioner testified, "It is understood as a condition of being hired at UIC that you would be on-call, snow duty is mandatory. If you're lower on the seniority list, which I started in 2012, I was, they make their way through the progressive list of overtime, and if no one accepts it, you have to take it. It's a condition of working in that capacity serving the State, which worked out fine for me because I don't mind working." (T. 51)

We acknowledge Petitioner's testimony that overtime work was required under certain circumstances, however, Petitioner failed to prove how many overtime hours were mandatory. There is no evidence showing which hours correspond to overtime worked on-call or on snow-duty and we cannot determine which hours were mandatory based on seniority or were instead voluntarily sought or accepted by Petitioner. There is no evidence that overtime was part of the regularly scheduled work week. In conclusion, we do not find that Petitioner proved all the overtime was mandatory and we cannot speculate as to which hours were and were not. Therefore, we find that Petitioner's earnings for the 52-week period preceding the accident were $67,137.60, resulting in an average weekly wage of $1,291.11 and a temporary total disability rate of $860.74.

Finally, we correct clerical errors in the Arbitrator's Decision misstating the date of accident as June 5, 2015. The date of accident is June 2, 2015, and therefore we correct the Arbitrator's Decision on page 3 and pages 11 through 15 where the erroneous accident date appears. Petitioner's entitlement to temporary total disability benefits commenced on June 3, 2015 rather than June 6, 2015, and we also correct the start date for temporary total disability in the Arbitrator's Decision.

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $860.74 per week for a period of 60 and 4/7 weeks, commencing June 3, 2015 through July 30, 2016, that being the period of temporary total incapacity for work under §8(b). Respondent shall have credit for temporary total disability benefits previously paid to Petitioner. As provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical care and treatment including a diagnostic left knee arthroscopy

17IWCC0699

recommended by Preston Wolin, M.D. on May 11, 2016 as well as necessary post-operative care under §8(a) of the Act. Respondent shall pay reasonable and necessary medical bills from June 2, 2015 through May 11, 2016, as set forth in Petitioner's trial exhibits 1 through 5 and 7 through 11, and reasonable and necessary medical bills for Petitioner's prospective medical care and treatment including the recommended diagnostic left knee arthroscopy and necessary post-operative care, adjusted in accord with the medical fee schedule provided by §8.2 of the Act.

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

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

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

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

DATED: NOV 3 - 2017
DLS/plv
o-10/19/17
46

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

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

17IWCC0699

WLODAREK, ROCCO
Employee/Petitioner

Case# **15WC027025**

THE UNIVERSITY OF ILLINOIS AT CHICAGO
DEPT OF TRANSPORTATION
Employer/Respondent

On 4/20/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.94% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0365 BRIAN J McMANUS & ASSOC LTD
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0904 STATE UNIVERSITY RETIREMT SYS
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CHAMPAIGN, IL 61825

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

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

APR 20 2017

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

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ROCCO WLODAREK
Employee/Petitioner

v.

UNIVERSITY OF ILLINOIS AT CHICAGO, DEPARTMENT OF TRANSPORTATION.
Employer/Respondent

Case # **15** WC **27025**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **12/5/2016**. 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 both **6/5/2015** and **4/22/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

On both **6/5/2015** and **4/22/2016**, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On both **6/5/2015** and **4/22/2016**, Petitioner ***did*** sustain accidents that arose out of and in the course of his employment.

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

Petitioner's current condition of ill-being ***is*** causally related to both accidents.

In the one year preceding the injury, Petitioner earned **$73,476.35**; the average weekly wage was **$1,413.01**.

On the date of accident, Petitioner was **36** 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.

ORDER

Respondent shall authorize and pay for prospective medical care and treatment including a diagnostic left knee arthroscopy recommended by Preston Wolin, M.D. on May 11, 2016 as well as necessary post-operative care.

Respondent shall pay reasonable and necessary medical bills from June 5, 2015 through May 11, 2016, as set forth in Petitioner's trial exhibits 1 through 5 and 7 through 11, and, as well, reasonable and necessary medical bills for Petitioner's prospective medical care and treatment including the recommended diagnostic left knee arthroscopy and necessary post-operative care, adjusted in accord with the medical fee schedule provided by §8.2 of the Act.

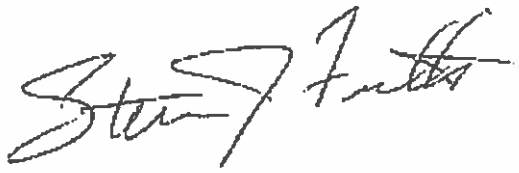
Respondent shall pay Petitioner temporary total disability benefits of $941.92 /week for 2 weeks, commencing 7/17/2016 through 7/30/2016 as well as $ 153.15/week, for 58 & 1/7weeks underpayment commencing 6/6/2015 through 7/16/2016, as provided in §8(b) of the Act.

If 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 18, 2017
Date

APR 20 2017

ROCCO WLODAREK v. UNIVERSITY OF ILLINOIS AT CHICAGO, DEPARTMENT OF TRANSPORTATION
15 WC 27025

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***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 accident?; ***G:*** What were Petitioner's earnings?; ***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 prospective medical care and services?; ***L:*** What temporary benefits are in dispute? TTD; ***M:*** Should penalties be imposed upon Respondent?

FINDINGS OF FACT

Petitioner Rocco Wlodarek worked for Respondent University of Illinois at Chicago (UIC), Department of Transportation on June 2, 2015. Petitioner has worked as a supplemental foreman for UIC since August 30, 2016, and prior to that time as a driver from January 10, 2012 until June 2, 2015. In his role as a supplemental foreman, Petitioner works in modified capacity and is not permitted to move anything. He testified that his supervisor on June 2, 2015 was Rich Riddle. He testified to making approximately $32.00 per hour and working constant weekly overtime. Petitioner testified that a condition of his hire was to be on-call and snow-duty overtime was mandatory.

Petitioner testified that as a driver for Respondent, his day-to-day job duties and responsibilities included check-in with the supervisor to see if anything special needed to be done, perform a pre-trip inspection of his vehicle, coordinate with his assigned work partner and work with him to resolve any issues from the preceding week, and then drive around to pick up various different types of debris from around the UIC campus. The driver's job required frequent pushing, pulling, and squatting with often times 30-45 stops made per day. The trucks that Petitioner drove for UIC had scales built into them and the heavier loads he pushed with his partner could weigh upwards of 1,500-2000 pounds. The driver's job also required lifting 100 pounds at any given time and it was repetitive over the course of the day. The job also required frequent bending.

Petitioner testified that on June 2, 2015, while working with his partner, Dione Campbell, in the lower dock of the 933 Building of UIC's campus, they were pulling a 2 yard container full of debris when the Petitioner's left foot fell 8-10 inches through rotted plywood covering a 'lift' that was taken out of the ground. Petitioner testified to

his left knee twisting violently when he fell. He heard a pop in his left knee and had immediate severe pain. He was unable to stand due to the pain. Petitioner sprained his left knee MCL in high school but had no left knee problems or treatment from 1995 until his work accident on June 2, 2015.

Petitioner's supervisor drove him to the UIC Medical Center emergency department (PX #1). Plain x-rays taken revealed joint spaces intact, no fracture, no dislocation, no chondrocalcinosis, or osteoarthritis. Petitioner was diagnosed with a possible MCL/ACL injury and given a knee brace, crutches, pain medication. He was directed to follow-up with orthopedics.

Petitioner followed up with his primary care physician, Dr. Albert Olorvida, who referred him to an orthopedist. Petitioner then saw orthopedist Dr. Arif Ali. Dr. Ali found grade II hemarthrosis, instability with valgus, and reduced range of motion. Dr. Ali diagnosed a left ACL tear, possible medial meniscus tear, and possible MCL tear. He ordered a left knee MRI, which was completed on July 6, 2015 (PX #3). The July 6 MRI revealed a possible degenerative medial meniscus tear (PX #4). The MRI was otherwise unremarkable. Dr. Ali then diagnosed a lefts knee strain and possible medial meniscus tear. Dr. Ali ordered a course of physical therapy, which Petitioner completed. Petitioner testified that the therapy did not help, and even worsened his pain.

While in physical therapy, Petitioner had a §12 IME with orthopedist Dr. Preston Wolin on August 11, 2015 (PX #7). Dr. Wolin had conducted a records review on July 30, 2015. Petitioner provided Dr. Wolin with his July 6, 2015 left knee MRI. Left knee range of motion was reduced. The left knee was swollen and tender. There was bilateral; crepitus. Dr. Wolin diagnosed a left medial meniscus tear that was related to Petitioner's work accident. Following the examination, Dr. Wolin recommended a steroid injection to alleviate pain. If pain persisted Dr. Wolin recommended arthroscopy.

Petitioner returned to Dr. Wolin September 30, 2015. Dr. Wolin noted that Petitioner had consulted Dr. Kuesis at Core Orthopedics for a second opinion. Dr. Kuesis concurred with Dr. Wolin's suggestion for surgery. Dr. Wolin then accepted Petitioner as his own patient. It was also noted that Petitioner was working limited duty.

Dr. Wolin performed arthroscopic medial meniscus repair on October 19, 2015 at Weiss Memorial Hospital (PX #8).

Petitioner had post-operative physical therapy at ATI Physical Therapy on December 10, 2015, and January 26, 2016 (PX # 9). On December 29, 2015, it was noted that Petitioner had made significant gains. Range of motion was improved with only mild deficits remaining. Petitioner reported in a January 27, 2016 treatment note that he recalled the previous Friday evening walking on some uneven ground, and afterward he had swelling in his knee joint.

Petitioner began post-operative physical therapy at Physical Therapy Institute the day after his arthroscopy. He completed his therapy December 9, 2015. On January 5, 2016 Dr. Wolin recommended Petitioner switch physical therapy providers because his range of motion was not progressing as anticipated and his left leg was still much weaker than the right (PX #7). Petitioner switched to ATI Physical Therapy (ATI), attending therapy 3 times per week through January 27, 2016. Additional physical therapy was prescribed by Dr. Wolin on January 27, 2016, which was denied.

Between January 27 and March 8, 2016, Petitioner did home exercises for his left knee. On March 8, 2016 Dr. Wolin ordered work conditioning for Petitioner, which began March 21, 2016. Petitioner followed up with Dr. Wolin on April 12, 2016. Dr. Wolin noted his concern with Petitioner's quadriceps and calf deficits on the left leg and that Petitioner was "under" rehabilitated.

On April 22, 2016 while in work conditioning at ATI, Petitioner was performing step-over maneuvers, which required stepping up and stepping down from an approximately 8-10 inch raised platform while carrying 40 pound dumbbells in each hand. Petitioner testified that while performing a step-over maneuver he was stepping down and his left leg twisted, gave out to the side causing him to fall to both knees. He heard an audible pop in his left knee. Petitioner testified he had extreme pain and immediate swelling. He reported incident to his therapist.

Petitioner consulted with Dr. Wolin on May 4, 2016, informing him of the April 22, 2016 work conditioning step-over injury. Dr. Wolin suspected a recurrence of the medial meniscus tear as well as a possible lateral meniscus tear. Dr. Wolin ordered a repeat left knee MRI, which was done on May 9, 2016 at Weiss Memorial Hospital (PX # 8). He also took Petitioner off work. When Dr. Wolin reviewed the MRI, Petitioner testified that Dr. that he had fractured his tibia and had a recurrent tear of his medial meniscus. On May 11, 2016, Dr. Wolin confirmed his diagnosis of recurrent medial meniscus tear and subchondral fracture of the tibial plateau. He recommended a repeat left knee arthroscopy (PX #8).

On July 11, 2016 Petitioner was seen by Dr. Kevin Walsh for a §12 IME. Petitioner testified that he was in the room with Dr. Walsh for 6 minutes and 37 seconds and that Dr. Walsh refused to review the May 9, 2016 left knee MRI that he brought to the examination. Dr. Walsh issued his IME report July 17, 2016 (PX #1).

Dr. Walsh reviewed a limited number of Petitioner's medical records from Dr. Wolin, Dr. Brecher's record review, imaging reports, and work hardening records. He did not then review actual radiology images. Dr. Walsh took a history from Petitioner and had Petitioner mark a pain diagram indicating stabbing, burning and aching pain in the left knee. Petitioner complained of 7/10 pain normally but 10/10 at its worst. He reported that standing, walking, sitting for a long time, and bending aggravate his knee pain. Petitioner reported that he originally injured his knee when he stepped on an improperly covered void and then re-injured the knee in work hardening.

On examination Dr. Walsh noted that Petitioner was 5'11" tall and reported he weighed 300 pounds. He observed Petitioner move about the examining room with ease. Dr. Walsh observed 2+ effusion and patellofemoral crepitation in both knees. There was no medial or lateral instability. Lachman and drawer tests were negative. There was diffuse tenderness over the medial and lateral joint lines. Petitioner complained of pain on forced flexion but had good extension. Dr. Walsh found no atrophy in the quadriceps or the calf.

Dr. Walsh diagnosed morbid obesity and symptoms of degeneration in the knee. Dr. Walsh noted partial thickness chondral defects involving the patella on either side. He opined that, more likely than not, Petitioner did not sustain a new tear of his meniscus in the step-over maneuver described by Petitioner from work hardening. Dr. Walsh further opined that the clinical presentation of effusion, patellofemoral crepitation, and pain were related to the degenerative changes in the knee rather than having been aggravated or accelerated by the work conditioning incident. He believed Petitioners knee condition degenerative knee condition was causally related to his obesity.

Dr. Walsh clarified his opinions by noting that the current MRI suggested a vertically oriented tear of the meniscus involving the posterior horn. He noted this was an entirely new location compared to the site of Dr. Wolin's surgery, being a new finding and not causally related to the original work accident June 2, 2015. Dr. Walsh further opined that Petitioner received reasonable medical care to the arthritis and up to Dr. Wolin's arthroscopy and a short course of therapy afterward. Dr. Walsh did not believe that ongoing work conditioning was reasonable or necessary. Dr. Walsh further opined that Petitioner had reached MMI with regard to his meniscal pathology and could return to work without restrictions as a result of that injury. Finally, Dr. Walsh opined that

Petitioner did not require any further medical care for his left knee injury from June 2015.

Dr. Walsh prepared an addendum report on September 5, 2016 (RX #2). He reviewed additional records from Dr. Wolin as well as those of Dr. Gerald Bedore, Dr. Olorvida, and Dr. Ali. He also reviewed additional records from ATI Physical Therapy. Dr. Walsh did not note in his addendum report whether he reviewed original radiological images. Dr. Walsh stated that the opinions he expressed in his July 17, 2016 report had not changed.

Petitioner returned to work in a different position on August 1, 2016 after UIC Health Services examined him and disagreed that he could return to work full-duty because of the condition of his left knee and his inability to perform many driver job functions.

Petitioner testified that his work injury causes pain in his left leg with prolonged sitting, walking, or standing, and with stairs due to instability. Petitioner cannot complete any arduous physical activity. Petitioner characterizes the pain as constant chronic aching pain and that anytime he pushes, gets up from a chair or climbs any stair, the pain radiates up and down. Petitioner wears either a knee sleeve or four-way brace anytime he is going to do a lot of walking or moving around. Petitioner has not had the recommended left knee arthroscopy, but wants to undergo the surgery so the pain will end and so he can go back to the way that he was before the accident.

Respondent submitted its exhibits #6, #7, and #8, reports of utilization review determination. RX #6, dated January 29, 2016, confirmed denial of authorization for therapeutic exercises 3 times a week for 6 weeks after peer-to-peer review. RX #7, dated April 19, 2016, also confirmed denial of authorization for therapeutic me exercises 3 times a week for 6 weeks after peer-to-peer review. The third utilization review, RX #8, also dated April 19, 2016, authorized work conditioning 5 times a week for 3 weeks.

Dr. Preston Wolin testified at evidence deposition November 2, 2016 (PX #13). Dr. Wolin reviewed the history of his care for Petitioner, including the arthroscopic surgery and post-operative therapy. He noted that Petitioner's post-operative rehabilitation was not satisfactory, particularly noting quadriceps atrophy. He ordered work hardening when additional physical therapy was not authorized.

Dr. Wolin confirmed his opinion that Petitioner sustained a re-tear of his left medial meniscus and a tibial plateau fracture during the step-over activity during work hardening. Dr. Wolin further confirmed his opinion that the injuries sustained during work hardening were causally related to Petitioner's original knee injury on June 2,

2015. He reiterated his opinion that Petitioner required a new arthroscopy that was related to the original injury. Petitioner would also require post-operative therapy and an FCE.

Dr. Kevin Walsh testified at evidence deposition November 15, 2016 (RX #3). Dr. Walsh refreshed his memory by reviewing his IME reports, marked as depositions exhibits 2 and 3. Dr. Walsh reiterated the opinions he stated in his two IME reports. In addition, he opined that Petitioner had pre-existing degenerative changes in his knee. He conceded that the original tour meniscus could be related to the work accident, but that the second meniscal tear, at the junction of the posterior horn and the body of the meniscus, was not related to the initial injury. He continued to opine that petitioner was at MMI and that he could return to work without restrictions.

Dr. Walsh further testified that the recommended second arthroscopy was not necessary to treat Petitioner's original injury because the later pathology was not related to that accident. However, due to that later pathology it would be reasonable to have the knee evaluated.

On cross-examination Dr. Walsh testified that medico-legal matters comprised 10% of his professional practice. He estimated that 70% to 80% of the medico-legal practice is for the defense.

On further cross-examination Dr. Walsh conceded that trauma could aggravate a degenerative condition such as chondromalacia. However, he was adamant that Pettioner did not reinjure his left knee during work hardening. He further stated his disagreement with Dr. Wolin's treatment plan after the original arthroscopy. Dr. Walsh believed only 12 post-operative therapy sessions were necessary. He also disagreed with Dr. Wolin's assessments of the later pathology.

Dr. Walsh acknowledged that he did not review actual radiological images.

CONCLUSIONS OF LAW

C: Did an accident occur on April 22, 2016 that arose out of and in the course of Petitioner's employment by Respondent?

F: Is Petitioner's current condition of ill being as of April 22, 2016 causally related to the injury sustained on June 2, 2015?

In this matter these issues are so closely related that it is logical to address them together.

An accidental injury is only compensable when it arises out of and in the course of the Petitioner's employment. An injury arises out of employment if it results from a risk connected with or is incidental to the employment so that there is a causal connection between the employment and the injury. An injury is in the course of employment if time, place, and circumstances of the injury are incidental to the employment.

There is no genuine dispute that Petitioner was originally injured in an accident June 5, 2015 that arose out of and in the course of his employment. He was engaged in work activities on Respondent's premises and at the direction of Respondent, for the benefit of Respondent.

In dispute here is whether an injury sustained during curative medical care or therapy for the first injury arose out of and in the course of Petitioner's employment. A natural consequence that flows from an injury that arose out of and in the course of a claimant's employment is compensable unless caused by a superceding intervening accident that breaks the chain of causation between a work-related injury and the later injury.

On April 22, 2016 Petitioner was engaged in work conditioning at ATI Physical Therapy. Work conditioning had been ordered by Petitioner's treating orthopedist, Dr. Preston Wolin. Dr. Wolin had ordered work conditioning because Petitioner had not progressed in rehabilitation following surgery necessitated by Petitioner original work injury June 5, 2015. Work conditioning was directly related to efforts to cure or relieve the effects of the original compensable injury. A secondary or aggravating injury sustained during connected therapy, as here, is a natural and foreseeable consequence of the original injury. Petitioner testified credibly that during a step-over maneuver in work hardening he twisted and stressed his left knee, which had been previously injured and operated on by Dr. Wolin. The ATI records corroborate Petitioner's account of the injury during work conditioning (PX #9).

There are conflicting causation opinions between Petitioner's treating orthopedist, Dr. Preston Wolin, and Respondent's §12 orthopedist, Dr. Kevin Walsh. Dr. Wolin was clear in his stated opinion that the step-over activity during work hardening on April 22, 2016 caused a re-tear of Petitioner's left medial meniscus. Dr. Walsh was equally clear in his opinion that the step-over exercise could not have caused a new injury to Petitioner's left knee, specifically stating that in his opinion Petitioner did not sustain a re-tear of the meniscus.

The Arbitrator finds the causation opinion of Dr. Wolin more persuasive than the opinion of Dr. Walsh. As a treating physician Dr. Walsh had a more extensive clinical

view of Petitioner's medical condition. His opinions were based on his initial care, the arthroscopy where he actually visualized the injured knee, post-operative status of Petitioner. Dr. Walsh derived his opinion a brief clinical exam, 6 minutes and 37 seconds if Petitioner's account is accurate, a review of limited medical records, and, importantly, no review of MRI imaging. In addition, Dr. Walsh's insistence that the step-over maneuver could not have possibly caused a reinjury of Petitioner's knee was almost dogmatic. His basis for that opinion indicated a lack of a mind open to the possibility that the described maneuver could have added twisting and stress to the point of causing reinjury. The Arbitrator also notes Dr. Walsh's potential bias from the overwhelming majority of his medic-legal consultations coming on behalf of the defense.

Given that Petitioner was clearly working pursuant to his job with Respondent on June 5, 2015 when he was originally injured and in work conditioning on April 22, 2016 for the June 5, 2015 work injury, the Arbitrator finds that the April 22 accident arose out of and in the course of Petitioner's employment.

In light of this finding, the Arbitrator also finds that petitioner proved that his current condition of ill-being is causally related the April 22, 2015 accident that arose out of and in the course of Petitioner's employment by Respondent.

G: What were Petitioner's earnings?

Petitioner testified that he made approximately $32 per hour working constant weekly overtime. In addition, Petitioner testified that a condition of his hire was to be on-call and that snow-duty overtime was mandatory. The Arbitrator finds that Petitioner's mandatory overtime during snow-duty is corroborated by his Historical Earnings Statements (PX #14).

Notably, the Historical Earnings Statements documents that Petitioner made $31.97 per hour from May 24, 2014 through January 2, 2015. The AWW for this first time period with straight time only is $1,278.80 ($31.97 x 40 hours). Then, Petitioner's wage increased to $32.77 per hour for the period of January 3, 2015 until June 5, 2015, yielding an AWW for this period for straight time only of $1,310.80 ($32.77 x 40 hours). Accordingly, for the entire 52 week period before June 5, 2015, Petitioner's base pay totaled $67,137.60.

The Historical Earnings Statements (PX #14) corroborate Petitioner's account of working mandatory overtime. During the first time period of May 24, 2014 through January 2, 2015, Petitioner worked 133.9 hours of overtime. This yields overtime pay at the straight time rate during this time period of $4,280.79 ($31.97 per hour x 133.9

hours). Similarly, Petitioner worked 62.8 hours of overtime over the second time period, January 3 through June 5, 2015. This yields overtime pay at the straight time rate over the second time period of $2,057.96 ($32.77 per hour x 62.8 hours). Accordingly, for the 52 week period before this accident, Petitioner's mandatory overtime amounted to $6,338.75.

The Arbitrator finds that Petitioner's total earnings over the 52 week period before his June 5, 2015 accident were $73,476.35, which yields an average weekly wage of $1,413.01.

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

The Arbitrator finds that all involved in the Petitioner's care including those physicians, therapists, and radiologists referred to in Petitioner's Exhibits 1 through 5 and 7 through 11 provided reasonable and necessary medical care and treatment. For the reasons outlined above regarding causal connection and the testimony of Petitioner and Dr. Preston Wolin, the Arbitrator finds that the Petitioner's care and treatment to date has been medically necessary.

Therefore, the Arbitrator awards Petitioner all of the medical bills incurred from June 2, 2015 through his most recent appointment of May 11, 2016, in accord with §8(a) of the Act and adjusted in accord with the medical fee schedule provided by §8.2 of the Act.

K: Is Petitioner entitled to prospective medical care and services?

For reason stated above the Arbitrator finds the opinions of Dr. Wolin regarding prospective medical care more persuasive than the conflicting opinions of Dr. Walsh.

Here, the Arbitrator gives deference to the surgical recommendation of the treating physician over the conflicting opinion of Respondent's retained expert. The Arbitrator notes that the goal of a treating physician is to make their patient better. Dr. Wolin had a broader view of Petitioner's injury and the ongoing condition of his left knee. Dr. Wolin's reasoning is persuasive.

The Arbitrator does not find Dr. Walsh's opinions persuasive. He tended to largely base his opinions regarding causation and necessity of future medical care on Petitioner's obesity and pre-existing degenerative condition of the knee. While these are important factors in Petitioner's case they are contributing factors only. The Arbitrator

finds that they contributed to the trauma sustained by Petitioner during work hardening.

Therefore, the Arbitrator directs Respondent to authorize and pay for the second arthroscopic surgery recommended by Dr. Preston Wolin and all related and necessary post-operative rehabilitative therapy.

L: What temporary benefits are in dispute? TTD

The Arbitrator finds that the Petitioner was off and unable to work from the date after the accident, June 6, 2015, until he returned to work on August 1, 2016. The Arbitrator notes that temporary total disability benefits were paid in the amount of $1,577.54 every 2 weeks from June 6, 2015 through July 16, 2016, representing 58 & 1/7 weeks. The TTD rate of $788.77 was based on an incorrect AWW rate of $1,183.28

As stated above, the correct AWW is $1,413.01. Therefore, the correct TTD rate is $941.92. The Arbitrator finds that there is an underpayment of $153.15 per week ($941.92-$788.77). For the time period of June 6, 2015 through July 16, 2016, the Arbitrator awards the underpayment of $8,905.68 (58.15 weeks x $153.15).

Furthermore, the Arbitrator finds that Respondent failed to pay any temporary total disability benefits from July 17, 2016 through July 30, 2016 or for a period of two weeks. As such the Arbitrator awards $1,883.84 (2 x $941.92) in temporary total disability benefits.

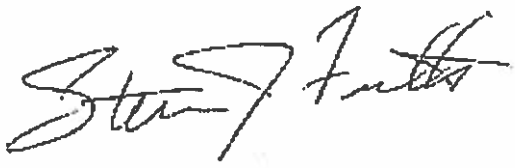
M: Should penalties be imposed upon Respondent?

§19(k) of the Act provides for penalties for unreasonable or vexatious delay of payment or intentional underpayment of compensation or proceedings that have been instituted or carried on by one liable to pay the compensation, which do not present a real controversy but are merely frivolous or for delay. §19(l) provides for penalties when an employer or his or her insurance carrier, without good or just cause, fail, neglect, refuse, or unreasonably delay the payment of benefits under §8(a) or §8(b) of the Act. In order for attorney fees to be awarded pursuant to §16, there must be a finding of compensation pursuant to §19(k) or §19(l).

Generally, an employer's reasonable and good faith challenge to liability does not warrant the imposition of penalties. When the employer acts in reliance on reasonable medical opinions or when there are conflicting medical opinions, penalties ordinarily are not imposed. Despite the Arbitrator's finding that the injury sustained during therapy April 22, 2016 was compensable and causally related to the original work injury

of June 5, 2015, based on the opinions of Drs. Walsh and Brecher Respondent had a reasonable basis to dispute medical treatment based on a lack of causal connection. Respondent additionally reasonably relied on the opinions of Drs. Walsh and Dr. Brecher in denying any further treatment.

The Arbitrator declines to award penalties and fees for the failure to authorize any further treatment. The Arbitrator does not find Respondent's actions to be so unreasonable or vexatious as to violate §19(k) and §19(l). For the foregoing reasons, the Arbitrator denies Petitioner's motions for penalties and attorney fees.



April 18, 2017

Steven J. Fruth, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kathleen McDonald,

Petitioner,

17IWCC0700

vs.

NO: 11 WC 15409

Illinois Department of Revenue,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, temporary total disability 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 the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, a 56-year-old long-time employee for Respondent, alleged that her work duties caused the recurrence of her longstanding conditions of bilateral carpal and cubital tunnel syndromes. Petitioner filed prior cases against Respondent for repetitive trauma injuries involving the same body parts. Case number 01 WC 30466 settled in 2002 and case number 08 WC 34865 was arbitrated on December 9, 2009 and a decision was issued on January 14, 2010. Six months prior to arbitration, Dr. Greatting placed Petitioner on permanent restrictions against typing for more than two hours per day. Respondent accommodated these restrictions, and at the time of arbitration Petitioner was working modified duty. In 08 WC 34865, the Commission held that Petitioner's job duties were causally connected to the repetitive trauma injuries alleged, including bilateral carpal tunnel and cubital tunnel syndromes.

Petitioner alleged that after the arbitration hearing in 08 WC 34865, she began typing beyond the allowance of her permanent restrictions, and her symptoms began to reoccur. On September 2, 2010, Petitioner returned to her orthopedic surgeon, Dr. Greatting. His record on that date states, *"she comes in today and basically states that she needs to be put on disability because of continuing problems with both upper extremities."* Petitioner reported that her permanent restrictions *"have not been completely followed."* On exam, Dr. Greatting noted positive Tinel's sign at both carpal tunnels and both transposed ulnar nerves. He concluded, *"I do not think any further surgery would benefit her. I do think she needs permanent restrictions of no keyboarding/typing more than 2 hours per day"* and *"if work is not available to her with those permanent*

restrictions she will most likely need to go on long-term disability or be off work." (PX1) Petitioner stopped working for Respondent after January 31, 2011. The evidence shows that Petitioner's restrictions could not be accommodated on a permanent basis that would allow her to continue working for Respondent; Petitioner's job required the ability to type for four to six hours per day. (PX5)

On August 17, 2011, Dr. Greatting issued a narrative report of his opinions on causation at the request of Petitioner's attorney. Dr. Greatting opined that Petitioner's recurrent bilateral cubital and carpal tunnel syndrome and irritation or entrapment of radial sensory nerve are work-related. He further opined that Petitioner had reached maximum medical improvement. (PX1) Dr. Greatting later testified, *"[S]he had the surgery on her right carpal tunnel twice and the symptoms had come back. And then she had surgery on her right – both cubital tunnels, as well as her left carpal tunnel, and again developed recurrent symptoms in both of those areas. So I didn't think it was reasonable to continue to do surgery when she would – it appears that she would just likely develop symptoms again."* (PX7, p. 20-21) Dr. Greatting's records show that he periodically submitted disability paperwork stating that Petitioner's permanent restrictions must be accommodated or she cannot work at all. (PX1)

Respondent's §12 examiner, Dr. Williams, opined in his report dated December 28, 2011 that Petitioner's carpal tunnel syndrome and cubital tunnel syndrome were not related to her employment, explaining *"the patient apparently had resolution of these symptoms following the last surgery of which Dr. Greatting performed back in 2008. At that point, she was released back to work with only a 2-hour restriction of keying. I do not feel 2 hours of keying in any way can lead to any recurrence of any carpal or cubital tunnel syndrome."* He further opined, *"I feel more likely than her job duties that her increased body mass index, her diabetes, and her hypothyroidism would have been more likely causes for her recurrence of her symptoms and her continued complaints than would be her job duties. She has not worked now for over 11 months and still has similar symptoms. Obviously, something is leading to these symptoms other than work."* (RX1) Dr. Williams later testified that he understood that after Petitioner's permanent restrictions were imposed she never typed more than two hours per day. He agreed that if in fact Petitioner typed *"for a substantial amount of the day, six hours or more"* that it was possible that her work duties were a causative factor in her recurrent carpal tunnel syndrome and cubital tunnel syndrome. (RX2, p. 12)

In a Decision dated February 19, 2016, the Arbitrator found that Petitioner sustained 20% loss of the person as a whole as a result of her work-related injuries. The Arbitrator found that Petitioner and her supervisor, Mr. Johnson, testified credibly. The Arbitrator relied on the opinions of Dr. Greatting over the opinions of Dr. Williams. The Arbitrator found that Petitioner was not entitled to temporary total disability benefits after she stopped working for Respondent because her condition was no longer "temporary" and she did not present any evidence to support an award of maintenance or vocational rehabilitation.

After considering all the evidence, we affirm the Arbitrator's finding that Petitioner sustained repetitive trauma injuries manifesting on September 2, 2010. There is no disputed evidence regarding Petitioner's job requirements or the physical performance of her duties, which the Commission previously found causally connected to Petitioner's conditions of ill-being. It is undisputed that Petitioner was typing six hours per day by September 2, 2010, despite her permanent restrictions.

We modify the Decision of the Arbitrator on the issue of temporary total disability benefits. It is undisputed that Petitioner stopped working because her restrictions could no longer be accommodated. We find that Petitioner was entitled to temporary total disability benefits from January 31, 2011 through August 17, 2011 when Dr. Greatting opined that Petitioner had reached maximum medical improvement. However, we agree with the Arbitrator's finding that Petitioner did not present any evidence to support an award of maintenance or vocational rehabilitation. Furthermore, we vacate the Arbitrator's award granting Respondent a $24,885.90 credit against permanency for "TTD" voluntarily paid to Petitioner between October 2011 and

September 2012.

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Finally, we modify the Decision of the Arbitrator on the issue of the nature and extent of the injury. We find that Petitioner failed to provide any evidence of permanent disability in this case. Petitioner testified that her pain is "pretty much gone" unless she does something to aggravate it. She complained of upper extremity weakness and difficulty doing her hair. On cross-examination, she testified that her symptoms have improved by 50 or 60% since she stopped working. However, she did not offer any evidence to show that her upper extremity difficulties are worse or different now than they were at the time of her prior arbitration in 08 WC 34865. We further note that Petitioner's permanent work restrictions constituted a partial basis for the Commission's award of §8(d)2 benefits in 08 WC 34865, and her restrictions have not changed. In conclusion, we do not find that Petitioner proved she sustained permanent disability as a result of the work-related injuries manifesting on September 2, 2010.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $548.63 per week for a period of 28 and 2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. The Arbitrator's award of "TTD" credit to Respondent of $24,885.90 is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of benefits under §8(d)2 of the Act is vacated and Petitioner's claim for permanent disability benefits is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $4,500.00 for medical expenses under §8(a) and §8.2 of the Act, and shall be given a credit for payments made by the group medical plan, and shall hold Petitioner harmless from all claims by any provider of the services for which Respondent is receiving credit, as provided in §8(j) of the Act.

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

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

DATED: NOV 3 - 2017
DLS/plv
o-9/7/17
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Deborah L. Simpson

Deborah L. Simpson

Stephen J. Mathis

Stephen J. Mathis

CONCUR IN PART, DISSENT IN PART

I concur with the majority decision with respect to Temporary Total Disability benefits, however, I respectfully dissent from the majority decision and would affirm the Arbitrator's well-reasoned decision with respect to Permanent Partial Disability benefits.

Prior to the accident at issue, Petitioner hade two previous claims for repetitive trauma injuries involving the same body parts. After the injuries incurred in Petitioner's second claim (08 WC 34865), she was given permanent two hour per day typing restrictions which Respondent accommodated. Petitioner testified that sometime after the resolution of her second claim, she began to exceed her restrictions out of workplace

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necessity and her symptoms began to reoccur, manifesting themselves on September 2, 2010. Upon examination, Dr. Greatting, petitioner's treater, concluded that further surgery (Petitioner had undergone two previous Carpal and Cubital Tunnel surgeries) would not benefit Petitioner and emphasized that she could keyboard/type no more than 2 hours per day. Dr. Greatting stated that if those restrictions could not be accommodated then Petitioner would need to be off work. Evidence showed that Respondent could not accommodate Petitioner's restrictions on a permanent basis and Petitioner was not allowed to return to work.

Prior to this accident, Petitioner was able to perform her job within the restrictions given. Because of changes in the nature of the job, Petitioner was forced to exceed her restrictions and redeveloped carpal and cubital tunnel resulting in pain to her upper extremities. Dr. Greatting informed Petitioner that her condition had progressed to the point that further surgical intervention would not be of benefit. Petitioner's testimony clearly demonstrated that her condition had worsened to what it was after returning to work after her second claim. Petitioner's condition has deteriorated to the point that surgical intervention is no longer of benefit and her job has changed to the point that Respondent can no longer accommodate her restrictions. The Arbitrator correctly concluded that Petitioner has suffered a loss of her occupation and awarded benefits accordingly given her worsened condition. Accordingly, I concur with the majority decision with respect to modifying the Arbitrator's decision to award Temporary Total Disability benefits; however, I would affirm the Arbitrator's well-reasoned decision with respect to Permanent Partial Disability benefits.

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0700

McDONALD, KATHLEEN G
Employee/Petitioner

Case# **11WC015409**

ILLINOIS DEPT OF REVENUE
Employer/Respondent

On 2/19/2016, 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:

2427 KANOSKI & ASSOCIATES
KATHY A OLIVERO
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

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

4138 ASSISTANT ATTORNEY GENERAL
WARREN WILKE
500 S SECOND ST
SPRINFIELD, IL 62706

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

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

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

FEB 19 2016

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

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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

Kathleen G. McDonald
Employee/Petitioner

Case # 11 WC 15409

v.

Consolidated cases:

Illinois Dept. of Revenue
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Douglas McCarthy, Arbitrator of the Commission, in the city of Springfield, on January 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 **September 2, 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 $42,792.88; the average weekly wage was $822.94.

On the date of accident, Petitioner was 56 years of age, ***married*** with no dependent children.

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

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

Respondent shall be given a credit of $24,885.90 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $24,885.90.

Respondent is entitled to a credit of $947.92 under Section 8(j) of the Act.

ORDER

- Petitioner is not entitled to any temporary total disability benefits as a result of her accidental injuries, as explained in the Arbitrator's findings which are attached

- Respondent shall pay Petitioner the sum of **$493.76**/week for a further period of 100 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused 20% loss of use of the person as a whole. Respondent is entitled to a credit against this award for the compensation paid to the Petitioner in the amount of $24,885.90.

- Respondent shall pay Petitioner compensation that has accrued from 9/2/10 through 01/20/16, and shall pay the remainder of the award, if any, in weekly payments.

- Respondent shall pay the further sum of **$4,500** for necessary medical services, pursuant to the medical fee schedule, as provided in Section 8(a) and 8.2 of the Act, and shall be given a credit for payments made by the group medical plan, and shall hold Petitioner harmless from any and all claims by any provider of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

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

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D. Dyan McGarity

2/15/2016

Signature of Arbitrator

Date

FEB 19 2016

Findings of Fact and Conclusions of Law

Petitioner began working for the State of Illinois in 1987 and for lottery in 1989, which became a part of Respondent in 2007. While at lottery, Petitioner worked in Data Entry for approximately 1½ years, Project Support for 4-5 years, TelCel for 6 months, and then Return Ticket Control for approximately 15 years. In Data Entry, Petitioner was required to type 10,000 keystrokes per hour. In Project Support, Petitioner was required to fill in for other employees anywhere in the building, drive cars the lottery used to award as prizes, and then drive top employees of the lottery to various places throughout the State of Illinois. In TelCel, Petitioner was required to call agents for lottery ticket orders. In Return Ticket Control (RTC), Petitioner was required to obtain the lottery ticket books in the warehouse, open the envelopes the ticket books came in, count the tickets in the books, write out the information for each ticket, enter the information for each ticket in the computer, repack the instant lottery ticket books, and then stack the lottery books back in the warehouse. Petitioner indicated tickets books held anywhere from 60 to several hundred tickets depending on the dollar amount of the ticket. There were 30 numbers on each ticket and Petitioner estimated she entered data from approximately 100 ticket books per day.

Petitioner began in RTC in 1995 or 1996, and estimated she spent 4-6 hours per day entering data from thousands of tickets and described she used her right hand to enter information on the keypad of the keyboard as her right forearm rested on the desk some of the time and her right elbow rested on the desk the rest of the time, and her right wrist and lower palm rested on the hard plastic of the keypad. Petitioner described she used her left hand to flip or turn the tickets while her left elbow rested on the desk. Petitioner described the keyboard as old and all the keys were located in a line in the same plane and sat on the desk and not on a pull out tray. Petitioner also described the mouse she used as one of the first that ever came out and there was no padding for it. Petitioner entered data from tickets in a straight block of time.

In RTC, Petitioner was also solely responsible for any tickets printed in error or destroyed throughout the State of Illinois, and this also required Petitioner to open the envelopes the tickets came in, obtain certain information from the computer regarding these tickets, write out an explanation for each ticket, enter the information for each ticket in the computer and in another computer called G Tech, and determine the amount of money to be returned to the agent. Petitioner estimated she handled approximately 300 tickets printed in error or destroyed per week. Petitioner described the G Tech computer as being located on another desk, with the position of the keyboard similar to Petitioner's own desk, and indicated she performed her duties at the G Tech computer in an identical fashion to what she performed at her desk. The duties of processing destroyed tickets or tickets issued in error, filing, answering the phone, and obtaining information for other departments was performed after Petitioner had completed data entry for the ticket books. Petitioner indicated she used her right hand more than her left hand and her left arm more than her right arm in performing her duties as an office associate. Petitioner identified Kent Johnson as her supervisor the entire time she was in RTC and the person Petitioner went to if she had any issues or questions about her work duties.

Petitioner made a claim against the State of Illinois for bilateral carpal tunnel syndrome that settled in April of 2002 (RX 4, p. 11-12). Petitioner acknowledged she received an award of 20% loss of use of the right hand and 15% loss of use of the left hand in that settlement (RX 4, p. 11-12). In association with that claim, Petitioner had undergone surgery for right and left carpal tunnel syndrome by Dr. Borowiecki

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in 2001. Petitioner indicated she had numbness and tingling in the fingers involved in carpal tunnel syndrome in 2001 that went away following each surgery, but gradually came back 6 years later. Petitioner was about 98% better with respect to her symptoms following the surgeries in 2001 but noted there was a difference in strength.

Petitioner made a second claim against the State of Illinois for injuries to her upper extremities with an accident date of 2/25/08, which involved right trigger thumb, right carpal tunnel syndrome, right cubital tunnel and radial tunnel syndrome, left cubital tunnel syndrome, and left shoulder impingement syndrome, and had an arbitration hearing on that claim in December of 2009 (RX 4, p. 4). Petitioner noted symptoms of tingling and numbness, and her fingers hurting sometime in 2007, initially in the right hand and then about 6 months later in the left hand, and acknowledged she had surgeries in 2008 for her conditions. Petitioner had informed Mr. Johnson of her complaints and then finally went to the doctor.

The records of Dr. Greatting reported Petitioner had undergone an EMG/NCV test on 3/10/08, which showed posterior interosseous neuropathy in the right dorsal proximal forearm, mild to moderately severe, ulnar neuropathy at right elbow, mild, and ulnar neuropathy at left elbow, relatively mild, and underwent another EMG/NCV test on 9/8/08, which showed posterior interosseous neuropathy in the right dorsal proximal forearm, similar to and largely unchanged in comparison to 3/10/08, ulnar neuropathy at right elbow, also largely unchanged in comparison to 3/10/08, median neuropathy at right wrist, mild to moderately severe, ulnar neuropathy at left elbow, similar in comparison to 3/10/8, and posterior interosseous neuropathy in left dorsal proximal forearm, relatively mild and new since 3/10/08 (PX 6, p. 7-13, 31-36). On 9/17/08, Dr. Greatting performed an anterior submuscular transposition of the right ulnar nerve, release of recurrent right carpal tunnel syndrome, and release of right radial tunnel syndrome (PX 6, p. 62-64). On 10/29/08, Dr. Greatting performed an anterior submuscular transposition of the left ulnar nerve (PX 6, p. 68-69).

The records of Dr. Greatting reported Petitioner was released to full duty work following the surgeries in 2008 on 1/5/09, and Dr. Greatting declared Petitioner to be at maximum medical improvement on 2/5/09 even though Petitioner reported some very mild occasional numbness and tingling in the ring and small fingers of the left arm but overall markedly improved (PX 6, p. 75, 76). Petitioner returned to Dr. Greatting on 3/23/09 who reported Petitioner's left cubital tunnel syndrome symptoms had resolved but Petitioner was complaining of left shoulder pain from wearing the splint and immobilization in a sling following the left cubital tunnel surgery (PX 6, p. 77-78). On 6/17/09, Petitioner again returned to Dr. Greatting for follow-up mainly about her left shoulder but also complained of some discomfort in her right hand, arm, and thumb when Petitioner did a lot of keying type activities (PX 6, p. 94). On physical examination, Dr. Greatting found tenderness over the A1 pulley and a little bit of triggering, and provided Petitioner with information about trigger finger. Dr. Greatting's office note indicates that the Petitioner requested that she be restricted to keyboarding of not more than two hours per shift. He said that was reasonable, and a permanent restriction of no keyboarding more than 2 hours per day was established. (PX 6, p. 94, 96). Petitioner also returned to Dr. Greatting on 11/6/09, who reported Petitioner was being seen for re-evaluation of the right trigger thumb (PX 6, p. 97). On physical examination, there was tenderness and a small catching sensation over the A1 pulley, but sensation was intact and there was no numbness, tingling, or burning sensations noted.

Petitioner stated the restrictions from Dr. Greatting helped a lot.

Petitioner acknowledged at the time of the arbitration hearing in December of 2009, she had received the restrictions of no keyboarding more than 2 hours per day from Dr. Greatting in June of 2009 and had testified those restrictions were being accommodated. Petitioner had given the restrictions she received from Dr. Greatting in June of 2009 to Mr. Johnson and noted that if she kept within the restrictions, things were better. Petitioner acknowledged she received compensation from the second claim and the payment was received sometime in March 2010, although the decision may have been received in January 2010 (PX 4). The Arbitration Decision in 08-WC-34865 was filed on 1/14/10 and awarded Petitioner 7.5% loss of use of the right thumb, 30% loss of use of the right hand minus the prior credit of 20% for a net award of 10%, 40% loss of use of the right arm, and 37.5% loss of use of the left arm, and specifically found the permanent restrictions Dr. Greatting placed on Petitioner had been accommodated.

Sometime the end of January of early February of 2010, the amount of keyboarding Petitioner performed in RTC changed. More work was coming in due to the holiday season, different tickets were being sold, and the unit had less employees. Petitioner ignored the restrictions Dr. Greatting had given her, as she could not let everyone else be doing the work, and performed keyboarding for 4-6 hours per day at the rate of near 10,000 keystrokes per hour. Petitioner acknowledged she was not told by anyone to go beyond the restrictions she had, but did discuss with Mr. Johnson she was going to do more even though she hurt. Petitioner thought this discussion with Mr. Johnson was in early 2010 and also in June of 2010. Petitioner did not discuss this with anyone in Human Resources. As Petitioner performed more than 2 hours of keyboarding per day, she noticed numbness, tingling, and shooting pain in her hands, right greater than left, the fingers became really cold, and her left arm was affected. Petitioner did not seek any medical care until 9/2/10, as Dr. Greatting had told Petitioner there was no more surgery to perform on her.

The records of Dr. Greatting reported Petitioner was seen on 9/2/10, and it was noted Petitioner had been working but the restrictions had not been completely followed. Dr. Greatting noted the Petitioner's prior surgeries.(PX 1, p. 4). On physical examination, Dr. Greatting found well-healed incisions consistent with the previous surgeries, a positive Tinel's over both carpal tunnels, a positive Tinel's over both transposed ulnar nerves, tenderness over the A1 pulley of the right thumb, and some mild triggering with flexion and extension, and noted he did not think any further surgery would benefit Petitioner, but Petitioner needed permanent restrictions of no keyboarding/typing more than 2 hours per day. Dr. Greatting also ordered electrodiagnostic testing and instructed Petitioner to be seen on an as-needed basis (PX 1, p. 4-5, 26).

Petitioner provided the work slip she received from Dr. Greatting to Mr. Johnson who said he would turn it in. Petitioner and Mr. Johnson also completed a new incident report and Petitioner stated at the time this form was completed, she was keyboarding from 4 to 6 hours per day. The Notice of Injury completed by Petitioner was dated 9/2/10, and identified the date of injury as 6/11/10, and the duties Petitioner was performing were keying in return ticket slips into the computer (PX 3, p. 2). The Supervisor's Report of Injury was completed by Mr. Johnson on 9/9/10, and identified the date of injury as 6/11/10, and the accident was described as a combination of all repetitive motion requirements for this job on a daily basis (PX 3, p. 1). The Demands of the Job completed by Mr. Johnson on 9/3/10 noted Petitioner used her hands for gross manipulation 6-8 hours per day and for fine manipulation 6-8 hours per day (PX 3, p. 3).

Dr. Trudeau saw the Petitioner on October 14, 2010 for electrodiagnostic testing. Dr. Trudeau found an increase of the median nerve lesion at the right wrist, the development of median neuropathy at the left

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wrist, and an increase of the ulnar nerve lesions at either elbow as well as development of right superficial radial neuropathy since the study of 9/8/08 (PX 2, p. 6).

The records of Dr. Greatting reported Petitioner was seen on 10/28/10. He noted the studies performed by Dr. Trudeau which showed bilateral median neuropathies at the wrists, increased on the right side, new on the left side, bilateral ulnar neuropathy at the elbow, both increased compared to the last study of 9/8/08, and then right superficial radial neuropathy that was new (PX 1, p. 6-7). Dr. Greatting reported Petitioner had numbness in both hands, some triggering of the right thumb, and her symptoms were worse with her work activities which require a lot of keyboarding/typing, and on weekends and on her days off, Petitioner will get decreasing symptoms in her hands. Petitioner indicated by Sunday her upper extremities were actually feeling pretty good. On physical examination, Dr. Greatting found well-healed incisions consistent with Petitioner's previous surgeries, a positive Tinel's over both carpal tunnel areas, a positive Tinel's over both transposed ulnar nerves, and a positive Tinel's over the radial sensory nerve. Dr. Greatting diagnosed left shoulder impingement syndrome, recurrent bilateral cubital and carpal tunnel syndrome, some irritation of the radial sensory nerve, and some triggering of the right thumb, and injected the left shoulder and reiterated the permanent restrictions he had given Petitioner in the past (PX 1, p. 7). Dr. Greatting's office received a form dated 11/11/10, concerning the workers' compensation claim Petitioner had filed (PX 1, p. 28). The records of Dr. Greatting also reported Petitioner had been seen on 12/23/10, and Dr. Greatting dictated a letter for Petitioner (PX 1, p. 8, 9, 27).

Sometime in January of 2011, management of the lottery was to be assumed by Northstar. On 1/31/11, Petitioner had gone to Human Services to obtain information, as she was scheduled for low back surgery on 2/24/11. At that time, Petitioner was told by Suzanne Bless, Respondent's workman's comp coordinator, that she could not be working because of the restrictions in her file. Petitioner was directed to leave work and told not to return the next day as well. Petitioner was told this was the rule at the State of Illinois but never received a letter to this effect. An email from Mr. Johnson to Ms. Bless confirmed Petitioner's job required keyboarding for 4-6 hours a day and indicated Petitioner's restrictions could not be accommodated (PX 5).

Petitioner used accumulated vacation and sick days she had, and proceeded with the surgery she had scheduled for 2/24/11. Petitioner also underwent foot surgery in April of 2011, and received a non-service disability from May of 2011 through September of 2011, and then started receiving TTD benefits 10/1/11 that went through 9/15/12. Petitioner did not work anywhere else after she last worked for Respondent and noticed her hands and upper extremities gradually started feeling much better but not perfect.

Dr. Greatting completed numerous Physician's Statements indicating Petitioner had developed recurrent problems in both upper extremities and was temporarily totally disabled from any occupation and her regular occupation on 2/10/11, 3/17/11, 4/15/11, 5/13/11, 6/14/11, 7/12/11, 8/2/11, 8/25/11, 9/20/11, 10/19/11, 11/21/11, 2/22/12, 3/28/12, 5/29/12, 6/25/12, 7/30/12, 8/29/12, and 11/1/12 (PX 1, p. 41-103). Petitioner returned to see Dr. Greatting on 11/1/12 and 4/4/13 for her upper extremity complaints (PX 1, p. 35, 112). On physical examination of Petitioner on 4/4/13, Dr. Greatting found mildly positive Tinel's over both ulnar nerve areas and both carpal tunnel areas (PX 1, p. 112).

Petitioner was requested to see Dr. Williams, an orthopedist, by Respondent on 12/28/11. Petitioner told Dr. Williams she had been employed by the State of Illinois since 1987 and explained her duties as an

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office associate to Dr. Williams, but Dr. Williams did not ask Petitioner to demonstrate how she performed those duties. Petitioner acknowledged Dr. Williams reviewed the job description with her but Dr. Williams never asked Petitioner to describe what she physically did to perform any of the duties listed in the job description. Petitioner had told Dr. Williams she had started typing more than 2 hours per day but did not tell Dr. Williams her upper extremities ruined her life. Petitioner told Dr. Williams she was taking Vicodin, which had been prescribed for her low back, but also helps with her upper extremities. Petitioner told Dr. Williams she slept in a recliner because of her low back not her upper extremities, but did not discuss other medical conditions she had with Dr. Williams.

Petitioner acknowledged she is a non-insulin dependent diabetic that is completely controlled by mediation, and those medicines have included Transeum, Bydureon, and Metformin. Petitioner's sugar problems came about in 2003 after an abscess was discovered on her pancreas. Petitioner also acknowledged she has been diagnosed with hypothyroidism that is completely controlled by the lowest dose of medication for it. Petitioner has been diagnosed with sleep apnea and wears a CPAP machine at night which completely controls it. Petitioner further noted in 1994 she had a hysterectomy when she was 40 years old and has been post menopausal since then. Petitioner also noted she has been at her current weight since she was 50. Petitioner acknowledged she had been a light smoker but stopped smoking in 1998.

Petitioner was also requested to see Dr. Robson by Respondent on 2/15/12, who informed Petitioner he was a spinal doctor and had Petitioner squeeze his hands. Petitioner did not have any complaints involving her cervical spine and had not received any treatment directed to her cervical spine. Petitioner had never made a claim involving her cervical spine during her employment with the State of Illinois. The report of Dr. Robson noted on physical examination of the hands, there was reduced grip strength bilaterally, a positive Tinel's sign at the wrist and ulnar groove bilaterally, a positive Phalen's sign bilaterally, extension strength of the right wrist was 5-/5, extension strength of the left wrist was 5-/5, weakness of fingers of the right hand was observed, and weakness of the fingers of the left hand was observed (RX 3). Dr. Robson diagnosed Petitioner with cervical spondylosis, carpal tunnel syndrome, and cubital tunnel syndrome, and opined that with regard to the cervical spine, Petitioner was capable of performing her full duties as an office associate and no further treatment was needed for the cervical spine.

Petitioner eventually retired from the State of Illinois in March 2013 as that was when she could by the rule of 85. Petitioner has not worked anywhere else since her employment with lottery ended and did not do any job searches or look for work elsewhere. Petitioner had not heard of any alternative employment program and was never enrolled in that. Petitioner had discussed the working conditions and obtaining ergonomic equipment at one time with Dr. Greatting, and then had a discussion with Mr. Johnson, but nothing was ever received by Petitioner and Petitioner acknowledged she never made a formal request for anything. Petitioner used her health insurance from Respondent for any medical bills she incurred. PX 8 showed payments on the medical bills by workers compensation and group health insurance in the amount of $947.92, and also showed unpaid bills that totaled the sum of $4,500.00.

At the present time, Petitioner notices she still has weakness in her upper extremities when fixing her hair or obtaining a gallon of milk, but the pain is pretty much gone and Petitioner estimated her symptoms have improved by 50% since she has not worked for Respondent and that her symptoms became intermittent about 6 months after she last worked for Respondent. Petitioner no longer does any

extreme housework or anything that involves a bunch of movement. Petitioner's right hand gives her more difficulties than her left hand and Petitioner's left elbow is sorer than her right elbow. Petitioner's left hand feels better than her right hand but talking on the phone produces pain in her left hand as does leaning on her elbows and brushing her dogs. Petitioner has 3 standard poodles that are pure bred, not show dogs, and she brushes them once a week for about 10 minutes but pays someone to groom them. Petitioner uses a Kindle to read because it is difficult to hold a book open very long with her right hand, does a Sodoku puzzle on occasion, and does a lot for her grandchildren in terms of picking them up and carting them around. Petitioner does not garden, ride a motorcycle, do any woodworking, or use any vibratory tools. Petitioner acknowledged she does not have a lot of symptoms at home unless she does something to aggravate her pain and she breaks up activities into small amounts of time. Petitioner was able to drive to the hearing.

Kent Johnson is employed as an Executive II for lottery and has held that position since March of 1986. Mr. Johnson's duties include overseeing the clerical staff, financial accounting section, and the Retailer Account Services section which used to be known as RTC. Mr. Johnson presently oversees 3 office associates and 2 account technicians, but had been Petitioner's direct supervisor until Petitioner was not working at lottery anymore. As Petitioner's direct supervisor, Mr. Johnson oversaw production and daily activities.

Mr. Johnson seldom had to work with Human Resources to accommodate restrictions with workers' compensation claims, but indicated he was in communication with workman's comp and at the relevant time regarding Petitioner, that person was Suzanne Bless. When Mr. Johnson works with the current workman's comp coordinator, David Clintonworth, he provides information about the job responsibilities and the daily activities the employee performs and has been asked before whether a position can accommodate restrictions.

In June of 2009, Mr. Johnson received some restrictions issued by Petitioner's physician and put them in Petitioner's file. Mr. Johnson discussed the restrictions of no typing or keying more than 2 hours with Petitioner and the requirement of keyboarding up to 6 hours in the position of office associate, and informed Petitioner they would try to abide by them. Mr. Johnson had communicated with HR and the work comp coordinator about these restrictions. After this discussion, the 2 hour restriction was followed by Petitioner in the performance of her duties as an office associate until the workload increased due to sales and decreased staff.

At some point, Mr. Johnson and Petitioner discussed Petitioner was going to have to type more than her 2 hours. Mr. Johnson did not know if he directly told HR and the work comp coordinator Petitioner was working beyond the 2 hour restriction but indicated Petitioner was communicating with them. Mr. Johnson noted Petitioner was exceeding the restrictions by 2-3 times as much on certain days and indicated there were days Petitioner did not meet production without having to rest due to soreness in her hands, but did not know how much time Petitioner rested. Mr. Johnson stated Petitioner's production never went back up from the time the restrictions were issued until Petitioner last worked for Respondent as Petitioner was unable to meet the production requirement for 6 hours.

In September of 2010, Mr. Johnson completed an incident report with Petitioner and sent it to Personnel and then continued to receive documentation of the 2 hour restrictions from Petitioner which he also

sent to Personnel. Mr. Johnson was present when Petitioner last worked for lottery on 1/31/11 but was not involved in the discussion Petitioner had on that date.

Dr. Greatting is a board certified orthopedic surgeon who concentrates on the upper extremities including the conditions of carpal tunnel syndrome, cubital tunnel syndrome, radial tunnel syndrome, and trigger thumb (PX 7, p. 5-6). Dr. Greatting initially saw Petitioner in July of 2008, and reported Petitioner had been employed by the State of Illinois, Dept. of Revenue/Lottery, for many years and did repetitive clerical type activities, including keying, writing out credits, filing, and using the phone but did not have any specifics on the number of hours Petitioner spent typing, the typing position Petitioner held, whether Petitioner used a mouse or trackball, and what Petitioner actually typed (PX 7, p. 6-8, 37). Dr. Greatting noted Petitioner was right hand dominant and had stopped smoking in 1998, and acknowledged smoking can be a comorbidity to cubital and carpal tunnel syndromes but opined a 10 year period of not smoking would eliminate any increased risk (PX 7, p. 44-45). Dr. Greatting explained at the time of a surgery, he is able to observe the diameter and appearance of the nerve but not the tunnel (PX 7, p. 45).

When Dr. Greatting treated Petitioner in 2008, he had access to 2 electrodiagnostic studies performed by Dr. Trudeau in March of 2008 and September of 2008 (PX 7, p. 8). In September of 2008, Dr. Greatting performed surgery for recurrent carpal tunnel syndrome, cubital tunnel syndrome, and radial tunnel syndrome on the right side (PX 7, p. 9). On 10/29/08, Dr. Greatting performed an anterior submuscular transposition of the left ulnar nerve (PX 7, p. 10).

Dr. Greatting explained that carpal tunnel syndrome is compression of the median nerve at the wrist, cubital tunnel syndrome is compression of the ulnar nerve at the elbow, and radial tunnel syndrome is compression of the posterior interosseous nerve in the proximal forearm (PX 7, p. 10). Dr. Greatting noted the causes of these conditions of ill-being include trauma or a mass in the area of the nerve, certain inflammatory conditions, repetitive use if it is sufficient, and exposure to vibration (PX 7, p. 10-11). Dr. Greatting explained the radial sensory nerve runs down the side of the forearm and provides feeling over the back of the thumb, index, and middle fingers, and noted the causes of this condition of ill-being include trauma to the nerve and sometimes repetitive use (PX 7, p. 19).

Dr. Greatting saw Petitioner on 2/5/09 and gave her a full duty return to work release and declared Petitioner to be at maximum medical improvement following the surgeries he performed in 2008 (PX 7, p. 10). Dr. Greatting reported Petitioner had occasional very mild numbness and tingling in the ring and small fingers of the left arm, but no findings on physical examination (PX 7, p. 12). Petitioner returned to Dr. Greatting on 3/23/09, and reported her symptoms were improved, and Dr. Greatting thought the improvement was related to Petitioner's left cubital tunnel syndrome but noted the assessment indicated all Petitioner's conditions of ill-being had resolved at that point as there were no findings on examination (PX 7, p. 41-42, 55-57).

Petitioner returned to see Dr. Greatting on 6/17/09 for a chief complaint involving the left shoulder but also expressed she was experiencing some discomfort in the right hand and arm when she does a lot of keyboarding activities. She requested a restriction of no more than 2 hours of keyboarding per day which Dr. Greatting provided as a permanent restriction (PX 7, p. 12-13, 56). Dr. Greattting did not document how long Petitioner was having this discomfort but thought if Petitioner were to have restrictions that limit those activities, it may make things more tolerable for Petitioner but not necessarily eliminate the

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symptoms (PX 7, p. 40, 43). Dr. Greatting thought there was an aggravation sometime within that 3 month period from March to June of 2009, and the aggravation caused Petitioner's symptoms as they persisted to the present but then noted Petitioner's left hand symptoms had come later than the 3 month period (PX 7, p. 43, 57). On physical examination of Petitioner, there were no findings, but Dr. Greatting thought he may not have done a physical examination of Petitioner (PX 7, p. 13, 56-57).

Dr. Greatting next saw Petitioner on 9/2/10, and reported Petitioner was complaining of problems with both arms, Petitioner indicated the permanent restrictions were not being followed as Petitioner was working above and beyond those restrictions, and Petitioner requested she be put on disability (PX 7, p. 14). Dr. Greatting did not document in that note how long Petitioner had been symptomatic or how long Petitioner had worked above and beyond the restrictions he had previously given her (PX 7, p. 39). Petitioner made reference to symptoms of carpal tunnel on the left side and on physical examination, Dr. Greatting found well-healed incisions consistent with Petitioner's previous surgeries, a positive Tinel's sign over both carpal tunnels, a positive Tinel's sign over both transposed ulnar nerves, good strength without muscle atrophy, good range of motion of the left shoulder with some mild evidence of irritation of the rotator cuff, and some triggering of the right thumb (PX 7, p. 57-58, 15). Dr. Greatting opined the symptoms and findings were consistent with recurrent problems in those areas and there were no findings of radial tunnel syndrome (PX 7, p. 16). Dr. Greatting provided Petitioner with permanent restrictions of no keyboarding or typing more than 2 hours per day, and noted if such work was not available, Petitioner would most likely need to be on long-term disability or off work.

Dr. Greatting was aware Petitioner had another electrodiagnostic study done on 10/14/10, and relied upon it in the care and treatment of Petitioner (PX 7, p. 17). That study showed Petitioner had bilateral median neuropathies at the wrist, bilateral ulnar neuropathies at the elbow, and a right superficial radial neuropathy (PX 7, p. 17-18). Dr. Greatting explained the left median neuropathy was new in that it was not on the last nerve test but was recurrent because Petitioner had had previous surgery for left carpal tunnel syndrome (PX 7, p. 49-50). Dr. Greatting noted the electrodiagnostic study showed increased bilateral neuropathies at both elbows even though Petitioner had an ulnar nerve transposition between this study and the study performed on 9/8/08 (PX 7, p. 50-51). Dr. Greatting thought Petitioner's symptoms had improved but the numbers were worse in 2010 than in 2008 and expressed Petitioner's surgeries had gone as expected in that Petitioner had improved after the surgeries and then the conditions came back (PX 7, p. 51-52). Dr. Greatting described possible outcomes from surgery to include getting better or worse if the nerve was injured during surgery, and described residual symptoms to be no improvement after surgery (PX 7, p. 53-54). Dr. Greatting noted that 95% of people or the great majority of people with intermittent symptoms do very well with surgery and less than 5% of people have recurrent symptoms (PX 7, p. 54-55).

Dr. Greatting discussed the electrodiagnostic study with Petitioner on 10/28/10, and reported Petitioner was having symptoms in both arms, Petitioner felt her symptoms were worse with her work activities which required a lot of keyboarding/typing, and Petitioner indicated on weekends or on her days off the symptoms would be less. Dr. Greatting thought the information that Petitioner's symptoms increased with work activities and lessened on weekends was significant as it would indicate Petitioner's work activities were aggravating her symptoms or making her symptoms worse (PX 7, p. 18-19). On physical examination, Dr. Greatting found Petitioner had positive Tinel's over both carpal tunnels, positive Tinel's over both transposed ulnar nerves, and a positive Tinel's over the radial sensory nerve on the right. Dr. Greatting diagnosed Petitioner with recurrent bilateral cubital and carpal tunnel syndrome, some

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irritation or entrapment of the right radial sensory nerve, some left shoulder impingement syndrome, and some evidence of a right trigger thumb (PX 7, p. 20). Dr. Greatting explained the term recurrent meant Petitioner had undergone surgery, improved following the surgery, and then got worse again and noted the conditions of ill-being he diagnosed in Petitioner were not continuous since the surgery he had performed on Petitioner (PX 7, p. 20). Dr. Greatting administered an injection to Petitioner's left shoulder and noted his opinion it was not reasonable for Petitioner to have another surgery for her arms and hands (PX 7, p. 21).

Dr. Greatting saw Petitioner again on 12/23/10, who returned to discuss the situation and Dr. Greatting again provided Petitioner with permanent restrictions and felt if those restrictions were not available to Petitioner, then Petitioner was unable to work and would have to pursue permanent disability (PX 7, p. 22). Subsequent to 12/23/10, Dr. Greatting completed numerous CMS Physician's Statements on behalf of Petitioner with respect to her bilateral upper extremity conditions of ill-being and opined Petitioner had a restriction of no keyboarding more than 2 hours per day and Petitioner was temporarily totally disabled from both her regular occupation and any occupation (PX 7, p. 22-23). Dr. Greatting opined he did not feel the need to have a current examination of Petitioner when he completed those forms as he did not expect there to be any change or improvement in Petitioner's conditions of ill-being (PX 7, p. 24). Dr. Greatting saw Petitioner again on 11/1/12, and reported if Petitioner did any keyboarding or typing at home for several minutes, Petitioner started to experience numbness and tingling and noted Petitioner had not worked since 1/30/11 (PX 7, p. 24-25). On physical examination, Dr. Greatting found Petitioner still had positive Tinel's over both transposed ulnar nerves and over both carpal tunnels, and positive Phalen's over both carpal tunnels (PX 7, p. 25). Dr. Greatting noted the positive Phalen's was a new finding since September of 2010, but did not think it was significant as it indicated an irritation of the median nerve at the wrist (PX 7, p. 25-26). Dr. Greatting again reiterated the permanent restrictions for Petitioner and opined Petitioner's problems were caused or aggravated by her work duties, including keyboarding, typing, filing, and writing (PX 7, p. 26).

Dr. Greatting also saw Petitioner on 4/4/13, with bilateral upper extremity complaints and some right shoulder pain, and noted again if Petitioner tried to do any keyboarding or typing more than several minutes Petitioner had pain and numbness and tingling in her arms (PX 7, p. 27). Dr. Greatting explained finger motion when keyboarding or typing can cause irritation of the median nerve at the wrist because the flexor tendons move back and forth next to the nerve, positioning of the wrist either flexed or extended over sustained periods of time can cause problems with the median nerve at the carpal tunnel, and positioning of the elbows or resting the elbows on armrests or hard surfaces for sustained periods of time can cause problems with the ulnar nerve in the elbow area (PX 7, p. 27-28). On physical examination, Dr. Greatting found a mildly positive Tinel's sign over both ulnar nerves and both carpal tunnel areas, but did not think this nor the absence of a Phalen's sign showed any improvement in Petitioner's conditions of ill-being (PX 7, p. 28-29).

Dr. Greatting diagnosed Petitioner with recurrent bilateral cubital and carpal tunnel syndrome, right trigger thumb, and shoulder impingement syndrome during the period of 9/2/10 through 4/4/13, and opined based upon a reasonable degree of medical and surgical certainty, the work duties Petitioner performed as an office associate for Respondent after 12/9/09 and before 9/2/10, were a contributing factor in the conditions of recurrent bilateral cubital tunnel syndrome, recurrent carpal tunnel syndrome, and right trigger thumb he diagnosed in Petitioner (PX 7, p. 29-31). Dr. Greatting explained the basis for his opinion was Petitioner's history of symptoms being worse while doing the keyboarding or typing

activities at work and Petitioner felt better when she was away from those activities, and noted he has treated a lot of other individuals who perform a lot of clerical activities who have developed similar conditions of ill-being (PX 7. p. 31). Dr. Greatting further noted from the nature in which those activities are performed, there is a compression of the median nerve and/or irritation of the ulnar nerve (PX 7, p. 32). Dr. Greatting further opined, based upon a reasonable degree of medical and surgical certainty, keyboarding or typing in excess of the 2 hour limit he had given Petitioner in June of 2009 was a contributing factor in the conditions of ill-being he diagnosed in Petitioner after 9/2/10, and explained the basis for his opinion was Petitioner's history as well as his understanding of how the work activities were performed by Petitioner (PX 7, p. 32-33).

Dr. Greatting also opined the services he provided Petitioner from 9/2/10 through 4/2/13 were reasonable, necessary, and medically appropriate (PX 7, p. 33). Dr. Greatting further opined that although he had not recently examined Petitioner, he was of the opinion the restriction of no keyboarding or typing more than 2 hours per day was still necessary. Dr. Greatting acknowledged he had not seen Petitioner's work station, did not know whether Petitioner used an ergonomic keyboard, had a pull-out tray for her keyboard, or used any gel pads (PX 7, p. 34).

During the period of time Dr. Greatting treated Petitioner, he found Petitioner to be straightforward, Petitioner's symptoms were consistent with findings on physical examination, and while he was aware Petitioner had been diagnosed with diabetes, he did know Petitioner had been diagnosed with hypothyroidism. Dr. Greatting noted Petitioner did not list hypothyroidism as a diagnosis when he first saw her (PX 7, p. 46). Dr. Greatting acknowledged women who are postmenopausal are at a higher risk of developing carpal and cubital tunnel syndrome and there are some people who get carpal tunnel and cubital tunnel syndrome who have no identifiable cause, and that is called idiopathic (PX 7, p. 46-47). Despite all of this, Dr. Greatting did not have any change in his causation opinions and again opined Petitioner's work duties were a significant aggravating factor (PX 7, p. 35, 47). Dr. Greatting noted with the conditions of ill-being he diagnosed in Petitioner, Petitioner may have reduced grip strength bilaterally, but not decreased extension strength of the right wrist or decreased deep tendon reflexes throughout the upper extremities.

Dr. Greatting opined proper ergonomics can reduce the risk of developing carpal tunnel and cubital tunnel but not necessarily eliminate it, and further opined improper ergonomics can increase the risk of developing these conditions (PX 7, p. 38). Dr. Greatting acknowledged certain people are more predisposed to developing these conditions when they type extended periods of the day regardless of ergonomics (PX 7, p. 38). Dr. Greatting expressed that had Petitioner only been typing for 2 hours per day when he first issued the restriction that would not affect his opinion on causation because in some people that amount could be a significant aggravating factor (PX 7, p. 47-48). Dr. Greatting further opined that Petitioner's work activities certainly made Petitioner more symptomatic but they also aggravated it to the point Petitioner required treatment and Dr. Greatting did not think this was similar to a person with lung cancer coughing when they ran up stairs (PX 7, p. 48-49). Dr. Greatting further expressed that none of the opinions he gave on direct examination concerning causation, aggravation, or a contributing factor of the work duties had changed in any way (PX 7, p. 58).

Dr. Williams is a board certified orthopedic surgeon with Midwest Orthopedic Center in Peoria, IL, who examined Petitioner on 12/28/11 at the request of Respondent (RX 2, p. 4-5). Dr. Williams estimated he spent 45-60 minutes reviewing the records and examining Petitioner, and stated he reviewed the records

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prior to his examination of Petitioner and then after seeing Petitioner (RX 2, p. 31). Dr. Williams has had individuals demonstrate how they perform their work activities, but could not state whether Petitioner demonstrated her typing method to him as he did not have an independent recollection, and admitted he did not know how Petitioner performed ripping envelopes and stacking of tickets nor how Petitioner wrote out credits onto a sheet (RX 2, p. 32-33, 17). Dr. Williams also acknowledged he had not been provided with any photos of Petitioner's work station (RX 2, p. 33).

Dr. Williams diagnosed Petitioner with recurrent carpal and cubital tunnel syndrome (RX 2, p. 6). On physical examination, Dr. Williams found Petitioner was alert and oriented, had a BMI of 43.3, had full cervical range of motion with no radiculopathy, no atrophy within either upper extremity, no complex regional pain syndrome, well-healed surgical scars from previous ulnar nerve surgery, radial tunnel surgery, and carpal tunnel surgery, no evidence of ulnar nerve subluxation at the cubital tunnel on either side, but a positive elbow flexion test as well as a positive Tinel's at the cubital tunnel, bilaterally, positive Tinel's, Phalen's, and median nerve compression tests at the carpal tunnels bilaterally, and a positive Tinel's at the superficial branch of the radial nerve, like what might be found with a Wartenberg-type syndrome (RX 2, p. 7-8). Dr. Williams explained Wartenberg syndrome is an entrapment or irritation of the superficial branch of the radial nerve as it crosses between the extensor carpi radialis longus and the extensor carpi radialis brevis, proximal to the tip of the radial styloid on the radial aspect of the wrist, and expressed the most common cause of this syndrome is trauma from hitting the area, and noted it was treated by removing some of the facia around the area and completely decompressing the nerve (RX 2, p. 22). Dr. Williams demonstrated this area to be on the thumb side with the palm facing down, and opined Petitioner's other medical co-morbidities would be a causative factor in the development of that syndrome (RX 2, p. 23).
Dr. Williams thought it significant Petitioner had evidence of non-insulin dependent diabetes mellitus and hypothyroidism, was post menopausal and in the severe obese category, which Dr. Williams expressed were all co-morbidities of Petitioner's diagnoses with diabetes the most significant risk factor (RX 2, p. 8-9, 21). Dr. Williams explained non-insulin dependent diabetes mellitus meant Petitioner was not to the point where she required insulin but did require oral medications for the control of her blood sugar, and described the severity of the diabetes to be mild to medium but acknowledged he did not know how well Petitioner's diabetes was controlled by medications (RX 2, p. 9, 33-34). Dr. Williams also noted Petitioner was on medication for hypothyroidism, and explained when there is a lack of the normal thyroid hormone the nerves are at increased predisposition for irritation or alteration but acknowledged he was not provided with any records concerning the extent of Petitioner's hypothyroidism (RX 2, p. 10, 34). Dr. Williams did not know when Petitioner became postmenopausal (RX 2, p. 34). Dr. Williams noted with a higher body mass index, there is a hydrophilic substance that attracts water which leads to edema and this leads to increased pressure within a given canal or area and acknowledged he did not know how long Petitioner had been considered obese (RX 2, p. 21, 34). Dr. Williams was unaware whether Petitioner had any other neuropathies beyond the upper extremities but then expressed Petitioner had idiopathic progressive polyneuropathy but did not know what body parts were involved in that diagnosis and opined the cause of that is unknown (RX 2, p. 25, 46).

Dr. Williams reported Petitioner had worked for the State of Illinois since 4/14/89, initially for 18 months with DECA, and then with lottery where Petitioner did data entry, inputting data operations, and did 10,000 key strokes an hour for approximately 11 ½ years, which Dr. Williams expressed was substantial (RX 2, p. 11). Dr. Williams then opined 10,000 key strokes an hour for 6 hours or more per day could possibly be a causative factor in the development of carpal or cubital tunnel because that

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would meet the criteria of a high degree of frequency and repetition (RX 2, p. 12-13). Dr. Williams also opined non-ergonomic work places and stations while typing can be a causative factor (RX 2, p. 13). Dr. Williams also opined if an individual was entering 10,000 key strokes an hour where ergonomics were correct such that the individual was not resting the wrist or forearms or elbows on the edge of a table or did not have the wrists significantly hyperflexed or hyperextended while doing the activity, then it was less likely that would be a causative factor but possible (RX 2, p. 13). Dr. Williams further opined a person leaning their elbows on the desk or other areas can be contributing factor in the development of cubital tunnel syndrome (RX 2, p. 42).

Dr. Williams explained a bad ergonomic posture for carpal tunnel syndrome while typing was one where the person is required to rest the wrists, elbows, or forearms on the edge of a table, on the edge of the keyboard or the like, or is required to have the wrists significantly flexed or extended during that time (RX 2, p. 16). Dr. Williams explained a poor ergonomic posture for the development of a radial neuropathy is not as well described and again noted a bad ergonomic posture for cubital tunnel syndrome is resting of the elbows or forearms on a hard surface for a period of time (RX 2, p. 16). Dr. Williams reported that in addition to data entry, Petitioner did entry of all instant ticket numbers in the computer for winnings, ripped envelopes, stacked tickets, keyed in and flipped lottery tickets with the left arm and keyed with the right, filed, and wrote out over 500 credits per week onto a sheet (RX 2, p. 17-18).

Dr. Williams indicated Petitioner informed him she had surgery in 2008 by Dr. Greatting which consisted of surgery on the left and right arms where she had revision carpal tunnel surgeries as well as cubital tunnel surgeries, and Petitioner had been released back to work in 2009 with a 2 hour permanent restriction of keyboarding for 2 hours for the whole day (RX 2, p. 14). Dr. Williams indicated Petitioner told him from July 2009 until 1/3/11, she was only performing keyboarding for 2 hours per day (RX 2, p. 14, 27). Dr. Williams expressed typing 2 hours per day was pertinent and in his opinion, did not see how any recurrence of these conditions of ill-being could be related to someone typing 2 hours per day (RX 2, p. 15).

Dr. Williams also opined Petitioner's current symptoms were not causally related to Petitioner's symptoms after the 2008 surgery as Petitioner's work related activities were restricted to typing 2 hours per day, which Dr. Williams said was based on information Petitioner gave him as well as Petitioner's medical records (RX 2, p. 18-19). Dr. Williams opined Petitioner had to be typing for 6 hours per day to have recurrent symptoms and expressed it was the period of time resting the arms in poor positions that was more important than the volume of key strokes and then opined Petitioner had to type this amount for approximately 5 years for this to be an aggravating factor for carpal tunnel syndrome but then stated it was the scar tissue that would be the problem and not the work duties (RX 2, p. 19, 26-27, 40). Dr. Williams further opined Petitioner was at maximum medical improvement when he saw Petitioner with regard to the incident of 6/10/10, and also opined Petitioner's conditions of ill-being could be related to Petitioner's other co-morbidities including increased body mass index, diabetes, and hypothyroidism, and noted Petitioner's symptoms had not improved when he saw her, despite that Petitioner was not working (RX 2, p. 20). Dr. Williams noted he had put in his report something was leading to Petitioner's symptoms other than work, otherwise Petitioner's symptoms should have improved (RX 2, p. 20-21).

Dr. Williams acknowledged Petitioner had informed Dr. Greatting in September of 2010, the restriction of no typing more than 2 hours had not been completely followed and stated Petitioner did not tell him

anything about that but could not say he specifically questioned Petitioner about that either (RX 2, p. 28-29). Dr. Williams acknowledged Dr. Greatting had reported Petitioner had decreasing symptoms in her hands on weekends and days off, but did not find that inconsistent with what he reported in that Petitioner had no improvement (RX 2, p. 29-30). Dr. Williams acknowledged the majority of people he sees get better when they do not have to perform the work activities (RX 2, p. 30-31).

Dr. Williams stated Petitioner gave him the date of surgery of 10/1/08 when Dr. Greatting performed a radial tunnel release and Petitioner told him she also had a revision of the carpal tunnel releases bilaterally (RX 2, p. 33-34). Dr. Williams acknowledged the job description he reviewed with Petitioner was an Office Associate and the specific duties of Petitioner were listed but not the activities the worker physically does to perform these activities (RX 2, p. 35-37). Dr. Williams also acknowledged Exhibit 4 indicates the worker performs lifting and gross and fine manipulation with the upper extremities (RX 2, p. 37). Dr. Williams reviewed the supervisor's report of 9/9/10, and did not know what the G-tech terminal was that was referenced in that report (RX 2, p. 38).

Dr. Williams expressed he wanted to review Dr. Trudeau's report of October 2010, to see if the conduction velocity or motor conduction velocity had changed since the prior study, as he likes to have the actual numbers (RX 2, p. 38-39). Dr. Williams was provided the report of Dr. Trudeau and reported the right median distal latency had increased from 3.8 to 6.0 and the left median distal latency had increased from 3.6 to 4.9, the right sensory latency had increased from 4.5 to 5.0, and the left sensory latency had increased from 3.3 to 4.8, which Dr. Williams indicated was a worsening in a period over 2 years from 9/8/08, which was prior to when Dr. Greatting performed surgery, and noted this information did not affect his opinion with regard to causation as it just confirmed the diagnosis of recurrent carpal and cubital tunnel syndrome (RX 2, p. 43-46).

Dr. Williams acknowledged he had not been given any documentation the employer could not accommodate the restrictions of no keyboarding more than 2 hours (RX2, p. 41 Dr. Williams further acknowledged he was never requested to visit Petitioner's work station (RX 2, p. 42). Dr. Williams opined that median neuropathy is the most common neuropathy found in the body and carpal tunnel release is the most common surgery performed in the United States, and then cubital tunnel is after that (RX 2, p. 47).

Dr. Williams opined there are certain things such as striking the wrist or elbow that make the conditions of ill-being more symptomatic but do not necessarily cause or aggravate the problem (RX 2, p. 49). Dr. Williams also opined if Petitioner was typing for 2 hours per day she could be more symptomatic without that activity being the causative factor of further aggravating her symptoms (RX 2, p. 49). Dr. Williams did not think Petitioner was doing well from her symptoms at the time of his examination as Petitioner said it ruined her life (RX 2, p. 49).

Therefore, the Arbitrator concludes as follows:

> Petitioner sustained an accident arising out of and in the course of her employment by Respondent and the date of accident was 9/2/10. Petitioner credibly testified to the activities she performed with her upper extremities in Return Ticket Control for approximately 15 years, in obtaining ticket books, opening envelopes, writing out ticket information, repacking ticket books, stacking ticket books, and entering information for each ticket in the computer, as well as the

manner in which she performed the entry of data from each ticket and the period of time she performed this entry of data daily. The manner in which Petitioner performed the data entry in RTC and the length of time spent performing these activities were corroborated by Petitioner's supervisor, Kent Johnson, and the Demands of the Job completed by Mr. Johnson. Mr. Johnson testified that when the job demands increased in late 2010, the Petitioner had to perform more than two hours of keyboarding per shift. He further said there were days when she exceeded two hours typing. His testimony, along with that of the Petitioner, causes the Arbitrator to find the testimony of Dr. Williams to be less than persuasive, as he opined based on the premise that the Petitioner did not exceed two hours of keyboarding during the period in question.

While Petitioner missed 15 weeks of work from 7/18/01 – 10/21/01 in association with the bilateral carpal tunnel surgeries she underwent in 2001 and 15 5/7 weeks of work from 9/17/08 – 1/4/09 in association with the right carpal tunnel release, right radial nerve release, and bilateral cubital tunnel surgeries she underwent in 2008, and performed reduced keyboarding activities for the period of June of 2009 through January of 2010, the credible evidence showed after January 2010, Petitioner performed keyboarding activities for 4-6 hours per day in the manner described and thus, sustained repetitive trauma to her upper extremities, even though Petitioner did not meet the production requirements for this period of time.

In addition, the undisputed evidence showed Petitioner performed her duties as an office associate at an improper ergonomic work station. Dr. Greatting explained how the finger motion when keyboarding and typing can cause irritation of the median nerve at the wrist and the positioning of the elbows or resting the elbows on hard surfaces for sustained periods of time can cause irritation of the ulnar nerve in the elbow. (PX 7 at 28) In addition, Dr. Williams, Respondent's Section 12 examiner, explained resting the elbows or forearms on hard surfaces for a period of time can cause cubital tunnel syndrome and typing for several hours per day in poor positions can be an aggravating factor for carpal tunnel syndrome, and expressed it was the period of time resting the arms in poor positions that was more important than the volume of key strokes. While Petitioner noticed her symptoms were getting worse in June of 2010, the date of 9/2/10 was the date Petitioner sought treatment for her worsening symptoms, was diagnosed with recurrent conditions of ill-being, and completed an incident report for Respondent, and thus, the date of accident as Petitioner's conditions of ill-being manifested themselves on that date.

Petitioner's conditions of ill-being of left carpal tunnel syndrome, left cubital tunnel syndrome, right carpal tunnel syndrome, and right cubital tunnel syndrome are causally related to the accident of 9/2/10. The sequence of events evidence supports this as does the testimony of Dr. Greatting, which is more credible and persuasive than Respondent's Section 12 examiner, Dr. Williams. Throughout the pendency of Petitioner's second claim against Respondent for injuries to Petitioner's upper extremities, Petitioner had no symptoms indicative of left carpal tunnel syndrome and no findings of left carpal tunnel syndrome on physical examinations performed by Dr. Greatting and Dr. Trudeau. Petitioner underwent two electrodiagnostic tests on 3/10/08 and 9/8/08 that showed no evidence of left carpal tunnel syndrome and little change in the 6 month period between them, other than the new finding of median neuropathy at the right wrist that was mild to moderate on the 9/8/08 test. Following the surgeries Dr. Greatting performed on Petitioner on 9/17/08 and 10/29/08, none of the physical examinations performed by Dr. Greatting thereafter had any findings of right carpal tunnel syndrome, right cubital tunnel

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syndrome, left carpal tunnel syndrome, or left cubital tunnel syndrome, only findings of left shoulder impingement syndrome and right trigger thumb. The medical records document the symptoms Petitioner had and did not have during this period of time and are given more weight than Petitioner's testimony several years later. However, on examinations of Petitioner after 9/2/10, Dr. Greatting found positive Tinel's signs over both carpal tunnels and positive Tinel's signs over both transposed ulnar nerves, and diagnosed Petitioner with recurrent bilateral cubital tunnel syndrome and recurrent carpal tunnel syndrome. Electrodiagnostic testing performed by Dr. Trudeau on 10/14/10, also showed an increase of the median nerve lesion at the right wrist, the development of median neuropathy at the left wrist, and an increase of the ulnar nerve lesions at either elbow, with the increases varying and ranging from .5 to 2.2. After 9/2/10, Petitioner also reported the symptoms in her upper extremities were better on weekends and when Petitioner had days off of work, and worse when Petitioner did any keyboarding or typing, even at home.

Dr. Greatting opined Petitioner's conditions of ill-being in her upper extremities were caused or aggravated by the work duties of keyboarding, typing, filing, and writing, and specifically opined the work duties Petitioner performed after 12/9/09 that exceeded the restrictions he had placed on Petitioner in June of 2009, were a contributing factor in the conditions of recurrent bilateral cubital tunnel syndrome and recurrent carpal tunnel syndrome diagnosed in Petitioner in 2010. Dr. Greatting further opined Petitioner's work duties that exceeded the 2 hour period of keyboarding not only made Petitioner more symptomatic but also aggravated the conditions of ill-being to the point Petitioner required further treatment.

The opinions of Respondent's Section 12 examiner, Dr. Williams, are not credible and persuasive for several reasons. In his report, Dr. Williams implied Petitioner's job duties may be a cause of Petitioner's recurrent conditions of ill-being but felt more likely Petitioner's other health conditions would have been more likely causes for Petitioner's recurrence of her conditions of ill-being than would be Petitioner's job duties (RX 1). However, the law only requires the work duties be a causative factor in the conditions of ill-being, not the more likely cause of the conditions of ill-being. Dr. Williams also acknowledged he did not know how well Petitioner's diabetes and hypothyroidism were controlled by medication and did not know how long Petitioner had been considered obese, thus diminishing the weight to be given his opinions that these health conditions were the more likely cause of Petitioner's conditions of ill-being in her upper extremities. While Dr. Williams opined a contributing factor in the development of cubital tunnel syndrome can be from resting the elbows or forearms on hard surfaces for a period of time and typing for a period of time can be an aggravating factor for carpal tunnel syndrome, and it was the period of time resting the arms in poor positions that was more important than the volume of key strokes, he further opined typing 2 hours per day cannot be a contributing factor. In rendering this opinion, Dr. Williams relied on information about the extent of typing Petitioner performed after June of 2009 and before 9/2/10, that was inaccurate and also inconsistent with the medical records provided to him. Dr. Williams also relied on information that Petitioner had undergone a left carpal tunnel release in 2008 that was also inaccurate and inconsistent with the medical records provided to him. Further, Dr. Williams relied on information that Petitioner's symptoms did not improve when she was not performing her duties as an office associate that was also inaccurate and inconsistent with the medical records provided to him. Finally, Dr. Williams did not explain how the varying increases as shown in the electrodiagnostic testing of Dr. Trudeau

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were consistent with systemic causes of Petitioner's conditions of ill-being, when the undisputed evidence showed Petitioner used her right hand more than her left hand and her left arm more than her right arm in performing her duties as an office associate for Respondent.

Timely notice of the accident was given to Respondent. Petitioner completed a Notice of Injury on 9/2/10 and Petitioner's supervisor, Mr. Johnson, completed a form entitled Demands of the Job on 9/3/10 and then a Supervisor's Report of Injury on 9/9/10.

Medical bills incurred by Petitioner in treatment of her conditions of ill-being of left carpal tunnel syndrome, left cubital tunnel syndrome, right carpal tunnel syndrome, and right cubital tunnel syndrome were reasonable and necessary and Respondent is liable for payment of the medical bills. Respondent had no objection to the reasonableness and necessity of these bills. Further, Dr. Greatting directly opined the services he provided Petitioner were reasonable, necessary, and medically appropriate. Dr. Williams only opined he did not feel Petitioner was in need of any further treatment when he saw Petitioner on 12/28/11, not that any treatment Petitioner had received before then was unreasonable or unnecessary. The opinion of Dr. Williams is not credible and persuasive. In addition, Dr. Robson only opined Petitioner did not need any further treatment with regard to her cervical spine. After payments by workers' compensation and Petitioner's group health insurance, the unpaid medical bills totaled the sum of $4,500.00 and this sum is subject to the fee schedule.

Petitioner is not entitled to any award of temporary total disability as a result of her accidental injuries. The evidence shows that she resumed treatment with Dr. Greatting on September 2, 2010. He noted increased symptoms and ordered a new set of nerve studies. After those were completed, he saw the Petitioner on tow more occasions in 2010; the last being on December 23, 2010. His office note of that date shows that permanent restrictions were given, and that no additional surgeries were anticipated. He testified that he did not expect to see any changes in her condition after December 23, 2010. (PX 7 at 24)

Temporary total disability ends when a person's condition is no longer temporary. Dr. Greatiing has seen the Petitioner on a number of occasions since December 23, 2010, but has provided no additional treatment. Her condition had reached a point of maximum medical improvement. While the Petitioner may have pursued vocational rehabilitation and maintenance after that date, no evidence was presented on the issue. Petitioner, who has a permanent keyboarding restriction, testified that she has not looked for work at any time since January 31, 2011, when she was informed that her restriction could no longer be accommodated. The Respondent subsequently made TTD payments From October 1, 2011 through September 15, 2012. It will be given a credit for those payments against the permanency awarded herein.

Petitioner has been diagnosed with recurrent bilateral carpal tunnel syndrome and recurrent bilateral cubital tunnel syndrome by all physicians who examined Petitioner after 9/2/10. While Petitioner had been given a restriction of no keyboarding more than 2 hours per day in June of 2009, that restriction was restated by Dr. Greatting on 9/2/10, 10/28/10, and 12/23/10, after Petitioner had findings on physical examinations and electrodiagnostic testing of left carpal tunnel syndrome, left cubital tunnel syndrome, right carpal tunnel syndrome, and right cubital tunnel syndrome, and was the basis for Petitioner being sent home from her position as an office

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associate with lottery on 1/31/11 and further instructed not to return to lottery. The conditions of ill-being of recurrent bilateral carpal tunnel syndrome and recurrent bilateral cubital tunnel syndrome have incapacitated Petitioner from pursuing the duties of her employment as an office associate and also other suitable occupations requiring keyboarding more than 2 hours per day. Petitioner credibly testified that while her symptoms have become intermittent since Petitioner no longer works as an office associate, she still experiences weakness in her upper extremities and paces herself with various daily activities. In addition, Petitioner indicated the pain medication she takes for her low back condition of ill-being assists with the pain and discomfort Petitioner experiences in her upper extremities.

There was no evidence presented, nor any claim made, for a wage loss pursuant to Section 8 (d) (1) of the Act. Accordingly, an award under Section 8 (d) (2) is proper. The Arbitrator awards 20 % Person As A Whole under said section.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Havron,
Petitioner,

vs.

Aramark,
Respondent.

17IWCC0701

NO: 13 WC 25311

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 25, 2017, is hereby affirmed and adopted.

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

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

The 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: NOV 3 - 2017
o9/7/17
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Stephen J. Mathis

Stephen J. Mathis

DISSENT

I respectfully dissent from the majority decision and would reverse the Arbitrator's decision in regard to accident. Petitioner was employed by Respondent Aramark on February 22, 2013. Petitioner was working at a Chik-fil-A located on the campus of Bradley University. Petitioner testified to going out the back door at approximately 8:30 AM to place empty boxes in the garbage bin. Petitioner testified to slipping on ice as he exited the back door and falling, incurring a laceration to his head and injuring his back. Petitioner presented at the ER later that day and reported falling after slipping on ice, landing on concrete, striking his head and back. Petitioner was diagnosed with a two-centimeter laceration and a coccyx contusion.

Petitioner initially reported the incident as a workman's compensation injury; however, when informed that his employer, Respondent Aramark, required a drug screening, Petitioner stated that he did not wish to report the incident as a workmen's compensation accident. Petitioner declined taking the drug test and informed the ER he would either use his Medicaid or self-pay for treatment.

Pursuant to Section 11 of the Act, "if an employee refuses to submit to testing of blood, breath, or urine, then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury." The Arbitrator incorrectly concluded that the Petitioner failed to rebut the presumption of intoxication and therefore failed to meet his burden of proving accident. The Arbitrator came to this erroneous conclusion based upon the observations of Nurse Hanson who noted that Petitioner became anxious and agitated after being informed of the drug screening requirement.

The Arbitrator failed to give sufficient weight to all of the evidence in arriving at his decision. Although Nurse Hanson noted that Petitioner became anxious and agitated after learning of the drug screening, Nurse Hanson also noted that Petitioner was calm and cooperative prior to learning of the screening. Additionally, the ER records indicate that there was no drug or alcohol use involved in the accident. The physical exam portion of the ER records note that the Petitioner was oriented as to person, place and time, had a non-toxic appearance, did not appear ill and was under no distress. Furthermore, the ER doctor stated upon examination that he observed no evidence of intoxication and that the Petitioner had a normal level of alertness.

David L. Gore

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

17IWCC0701

HAVRON, ROBERT
Employee/Petitioner

Case# **13WC025311**

ARAMARK
Employer/Respondent

On 1/25/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.60% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
STEVEN R WILLIAMS
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0000 INMAN & FITZGIBBONS LTD
COLIN M MILLS
301 N NEIL ST SUITE 350
CHAMPAIGN, IL 61820

17IWCC0701

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Robert Havron
Employee/Petitioner

v.

Aramark
Employer/Respondent

Case # **13** WC **25311**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Peoria**, on **9/20/16**. 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. ☒ 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 **Section 11 Intoxication**

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FINDINGS

On the date of accident, **2/22/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$11,139.13 (over 27 weeks)**; the average weekly wage was **$412.56**.

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

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

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

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

ORDER

Because Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment with Respondent 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.

Michael K. Nowak, Arbitrator

1/12/17
Date

ICArbDec19(b)

JAN 25 2017

FINDINGS OF FACT

On February 22, 2013 Petitioner was employed by Respondent Aramark. On that date he was working at a Chick-fil-A restaurant located on the campus of Bradley University. At approximately 8:30 in the morning Petitioner went outside the back door in order to place some empty boxes in the garbage bin. As he did so, he slipped on ice and fell lacerating his head and injuring his back.

Following the injury Petitioner was driven to St. Francis Medical Center by his wife. Petitioner was noted to present with a head injury and a head laceration after a fall that occurred earlier that day. Petitioner reported that he was walking when he slipped on ice. He landed on concrete. The point of impact was the head. The laceration on the head was two centimeters, and two sutures were used to close the laceration. Petitioner was also diagnosed with a coccyx contusion. It was noted in the Emergency Room records that the history given by Petitioner indicated there was neither drug use nor alcohol use involved in the accident. (RX 2, p. 4). X-rays demonstrated no acute fracture or dislocation. A normal head CT was noted which revealed no mass, hemorrhage, or acute infarct. A scalp hematoma right and medial frontal without underlying fracture was noted. (PX 3). On physical examination it was noted that Petitioner had a normal level of alertness and no evidence of intoxication. (RX 2, p. 6).

At 11:28 a.m. Rachel Hanson, RN made the following notation "Pt now reporting that injury to be workman's comp. Per Stolas, drug screen required for Aramark. Occ Health contacted for drug screening." Then, at 12:04 p.m. nurse Hanson noted:

> Pt now states that he does not wish to file workman's comp and will just use his Medicaid. Pt advised that Medicaid may not pay his claim if they deem it to be work related. Pt states "then we will self pay." Pt has been calm and cooperative throughout the visit, but when notified of need for drug screening with work comp claim, pt appeared to become anxious and kept insisting that no drug screen was necessary. Per Stolas and Occ health, drug screen required for his company. Pt states "we don't need that" and then changed insurance pay information with registration so that no drug screen would be required. Pt now seems agitated and wants to leave. Pt advised that he would be discharged, but this RN was not informed of the change in work comp status. (RX 2, pp. 8-9).

Although Petitioner denied recalling having become agitated and wanting to leave after being informed that his employer required drug screening, he did admit that he was asked to submit to screening and that he refused. (T. 21-22). When questioned further about the refusal to submit to screening during re-cross examination, Petitioner became somewhat evasive in his answers.

Petitioner was next treated at Heartland South on March 4, 2013. With regard to the head injury, staples were removed without complications. With regard to the tailbone injury, Petitioner was to avoid lifting more than 20 pounds. Petitioner was prescribed Ibuprofen and Vicodin. Petitioner was diagnosed with musculoskeletal pain, which was worsening. Petitioner reported that he was unable to sit on his tailbone due to pain. (PX 4). Petitioner returned to Heartland South on March 25, 2013. Petitioner needed a note to release him back to work. A lumbar muscle spasm was noted. There was no indication of pain radiating down the leg. The diagnosis was back pain. Petitioner was returned to work, restricted to no lifting over 36 pounds. (PX 4).

Petitioner underwent an MRI of the lumbar spine on April 10, 2013 at the Peoria Imaging Center. The MRI was read to reveal mild right foraminal stenosis at L3-4, mild bilateral foraminal stenosis at L4-5, and slight anteriolisthesis at L4-5 with a small central disc protrusion with annular disc tear. No nerve impingement was noted. (PX 2, RX 3).

Petitioner returned to Heartland South on April 17, 2013. The MRI was reviewed, and Petitioner was to be scheduled for a pain clinic appointment to consider a steroid injection due to the disc tear. Petitioner was returned to work restricted to no lifting. (PX 4). Petitioner underwent a drug screen on April 29, 2013 at the request of Heartland South. The presence of metabolites of cocaine was confirmed, evidencing cocaine use. (RX 4).

Petitioner presented for a Section 12 Examination on May 20, 2013 with Dr. Julie Wehner. Petitioner reported that on February 22, 2013, he was taking boxes outside to throw away in the trash. There was a metal plate on the ground which has slush on it and when he stepped on it he slipped and fell on the ground. Petitioner reported that he hit the right side of his head and had to have two stitches. He also injured his low back and tailbone area. Petitioner went to the emergency room at St. Francis OSF. X-rays of his sacrum were performed, and two weeks later he followed up Heartland South. (RX 1, ex. 2). Petitioner had not had any therapy. Petitioner complained of pain in his neck, his low back area, the right posterior thigh area, and the right lateral foot area. Petitioner also indicated that his foot went numb at various times, for approximately two times a week. Petitioner reported his pain level at 2/10. The doctor reviewed the job description of a food service worker, which indicated that Petitioner was required to lift 30 pounds or less continuously, 50 pounds or less rarely, and 20 pounds frequently. (RX 1, ex. 2).

Dr. Wehner also reviewed medical records and films. She diagnosed Petitioner with a head laceration and a low back contusion/sprain in the sacral area as a result of the slip and fall. The injury at this time was three months old. The head injury appeared to have healed uneventfully. However, Petitioner still had some subjective complaints of pain in the low back. She felt a course of therapy of six to 12 visits would be reasonable. Petitioner had not had any therapy to date, and injections were not medically indicated for an annular tear, as annular tears were found in asymptomatic individuals and could not be correlated to a specific injury. The tear did not require specific treatment or restrictions. Based on the injury date, Petitioner could return to work at full duty for a soft tissue sprain, and after physical therapy would be at maximum medical improvement. The doctor opined that there was no permanent disability as a result of the sacral contusion/sprain. The radiologic findings were part of the normal aging process. (RX 1, ex. 2).

On May 29, 2013, Petitioner returned to Heartland South. Petitioner was to continue with no lifting restrictions until evaluated by physical therapy. Petitioner was diagnosed with back pain. (RX 5).

On June 3, 2013, Respondent authorized six to 12 visits of Physical Therapy with regard to Petitioner's low back soft tissue sprain. (RX 4). Petitioner presented to the Institute of Physical Medicine and Rehabilitation on June 17, 2013. Petitioner was to undergo therapy two to three times a week for eight weeks. He followed up on June 19, and 24, 2013. (RX 5).

Petitioner returned to Heartland South on June 26, 2013. Petitioner was diagnosed with a backache. Petitioner's restrictions were limited to no more than 20 pounds lifting, and he was to continue physical therapy. Petitioner also requested a referral to Dr. Russo. (RX 5).

Petitioner presented to physical therapy on June 26, and July 1, 3, and 8, 2013. (RX 5).

Petitioner saw Dr. Frank Russo at the Institute of Physical Medicine and Rehabilitation on July 9, 2013. The doctor reviewed all records and films. The doctor diagnosed Petitioner with a musculoligamentous injury of lumbosacral spine with underlying lumbar disc disease and facet arthropathy without overt evidence of lumbar radiculopathy. It was noted that Petitioner was making steady, slow progress in rehabilitation. Petitioner had only five sessions to that point, however. The doctor concurred with Petitioner continuing his physical therapy through the end of the month. The doctor believed that an appropriate plan would be to gradually increase the weight restrictions to try to return to him or functional level of the job after he was adequately reconditioned and tolerating activities. If the symptoms were persisting, consideration might be a referral to one of the pain management physicians for consideration of dealing with soft tissue or facet injections, as the back symptoms seemed to be predominantly mechanical rather than radicular. The doctor believed the prognosis for improvement was fair, and it was also noted that Petitioner seemed to be reasonably well motivated to improve functionally. The doctor did not set up a follow-up visit but indicated he would be happy to reassess if it appeared appropriate. The doctor concurred with the current restrictions and it was noted the he would suggest an increase in levels as he further improved. (RX 4),

Petitioner returned to Heartland South on July 10, 2013. Petitioner was diagnosed with a backache and was to continue physical therapy and not lift more than 20 pounds. Petitioner was also diagnosed with benign hypertension and elevated liver enzymes. (PX 4). Petitioner presented to physical therapy on July 10, 17, 19, 22, 24, and 29, 2013 (RX 5).

Petitioner was released to work on July 31, 2013 by Heartland South, restricted to no lifting more than 30 pounds. Petitioner was to continue physical therapy. (RX 5).

Petitioner also returned to physical therapy on July 31, 2013. He reported a 40%-50% improvement. Petitioner would continue with physical therapy as planned. (RX 5).

Petitioner returned to Dr. Wehner on October 28, 2013 for a follow-up Section 12 Examination. Petitioner reported that he was 25% better. He was taking over-the-counter medications and working with lifting restrictions of no more than 30 pounds. He had undergone 12 physical therapy sessions, which he said had helped. The doctor noted the April 29, 2013 drug test which revealed metabolites of cocaine. Petitioner indicated that the Physician's Assistant stopped giving him Hydrocodone because of a concern of using cocaine and Hydrocodone at the same time. (RX 1, ex. 3).

Dr. Wehner opined that Petitioner's diagnosed head injury had resolved and that the radiologic findings were pre-existing and consistent with the normal degenerative process that occurred with aging. Otherwise, he had a low back soft tissue injury which did not warrant any type of injection or surgery. Petitioner should otherwise continue with a home exercise program and return to work full-duty. He was placed at maximum medical improvement. The doctor also opined that based on the soft tissue strain diagnosis there was no

permanent disability according to the AMA guidelines. Finally, the doctor opined that Petitioner should be monitored closely with the primary care physician regarding the overlapping use of Hydrocodone and possibly cocaine as well as the elevated liver function tests which was a non-work related issue. (RX 1, ex. 3).

Petitioner saw Dr. Ji Li at the Applied Pain Institute in Bloomington, Illinois on February 24, 2014. It was noted that Petitioner presented for an evaluation for low-back pain which stemmed from a work-related accident on February 22, 2013. After the fall, he had an acute onset of low back pain which had become chronic pain. It was a continuous, sharp and achy pain in the lower lumbar spine radiating to the anterior and lateral sides of both legs. The right side was reported as more painful than the left side. Petitioner reported that he had 12 physical therapy sessions without any pain relief. He was continuing to work, but with a weight restriction of 40 pounds. (PX 6).

Petitioner had no complaints of numbness or tingling to the legs. An MRI was noted to have revealed L3-4 and L4-5 broad disc bulging with bilateral foraminal stenosis, right worse than left. Dr. Li diagnosed Petitioner with lumbar radiculopathy and lumbar degenerative disc disease. The doctor opined that Petitioner's low back pain was most likely due to lumbar radiculopathy secondary to the L3-4 and L4-5 disc herniation. A transforaminal epidural steroid injection would be the first choice in his treatment plan. If necessary, the procedure could be repeated until his pain was under control. Once the pain was improved, he would then need another course of physical therapy. He would then wean from medications as pain improved. (PX 6).

Petitioner returned to Dr. Wehner on July 14, 2014 for a third Section 12 Examination. The doctor again noted that on her initial examination Petitioner had nonspecific back pain and an otherwise normal neurological examination. The MRI revealed foraminal stenosis and slight listhesis at L4–5, and a small central protrusion at L5–S1 with an annular disc tear, all consistent with the normal aging process. Dr. Wehner also noted that on her second examination of Petitioner, he also had a normal neurologic examination. At that time the doctor placed Petitioner at maximum medical improvement and opined that he could return to work full duty without restriction. (RX 1, ex. 4). After her review of updated records, and re-examination of Petitioner, Dr. Wehner again opined that Petitioner's examination revealed no neurologic deficits other than some mild pain with palpation in low back area. The ongoing subjective complaints of low back pain were not corroborated by any objective findings or the MRI. Therefore, the current diagnosis was low back pain with chronicity. The ongoing subjective complaints could no longer be explained based on the mechanism of injury from the February 22, 2013 incident. There was no medical basis to give restrictions based on the present clinical examination or the MRI findings for a soft tissue sprain on February 22, 2013. There were no neurologic subjective complaints, such as radiating pain, and Petitioner had no clinical findings radicular pain. Therefore, performing injections was not medically indicated. Petitioner did and could continue to work full duty. (RX 1, ex. 4).

Dr. Li testified by deposition on September 4, 2014 (PX 1). When Dr. Li saw Petitioner for his lone examination on February 24, 2014 Petitioner reported continuous, sharp, and achy pain in the lower lumbar spine, and on the sides of both legs, as the result of slip and fall on ice while working on February 22, 2013. (*Id.*, at 9). Dr. Li reviewed an MRI (04/10/2013), which he read to reveal "some lumbar disc disease." (*Id.*, at 10). It involved the lower lumbar spine from L3-4, L4-5, and L5-S1, particularly at the L3-4, L4-5 levels, showing the disc herniations with some foraminal stenosis, and the right side a little worse than the left. Following his examination, Dr. Li diagnosed Petitioner with lumbar radiculopathy secondary to L3-4, L4-5 disc herniations.

(*Id.*, at 11). Dr. Li recommended transforaminal injections for pain relief, and resumed physical therapy and conditioning. (*Id.*, at 12). Dr. Li opined that the MRI findings supported the need for injections, and that Petitioner's complaints were consistent with the MRI. (*Id.*, at 14). When asked if the injury could have caused or aggravated Petitioner's condition of ill-being, Dr. Li responded that there was no reason for him to not believe that Petitioner's symptoms were related to the fall, simply based on Petitioner's history of having no back pain prior to the alleged accident. (*Id.*, at 17). Dr. Li testified that he could not state "for sure" whether the MRI findings were caused or aggravated by the alleged accident because there were "some degenerations that may not be related to the falling, but there is also a disc herniation that may or may not be related to the falling." Ultimately, Dr. Li's opinion was that the herniations "could be" related to the fall, and that "it's possible" that the "remaining parts of [his] findings on the MRI" were aggravated by the fall. (*Id.*, at 18).

Dr. Li testified that he was not sure when Petitioner began to complain of radiating symptoms in the legs, but conceded that this complaint was not documented in the initial Emergency Room records. (*Id.*, at 25-26).

Dr. Li noted Petitioner's history of cocaine usage and opined that he would be extremely careful with such a patient when it comes to managing pain with medications. However, this did not affect his decision and opinion with regard to the injection treatment he was recomending. (*Id.*, at 34).

Dr. Wehner's testified by deposition on November 12, 2014. Dr. Wehner opined that when she first examined Petitioner his gait pattern was normal. Of note, Petitioner's straight leg raising was normal. There was no pain with axial compression. (RX 1, p. 10). Dr. Wehner testified that she reviewed the MRI report and the films from April 10, 2013. The doctor read the film to reveal a mild right foraminal stenosis at L3–4. There was mild foraminal stenosis at L4–5, and slight listhesis at L4–5. At L5-S1 there was a small central protrusion with an annular disc tear. (*Id.*, at 12). Dr. Wehner was unable to opine as to the age of the annular tear. Otherwise, Dr. Wehner diagnosed Petitioner with a head laceration and a low back contusion/sprain in the sacral area. She recommended a course of conservative treatment, consisting of therapy for 6 to twelve visits, and then a transition to a home exercise program. There was no medical indication for injections. Injection treatment was not warranted for annular tears. There is no specific treatment for annular tears and specific clinical significance is not attached to annular tears. (*Id.*, at 13). In order to justify injections, the patient would need to present with radicular pain, with numbness or tingling, due to a herniated disc or spinal stenosis. However, Petitioner had no complaints of radicular pain when seen by Dr. Wehner. The Dr. further pointed out that Petitioner also had no complaints of radiation on March 25, 2013 according to the Heartland record from that date. The doctor also opined that Petitioner could return to work full duty based on his job description that indicated he had to lift 50 pounds rarely and 20 pounds frequently. (*Id.*, at 14).

Dr. Wehner then testified as to her October 28, 2013 examination of Petitioner and corresponding report (RX 1, ex. 3). The October 28, 2013 examination again revealed a negative straight leg raise and no pain with axial compression or axial rotation. There were no complaints or findings of radicular pain. (*Id.*, at 17). Dr. Wehner testified that her diagnosis of a low back soft tissue injury resulting from the incident remained unchanged. She went on to explain that Petitioner merely had low back pain consistent with the normal aging process that would have been pre-existing. There were no radiologic findings to indicate otherwise. (*Id.*, at 19-

20). She felt Petitioner needed no further treatment related to the alleged accident and could work full duty. He had reached maximum medical improvement. (*Id.*, at 20).

Finally, Dr. Wehner then testified as to her July 14, 2014 examination of Petitioner and corresponding report (RX 1, ex. 4). She again examined Petitioner, who was not in any distress. There was no pain with axial compression. The straight leg raising was again negative. Dr. Wehner diagnosed Petitioner in July 2014 with subjective complaints of low back pain, as the soft tissue injury component would have resolved by the time of that examination. Her opinion also remained unchanged with regard to maximum medical improvement as of the October 28, 2013 examination. Otherwise, Petitioner should continue his home exercise program and lose weight. Injections remained inappropriate based on the MRI findings, Petitioner's subjective complaints, and the clinical examination. (*Id.*, at 25).

On cross-examination, Dr. Wehner testified, after lengthy questioning, that it was possible that a patient, or Petitioner's, complaint of right thigh and or foot pain could have been radicular in nature, but the doctor opined that in Petitioner's particular case it was not. His description of pain was not a radicular pattern of pain. Therefore it was not in this case. Dr. Wehner testified that a description of Petitioner's pain as radicular in nature did make sense in Petitioner's case. (RX 1, p. 33).

Petitioner testified that he had not returned to any doctor since February 24, 2014 as the employer would not pay treatment. Petitioner did wish to undergo the treatment recommended by Dr. Li. Petitioner continued to work full duty as of the date of hearing.

CONCLUSIONS

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

Issue (O): Is Respondent entitled to a Section 11 intoxication defense?

It is undisputed that Petitioner fell striking his head and tailbone on the date of accident. The question is whether the incident constitutes an accident which arose out of and in the course of Petitioner's employment with Respondent.

Section 11 of the Act provides, in pertinent part:

> No compensation shall be payable if (i) the employee's intoxication is the proximate cause of the employee's accidental injury or (ii) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment. Admissible evidence of the concentration of (1) alcohol, (2) cannabis as defined in the Cannabis Control Act, (3) a controlled substance listed in the Illinois Controlled Substances Act, or (4) an intoxicating compound listed in the Use of Intoxicating Compounds Act in the employee's blood, breath, or urine at the time the employee incurred the accidental injury shall be considered in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries.

> If at the time of the accidental injuries, there was 0.08% or more by weight of alcohol in the employee's blood, breath, or urine or if there is any evidence of impairment due to the unlawful or unauthorized use of (1) cannabis as defined in the Cannabis Control Act, (2) a controlled substance listed in the Illinois Controlled Substances Act, or (3) an intoxicating compound listed in the Use of Intoxicating Compounds Act or if the employee refuses to submit to testing of blood, breath, or urine, then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury. The employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries. Percentage by weight of alcohol in the blood shall be based on grams of alcohol per 100 milliliters of blood. Percentage by weight of alcohol in the breath shall be based upon grams of alcohol per 210 liters of breath. Any testing that has not been performed by an accredited or certified testing laboratory shall not be admissible in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injury. 820 ILCS 305/11 (emphasis added)

Petitioner's own testimony indicates he was requested to undergo testing in the hospital on the date of injury and he refused. This is corroborated by the St. Francis Medical Center Emergency Department records. Petitioner's refusal to undergo testing resulted in a rebuttable presumption that the he was intoxicated and that the intoxication was the proximate cause of his injury. Although the "employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries" Petitioner failed to do so in this case.

It is not lost on the Arbitrator that the Emergency Department records note that the history given by Petitioner indicated that "there was neither drug use nor alcohol use involved in the accident", and that on physical examination it was noted that Petitioner had "a normal level of alertness and no evidence of intoxication." However, when these notations are consider with the notations made by nurse Hanson after Petitioner was advised that a drug screen was required in Workers' Compensation matters, the Arbitrator is not persuaded that the preponderance of the evidence indicates the presumption of intoxication has been rebutted.

Nurse Hanson noted that Petitioner had been calm and cooperative during the visit until notified of the need for drug screening, at which point he became anxious and insisted that no drug screen was necessary. He then changed the insurance pay information he had provided to registration so that no drug screen would be required. She further indicated that at that point Petitioner seemed agitated and wanted to leave. In addition, when questioned about the refusal to submit to screening during re-cross examination at the hearing, Petitioner became somewhat evasive in his answers.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has failed to meet his burden of establishing that he sustained accidental injuries which arose out of and in the course of his employment with Respondent. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KARI KAPSALIS,

Petitioner,

17IWCC0702

vs.

NO: 13 WC 33734

PALOS COMMUNITY HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In September 2013, Petitioner was working as a registered nurse for Respondent, Palos Community Hospital. She also worked as a nurse at Tinley Woods Surgical Center and basically split her time evenly between the two jobs. She earned 31.50 an hour from Tinley and $44 an hour from Respondent because she worked the night shift.

On September 9, 2015, while working for Respondent, Petitioner left a patient's room and went to the Pantry to wash her hands. She did not want to wash her hands in the room because the patient's wife was in the room sleeping. In the pantry, her foot got stuck in "some dried old food." However, her momentum kept her moving forward, she hit the wall, and fell backwards on her "left outstretched hand." She called for help and the woman in charge helped her up. She developed a lot of swelling, put ice on it, wrote up the incident report, and went to Respondent's emergency department.

17IWCC0702

On March 17, 2014, Dr. Fakhouri performed a trapeziectomy "with a suspension, interposition arthroplasty with flexor *carpi radialis* tendon graft of" her left thumb. She continued to treat with Dr. Fakhouri through February 10, 2015. On April 30, 2015, Petitioner had an examination with Dr. Fernandez pursuant to §12 of the Act. He recommended a CT scan. Thereafter, he recommended revision surgery, which he performed on August 17, 2015. On May 19, 2016, Dr. Fernandez released her at maximum medical improvement and placed a permanent 5-lb lifting restriction on her. At that time, Respondent provided Petitioner a job involving preparing Utilization Review reports because she could no longer work as a registered nurse with her restrictions. Petitioner testified that one has to be a nurse or have another specific certification to have the job she currently had. She earned $37.50 in her current job.

On November 11, 2016, Petitioner had another examination under §12 of the Act, this time with Dr. Vender. Dr. Vender noted that Petitioner was initially diagnosed with a work-related radius fracture and later diagnosed with exacerbation or aggravation of preexisting arthritis of the CMC joint and problems with the pisiform. "These can be associated and complications from an injury that would lead to a distal radius fracture." He noted that Petitioner could be considered at maximum medical improvement, but it is not uncommon for patients to have residual complaints from the procedures she had and it could impact the ability to perform forceful activities with the thumb or heavy lifting and could make her work as a nurse difficult. Dr. Vender rated her AMA impairment rating at 9% of the left upper extremity.

At arbitration, Petitioner testified that currently she felt "varying degrees of pain from day-to-day depending on" her activities. She does not have the strength or capability she had prior to the accident. Her injury ceased her occupation as a nurse, and required her to take an office job. She can no longer pick up her 2 and 3-year-old grandchildren and can no longer garden, which "was kind of" her passion. She had never injured her wrist or thumb prior to the accident.

The Arbitrator awarded Petitioner 25&2/7 weeks of temporary total disability benefits, $37,742.89 in medical expenses, and 175 weeks of permanent partial disability benefits representing loss of 35% of the person-as-a-whole. The Arbitrator awarded the person-as-a-whole award under §8(d)2, rather than an award for injuries to discrete parts of her body under §8(e), because the injury deprived Petitioner of her previous occupation as registered nurse. The Commission agrees with the findings of the Arbitrator on the issues of causation, temporary total disability, and medical expenses. The Commission also finds the Arbitrator's conversion of an ostensibly §8(e) injury to a §8(d)2 person-as-a-whole award appropriate because the injury resulted in Petitioner's inability to perform her normal profession as a nurse. However, the Commission finds that the Arbitrator's permanent partial disability award is excessive.

In looking at the statutory factors we are required to use in determining permanent partial disability, the Commission gives some weight to Dr. Vender's AMA impairment rating of loss of 9% of the left upper extremity. The Commission gives great weight to the evidence of disability in the medical records, primarily the permanent and severe lifting restrictions imposed by Dr. Fernandez. The Commission also notes that Petitioner was 56 years old at the time of the accident in 2013, and therefore she likely has a limited future work life in which she has to cope with her disability.

In this instance, the Commission finds the last criteria in determining permanent partial disability, Petitioner's occupation and the potential loss of earning potential, are interrelated. In arriving at the permanent partial disability award, the Arbitrator noted "there is no evidence that Petitioner's current base hourly rate is less now than it was at the time of the accident, although it appears she no longer has access to a higher night differential rate. Regardless, the Arbitrator views the injury as having potentially affected Petitioner's future earning capacity since her current career choices would be limited if her current job comes to an end." The Commission finds that the Arbitrator placed too much weight on the unrealized potential loss of earning potential, which is speculative especially considering Petitioner's age and likely limited future work life. The loss of earning potential should be a primary factor in assessing a §8(d)2 award for injuries normally designated under §8(e). In looking at the entire record before us, and assessing the statutory criteria in assessing permanent partial disability awards, the Commission finds an award of loss of 25% of the person-as-a-whole appropriate in this claim and modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,120.55 per week for a period of 25&2/7 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 $721.66 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 25% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $37,742.89 in medical expenses for medical expenses, as specified in the Decision of the Arbitrator, 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: NOV 3 - 2017

Deborah L. Simpson

Deborah L. Simpson

David L. Gore

David L. Gore

Stephen J. Mathis

Stephen J. Mathis

DLS/dw
O-10/19/17
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0702

KAPSALIS, KARI
Employee/Petitioner

Case# **13WC033734**

PALOS COMMUNITY HOSPITAL
Employer/Respondent

On 1/9/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.63% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 AND KRESS
FRANK D KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

0075 POWER & CRONIN LTD
JOHN FASSOLA
900 COMMERCE DR SUITE 300
OAK BROOK, IL 60523

17IWCC0702

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

Kari Kapsalis
Employee/Petitioner

v.

Palos Community Hospital
Employer/Respondent

Case # **13** WC **33734**

Consolidated cases: **D/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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **December 16, 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 **September 15, 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 **$87,360.00**; the average weekly wage was **$1,680.83**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$28,333.93** for TTD, **$0.00** for maintenance, and **$0.00** for other benefits. The parties stipulated that all temporary partial disability [TPD] benefits were paid. Arb Exh 1.

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

ORDER

Medical Expenses

Per the parties' post-arbitration stipulation, Respondent shall pay $38.24 to MidAmerica Orthopedics. Respondent shall also pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,700.00 to Midwest Anesthesia Partners, and $34,004.65 to Midwest Orthopaedics at Rush, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

The parties did not place temporary total disability at issue. Arb Exh 1. Per their stipulation, Respondent shall pay Petitioner temporary total disability benefits of $1,120.55/week for 25 2/7 weeks, for the periods September 16, 2013 through October 15, 2013, March 23, 2014 through June 3, 2014 and August 17, 2015 through October 19, 2015, as provided in Section 8(b) of the Act, with Respondent receiving credit for its payment of $28,333.93.

Permanent Partial Disability

For the reasons set forth in the attached decision, the Arbitrator finds it appropriate to award permanency pursuant to Section 8(d)2 of the Act. The Arbitrator finds that Petitioner is permanently partially disabled to the extent of 35% loss of use of the person as a whole, equivalent to 175 weeks of benefits. Based on the stipulated average weekly wage, the Arbitrator awards permanency at the applicable maximum rate of $721.66 per week.

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

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

1/9/17
Date

JAN 9 - 2017

Kari Kapsalis v. Palos Community Hospital
13 WC 33734

Summary of Disputed Issues

It is agreed that Petitioner, a registered nurse, sustained a work-related fall on September 15, 2013. It is also agreed that this injury resulted in the need for a left wrist trapeziectomy and a left thumb arthroplasty performed by Dr. Fakhouri on March 17, 2014. The disputed issues include causation, reasonableness and necessity as to the wrist-related portion of a second surgery performed by Dr. Fernandez in August 2015, certain medical expenses and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she held two nursing jobs as of her September 15, 2013 accident. For Respondent, she worked two 12-hour shifts per week in a post-operative cardiac unit. This job required her to use both hands to perform CPR, transfer, position and bathe patients and apply pressure for extended periods after removing sheaths in the cardiac catheterization lab. Her base pay was $37.50 per hour but because she worked at night, she earned about $44.00 per hour. She also worked three days a week for a different employer, Tinley Woods Surgery Center, where she earned $31.50 per hour. At Tinley Woods, she assisted patients who were undergoing same day surgical procedures. She had to use her hands to dress patients post-procedure and transfer them from one cart to another.

Petitioner testified that, on September 15, 2013, she was assigned to a patient who was dying. In order to avoid waking the patient's wife, who was sleeping in the room, she went across the hall to wash her hands in a pantry area. Her foot became stuck on some dried food on the floor, causing her to lose her balance and fall. She fell onto her outstretched left hand. She was unable to get up on her own and called for help. A nurse came to her aid. Her left hand was swollen and painful. She went to Respondent's Emergency Room, where she reported her fall and underwent left wrist X-rays. The X-rays demonstrated a "questionable non-displaced fracture of the dorsal radial metaphysis" and degenerative changes of moderate severity in the first carpometacarpal joint. PX 1, p. 13. The Emergency Room physician applied a posterior mold cast, prescribed Tylenol for pain and directed Petitioner to keep her wrist elevated and undergo repeat X-rays in two to three days. PX 1, p. 9, 18.

Petitioner testified that, at the recommendation of one of her co-workers at Tinley Woods, she contacted the office of Dr. Fakhouri, a hand surgeon. After learning that Dr. Fakhouri was on vacation, she scheduled an appointment to see his partner, Dr. Kronen.

Dr. Kronen's note of September 16, 2013 sets forth a consistent history of the work fall and subsequent Emergency Room care. The doctor noted that Petitioner complained of pain in her left wrist and the base of her left thumb. On examination, he noted "swelling with an obvious dorsal deformity of the left wrist with limited motion" and tenderness at the base of the thumb CMC joint. He obtained new X-rays and read the films as showing a dorsal fracture of the distal radius along with CMC joint arthritis. He informed Petitioner that the fracture "just required a short arm cast." He applied the cast, prescribed occupational therapy and indicated Petitioner might require an injection for the arthritis. He released Petitioner to right-handed work. PX 2, pp. 84-85.

Petitioner returned to Dr. Kronen on September 23, 2013. The doctor obtained repeat X-rays. He noted that the films showed no further displacement of the fracture. He released Petitioner to primarily right-handed work with the left hand assisting at two to three pounds. PX 2, p. 83.

On October 7, 2013, Dr. Kronen removed Petitioner's cast, due to some skin irritation, and applied a new one. PX 2, p. 82. A week later, he obtained repeat X-rays and recommended two more weeks of casting. He administered a corticosteroid injection for the CMC arthritis and continued the previous work restrictions. PX 2, p. 81.

On October 28, 2013, Dr. Kronen noted minimal swelling and some tenderness with range of motion. He obtained repeat X-rays, which showed complete healing of the fracture. He provided Petitioner with a support splint and prescribed occupational therapy. He released Petitioner to primarily right-handed work with the left hand assisting at one to two pounds. PX 2, p. 79.

Petitioner started a course of occupational therapy thereafter. On November 18, 2013, she returned to Dr. Kronen and reported limited motion and left thumb pain. The doctor recommended additional therapy. He released Petitioner to primarily right-handed work with the left hand assisting at five to ten pounds. PX 2, p. 77.

On December 9, 2013, Petitioner complained to Dr. Kronen of significant pain in her left wrist and the base of her left thumb. The doctor recommended additional therapy and indicated Petitioner might need a basal joint arthroplasty once her fracture symptoms resolved. He released Petitioner to right-handed work with the left hand assisting at twenty to twenty-five pounds. PX 2, pp. 75-76.

Dr. Kronen again recommended additional therapy at the next visit, on January 6, 2014. PX 2, p. 73.

On January 28, 2014, Petitioner saw Dr. Fakhouri for the first time. Petitioner testified she was "okay with" Dr. Kronen but decided to consult Dr. Fakhouri once surgery came under discussion. Dr. Fakhouri recorded a history of the work fall. He noted that Petitioner was attending therapy and performing light duty but remained symptomatic. On left wrist examination, he noted a limited range of motion, exquisite tenderness at the level of the ulnar aspect of the wrist and pain with ulnar deviation. On left thumb examination, he noted exquisite tenderness at the basal joint and positive grind testing.

Dr. Fakhouri found Petitioner's left wrist condition to be directly related to the work fall. He further found that the work fall aggravated an underlying left thumb basal joint arthritis condition, noting that Petitioner denied having any significant left thumb pain before the fall.

Dr. Fakhouri injected the ulnar aspect of the left wrist and the basal joint of the left thumb. He prescribed a left wrist MRI, a CMC splint and continued therapy. He released Petitioner to light duty with wrist splint usage and no lifting, carrying, pulling or pushing over 5 pounds. He indicated it was too early to determine when Petitioner would reach maximum medical improvement or be able to resume full duty. PX 2, pp. 70-72.

According to RX 5, a utilization review report, Petitioner underwent the recommended left wrist MRI on January 28, 2014. RX 5, p. 4. The report concerning this MRI is not in evidence.

When Dr. Fakhouri next saw Petitioner, on February 25, 2014, he noted some left wrist improvement, secondary to the injection, but persistent complaints relative to the left thumb. He discussed several treatment options with Petitioner, noting she opted for surgery in the form of a trapeziectomy and tendon graft. He estimated that Petitioner would reach maximum medical improvement four to five months following this procedure. He continued the previous work restrictions. PX 2, pp. 68-69.

On March 17, 2014, Dr. Fakhouri performed surgery consisting of a left wrist trapziectomy and left thumb arthroplasty with flexor carpi radialis tendon grafting. PX 2, pp. 87-88.

At the first post-operative visit, on March 28, 2014, Dr. Fakhouri described the surgical incisions as well-healed. He applied a thumb spica splint and prescribed occupational therapy. He indicated he anticipated addressing work restrictions in three to four weeks. PX 2, p. 67.

On April 29, 2014, Dr. Fakhouri noted that Petitioner was making progress, thumb-wise, but was still experiencing dorsal and radial left wrist pain. After obtaining left wrist X-rays, he indicated that it appeared Petitioner had developed dorsal left wrist synovitis and first dorsal compartment extensor tendinitis. He injected the left wrist and recommended continued therapy. PX 2, pp. 65-66.

On May 27, 2014, Dr. Fakhouri noted that Petitioner's pain had subsided but that she was still experiencing left hand weakness. He directed Petitioner to continue occupational therapy. He released her to light duty as of June 2nd with no lifting, carrying, pushing or pulling over 3 to 5 pounds. PX 2, p. 64.

At the next visit, on June 24, 2014, Dr. Fakhouri prescribed additional therapy and directed Petitioner to gradually increase her lifting to 10 pounds. PX 2, p. 63.

On August 5, 2014, Petitioner returned to Dr. Fakhouri and complained of increasing pain in the area of the base of thenar eminence of the left thumb. On examination, the doctor noted fullness and swelling in both that area and the dorsal aspect of the left hand. He injected the left wrist and continued the previous work restrictions. PX 2, p. 62.

On August 29, 2014, Dr. Fakhouri noted that Petitioner's pain was "now localized to the palmar aspect of the left wrist" and that she was "most tender in the area of the harvesting of the FCR." He administered another injection and imposed a 5-pound lifting restriction. PX 2, p. 61.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Carroll on October 3, 2014. In his report of that date, Dr. Carroll recorded a history of the work fall and subsequent care, noting he reviewed various treatment records as well as radiographic studies. He described Petitioner as right-handed. He indicated that Petitioner was still experiencing pain in her left wrist and at the base of her left thumb.

On examination, Dr. Carroll noted a healed surgical scar at the base of the left thumb, no left elbow or forearm abnormalities, a limited range of motion in the left wrist, some residual dorsal and distal wrist pain in the area of the injury, pain at the base of the left thumb, no carpal instability, pain over the volar thenar eminence and base of the second metacarpal, 45 degrees of motion of the left thumb, normal sensation and no atrophy. He measured grip strength at 80 pounds on the right and 45 pounds on the left.

Dr. Carroll noted that Petitioner declined to undergo any additional X-rays at his office since she had already undergone a number of them since the accident and was concerned about additional radiation exposure. He interpreted the most recent X-rays of August 5, 2014 as showing post-surgical changes with excision of the trapezium and some proximal migration of the metacarpal. He indicated he was unable to view the MRI images due to a problem with the disc.

Dr. Carroll diagnosed a healing arthroplasty of the left thumb and a healing left distal radius fracture. He found a correlation between Petitioner's subjective complaints and "these objective findings." He also found causation as to the work fall, indicating that the injury "aggravated an underlying arthritis and brought [Petitioner] to a point of being symptomatic." He described the treatment to date as "timely, reasonable and appropriate." He saw no need for further surgery or work conditioning. He recommended a maximum of three injections and indicated Petitioner should perform home exercises. He expressed a desire to review the MRI. He opined that Petitioner "will have some residual pain regardless of her ongoing appropriate care." He found Petitioner capable of light duty with no lifting over 10 pounds with the left hand and use of a thumb spica splint as necessary. He saw no need to restrict Petitioner's work hours or right hand usage. He estimated that Petitioner would reach maximum medical improvement in three months. RX 2.

On October 24, 2014, Dr. Fakhouri noted ongoing complaints. On re-examination, he noted fullness, swelling and some bogginess in the area of the base of the first metacarpal. He indicated this could be synovitis or possibly a "dislodged interposition tendon arthroplasty," referencing the surgery he performed. He prescribed another MRI and continued therapy. He increased Petitioner's lifting to 10 pounds. PX 2, p. 60.

Respondent submitted Dr. Fakhouri's requests for a repeat MRI and additional therapy to utilization review. A Triune Health Group report dated December 5, 2014 reflects that per the recommendations of Dr. Coats, a hand surgeon, the continued therapy was non-certified and the repeat MRI was certified. Dr. Coats noted that, as of October 23, 2014, Petitioner had made only minimal progress, despite attending 63 therapy sessions, and that ODG guidelines called for 24 visits over an 8-week period for post-surgical treatment of unspecified arthropathy. He found the repeat MRI to be warranted, based on ODG guidelines, based on Petitioner's persistent complaints despite extensive therapy. RX 5.

On December 8, 2014, Triune Health Group sent Dr. Fakhouri a letter non-certifying the additional therapy and certifying the MRI, in accordance with Dr. Coats' analysis and opinions. RX 6.

Petitioner underwent a left hand and wrist MRI on January 3, 2015. The interpreting radiologist noted surgical changes, a joint effusion between the proximal and distal carpal rows, focal calcification of the scapholunate ligament and myxoid degeneration of the angular fibrocartilage without fenestration or perforation. PX 5, pp. 3-4.

On February 10, 2015, Dr. Fakhouri interpreted the MRI as showing apparent synovitis as well as possible dislodging of the tendon graft and flexor synovitis of the left index finger. He indicated the latter could be due to all the exercises she performed during therapy. On re-examination, he noted fullness and swelling in the base of the left thumb, tenderness in the radial aspect of the left wrist, a flexion deformity of the first metacarpal and thickening, swelling and tenderness diffusely over the proximal flexor sheath of the left index finger. He discussed various treatment options, noting that

Petitioner opted for surgery over additional injections. He released Petitioner to light duty with no lifting, carrying, pulling or pushing over 3 to 5 pounds. PX 2, p. 59.

Petitioner testified she did not return to Dr. Fakhouri after February 10, 2015.

At Respondent's request, Dr. Carroll re-examined Petitioner on March 13, 2015. In his report of the same date, Dr. Carroll essentially reiterated his previous examination findings and diagnoses. He again found a correlation between Petitioner's subjective complaints and his findings. He indicated his review of the report concerning the recent MRI did not prompt him to change his opinion that no additional surgery was needed. He stated, however, that "final review of the MRI and films would be appropriate as a supplemental service with review of all of [Petitioner's] radiographs to come to a final determination." He went on to state that, while Dr. Fakhouri contemplated flexor tenosynovectomy of the left index finger, Petitioner "should consider revision reconstruction of the base of the thumb with a different tendon graft or donor." He indicated that Petitioner should undergo this care "regardless of the opinions" as to causation. He anticipated that Petitioner would reach maximum medical improvement within six to twelve months of the surgery. He stated it would be "premature to assume that [Petitioner] has any permanent injury." He indicated Petitioner might resume full activity "if she has successful reconstruction and tenosynovectomy." He recommended restrictions of no lifting over five pounds with the left hand and no forceful gripping or grasping. RX 3.

On April 20, 2015, Dr. Carroll sent a report to the adjuster after reviewing the films of the MRI performed on January 3, 2015. He indicated this review did not prompt to change his mind:

> "I agree with the opinions stated in my exam of 3/13/15. I believe that further thumb and index [finger] surgery is indicated. I agree with the recommendations presented by my exam and would not change the opinions based upon this review."

RX 4.

On April 30, 2015, Petitioner saw Dr. Fernandez, a hand surgeon of her own selection, for purposes of an independent medical examination.

In his report of April 30, 2015, Dr. Fernandez indicated he reviewed records from Drs. Kronen and Fakhouri, as well as Dr. Carroll's report of October 3, 2014, in connection with his examination.

Dr. Fernandez noted that Petitioner complained of residual pain, swelling and deformity at the basilar thumb as well as weakness to pinch and grip.

On examination, Dr. Fernandez noted no symptom magnification, a well-healed surgical scar along the dorsum of the basilar joint, weakness to pinch and grip less than 50% of the contralateral side, significant dorsal prominence at the left thumb metacarpal base, crepitus and pain to direct palpation of the left thumb metacarpal base as well as the A1 pulley, mild triggering of the A1 pulley, palpable tenderness at the left wrist and significant laxity and reduced motion in the left thumb.

Dr. Fernandez obtained multiple X-rays of the left hand and wrist. He interpreted the films as showing "significant collapse of the thumb metacarpal on to the scaphoid with local cyst in the

scaphoid," no significant degenerative process within the carpus itself at the wrist level and cysts at the thumb metacarpal base. He diagnosed left thumb basilar joint instability with arthroplasty collapse, post CMC joint arthroplasty, left wrist scapholunate ligament pain and "probable scapholunate ligament tear." He found a causal relationship between the work accident and Petitioner's current symptoms. He also found causation as to the treatment rendered to date, indicating that, while Petitioner "may have had some pre-existing arthritis, this was significantly aggravated and/or required further treatment as a result of the fall and the work injury."

Dr. Fernandez opined that Petitioner would not benefit from additional conservative care. He recommended surgery, specifically a "revision carpometacarpal joint arthroplasty." He indicated Petitioner might require a left wrist arthroscopy thereafter. He indicated the two procedures should not be performed at the same time "as the recoveries are competing." He further recommended that Petitioner undergo a thumb CT scan before surgery to further delineate the areas of impingement. He stated that "the thumb collapse can occur following [the type of surgery Dr. Fakhouri performed]", indicating he has seen this type of collapse in his own patients. He found Petitioner capable of only very light work in the 5- to 10-pound range with no significantly repetitive gripping, grasping or pinching. PX 3, pp. 67-71.

Petitioner testified she decided to undergo additional treatment with Dr. Fernandez following the examination.

On May 20, 2015, Phil Arnold, an adjuster, sent a letter to Dr. Fernandez via facsimile authorizing "the left thumb surgery under workers' compensation." PX 3, p. 182.

Petitioner underwent the recommended left wrist CT scan on June 30, 2015. The scan, performed without contrast, demonstrated surgical removal of the left trapezium and several small ossific densities around the region of the surgically removed trapezium. PX 3, p. 130.

On July 23, 2015, Petitioner returned to Dr. Fernandez and reported no change in her symptoms. The doctor reviewed the CT results with Petitioner and again recommended revision surgery. He informed Petitioner he planned to pin the joint for further stability and that she would require an additional procedure in the future to remove the pin. He continued the previous work restrictions. PX 3, pp. 54-56.

On August 17, 2015, Dr. Fernandez performed surgery consisting of a left thumb revision trapezial excision with interposition arthroplasty, a left wrist/thumb tendon transfer, a pisiform excision, an ulnar nerve release and an extensor pollicis longus tenolysis. In his operative report, the doctor noted that the distal two-thirds of the pisiform was completely normal but that the inferior portion was "traumatically degenerated with what appeared to be a shear-type of injury to the cartilage in that portion, likely contributing to the local loose body and then subsequent degeneration." He stated "this appeared to be traumatic in nature consistent with the history [Petitioner] gave of symptoms following a fall." PX 3, pp. 48-51 and 74-77.

Dr. Fernandez took Petitioner off work following the surgery. PX 3, p. 47.

At the first post-operative visit, on September 1, 2015, Dr. Fernandez obtained left hand and wrist X-rays. He described the films as showing "excellent suspension of the thumb metacarpal with TightRope technique." He recommended that Petitioner transition to a thumb spica splint, to be worn

at all time other than when showering. He also prescribed occupational therapy. He released Petitioner to work with splint usage and no use of the affected extremity. PX 3, pp. 42-45.

Petitioner underwent an initial therapy evaluation at Accelerated Rehabilitation on September 2, 2015. The evaluating therapist noted mild swelling throughout the hand and fingers and tenderness to palpation over the radial side of the thumb. PX 4, pp. 42-44.

In a progress note dated September 29, 2015, Petitioner's therapist informed Dr. Fernandez that Petitioner had improved somewhat but was still complaining of pain and sensitivity, especially in the web space. PX 4.

On November 5, 2015, Dr. Fernandez recommended that Petitioner hold off on therapy for four weeks and engage only in very light activities due to complaints of pain, swelling and numbness in the left thumb. PX 3, pp. 30-33. At the next visit, on December 3, 2015, the doctor recommended that Petitioner hold off for another four weeks and then resume therapy. PX 3, pp. 27-29.

On January 14, 2016, Dr. Fernandez noted ongoing complaints of residual left thumb CMC joint pain that was affecting Petitioner's ability to lift, garden and play the guitar. On examination, the doctor noted a positive Tinel's 3.5 inches distal to the distal portion of the scar, "showing improvement of the nerve recovery," thickening along the wrist, discomfort with forced flexion of the MP joint, left thumb MP joint motion of 0/30 versus 0/50 on the right, and a 20% reduction in CMC joint range of motion. He obtained additional X-rays, which showed no subluxation. He recommended additional therapy and continued the previous work restrictions. PX 3, pp. 21-25.

Petitioner resumed therapy on January 16, 2016. The re-evaluation report indicates that Petitioner reported being able to engage in more activities but was still experiencing pain in the palm near her thumb. PX 4, pp. 87-89.

On February 25, 2016, Petitioner reported a little improvement to Dr. Fernandez but complained of pain with pinching and throbbing volar CMC joint pain on a daily basis. The doctor noted some mild swelling, tenderness to palpation along the incision site, a reduced range of motion and the ability to make a full composite fist. He recommended additional therapy and continued the previous work restrictions. PX 3, pp. 18-20.

Petitioner testified she last attended formal therapy on May 10, 2016.

Petitioner returned to Dr. Fernandez on May 19, 2016. The doctor noted that Petitioner rated her lingering symptoms at 5-6/10. On re-examination, he noted subjective complaints of paresthesias into the dorsoradial nerve distribution with a positive Tinel's sign, continued pain to direct palpation and difficulty in terminal adduction and radial abduction. He recommended that Petitioner finish her formal therapy and transition to a home exercise program. He found Petitioner to be at maximum medical improvement subject to a permanent 5-pound lifting restriction. He indicated Petitioner might require surgery in the future "including dorsoradial neurolysis or nerve resection and burial," but indicated Petitioner should "wait with that if possible." PX 3, pp. 13-14.

Petitioner testified she has not returned to Dr. Fernandez since May 19, 2016.

At Respondent's request, Petitioner underwent a Section 12 examination by a different hand surgeon, Dr. Vender, on November 16, 2016. The doctor's lengthy report of that date sets forth a consistent account of the work fall and subsequent care. The doctor noted that Petitioner had undergone further surgery in August 2015 and that she was still experiencing soreness in the area of the pisiform excision and pain in the area of the thumb CMC joint and volar radial wrist.

On examination, Dr. Vender noted surgical scarring, grossly intact motor strength for the median and ulnar nerves, a normal range of motion in all the fingers and the right thumb, a reduced range of motion in the left thumb with palmar abduction of 45 versus 50 on the right, symmetric opposition to the small finger, a range of left wrist motion of 65/50 versus 65/65 on the right, a left grip strength of 32 versus 62 on the right and a three-pinch jaw of 8 on the left versus 16 on the right.

Dr. Vender obtained left wrist and left thumb X-rays. He interpreted the wrist films as showing good carpal and distal radius alignment, along with excision of the pisiform bone. He interpreted the thumb films as showing resection arthroplasty and residual fixation.

Dr. Vender described Petitioner as having very limited residual symptomatology with regard to the first surgery and some residual wrist and thumb complaints relative to the second surgery. He addressed causation as follows:

> "[Petitioner's] initial diagnosis was that of a left distal radius fracture. This apparently was a work-related injury. She was subsequently diagnosed as having an exacerbation or aggravation of pre-existing degenerative arthritis of the thumb carpometacarpal joint. Similarly, she was also felt to have problems related to her pisiform. These can be associated injuries and complications from an injury that would lead to a distal radius fracture."

Dr. Vender found Petitioner to be at maximum medical improvement. He stated it was "not uncommon to have some residual complaints and findings and problems related to thumb CMC arthroplasty, especially when revision arthroplasty is performed." He indicated that such residual problems could "impact ability to do forceful activities with the thumb." With specific reference to Petitioner, he stated that the problems "could make it difficult for her to perform previous work activities that would involve heavy lifting." He noted that Petitioner was currently performing office work.

Dr. Vender went on to perform an AMA impairment rating, after noting Petitioner's Quick Dash Score of 35. He rated the thumb impairment at 26%, based on Table 15-2, and stated this was equivalent to a 9% upper extremity impairment. RX 1.

Petitioner testified she is still working for Respondent but in a utilization review capacity. Respondent offered her this position. She continues to experience pain. The pain varies in degree, depending on her activity level. Her left wrist pain has "tapered." She now experiences this pain, in the radial side of the wrist, on a weekly basis. She also has pain along the incision. The pain along the inside of the wrist has never gone away. She experiences pain when using her hands and wrists to assist in getting up from a seated position. The pain and permanent restriction as to lifting "stopped her career," in that she has never been able to resume active patient care as a nurse. She is not able to pick up her grandchildren, who are 2 and 3 years old. Gardening used to be her passion but she can no longer engage in this activity.

Petitioner denied injuring her left thumb or wrist before or after the work accident.

Under cross-examination, Petitioner testified that, when she last saw Dr. Fernandez on May 19, 2016, he indicated he could perform additional surgery in the future to "bury" the nerve in an effort to reduce the nerve-related pain. No physician is currently prescribing medication for her wrist or thumb. She is right-handed. The restriction relates only to her left hand. Respondent accommodated her with light duty before she reached maximum medical improvement. Her current utilization review job was not created especially for her. It was an existing job. Three other individuals hold the same job at Respondent. Two of these individuals are not registered nurses. The job requires either that you be a registered nurse or that you hold RIHT certification. A supervisor selected her for the job. The job is within her restrictions. With respect to Respondent, she earns more at her current job than when she worked part-time as a nurse but, because her current job is full-time, she can no longer spend time with her grandchildren. She saw Drs. Carroll and Vender at Respondent's request. Dr. Carroll assessed her with respect to additional surgery. She has not reviewed Dr. Carroll's reports.

On redirect, Petitioner testified that Dr. Fernandez is not recommending any additional surgery at the present. He indicated it would be up to her to decide if she wanted to undergo additional surgery in the future. He told her it takes two years for nerve pain to heal. The two-year anniversary of the revision surgery will occur in August 2017.

No witnesses testified on behalf of Respondent.

Arbitrator's Credibility Assessment

Petitioner was an articulate, responsive witness. The Arbitrator found her very credible.

None of the physicians involved in this case noted symptom magnification or unusual pain behavior.

Arbitrator's Conclusions of Law

<u>Did Petitioner establish a causal connection between her undisputed accident of September 15, 2013 and her current condition of ill-being? Did Petitioner establish causation as well as reasonableness and necessity with respect to the non-thumb aspects of the August 17, 2015 surgery?</u>

Although Respondent placed causation in dispute, it agrees that Petitioner sustained a work-related fall on September 15, 2013, injuring her left wrist and thumb. Respondent also takes no issue with the procedures performed by Dr. Fakhouri in March 2014 or the thumb aspect of the surgery performed by Dr. Fernandez on August 17, 2015. The dispute centers on the wrist-related aspect of the 2015 surgery. The Arbitrator finds that Petitioner established causation, as well as reasonableness and necessity, as to all of the surgical procedures Dr. Fernandez performed on August 17, 2015. While Dr. Fernandez originally planned to proceed only with the revision arthroplasty and defer the other procedures, it appears he changed his mind during the surgery. The Arbitrator finds it reasonable to infer he altered his plan due, at least in part, to the trauma-related pisiform abnormalities he noted in his operative report. Respondent's first examiner, Dr. Carroll, commented on the surgeries proposed by Dr. Fakhouri, not Dr. Fernandez. There is no evidence indicating Dr. Carroll ever reviewed Dr. Fernandez's records. While Dr. Carroll originally stated he saw no need for a wrist arthroscopy (RX 2, p.

4), he did not specifically comment on this issue in his later reports. RX 3-4. Respondent's second examiner, Dr. Vender, who saw Petitioner in 2016 and reviewed the August 2015 operative report, found causation as to the distal radius fracture, thumb arthritis (via an aggravation theory) and pisiform problems. He did not question any aspect of the surgery performed by Dr. Fernandez. RX 1.

Is Petitioner entitled to reasonable and necessary medical expenses?

At the hearing, Petitioner claimed unpaid medical expenses from the following providers: 1) MidAmerica Orthopaedics (Drs. Kronen and Fakhouri), $716.24 – PX 2; 2) Midwest Anesthesia Partners, $3,700.00 (anesthesia administered during the August 17, 2015 revision surgery – PX 6); and 3) Midwest Orthopaedics at Rush (Dr. Fernandez), $34,004.65 – PX 7. After the hearing, the parties tendered a written stipulation to the Arbitrator agreeing that much of the MidAmerica Orthopaedics bill was in fact paid and that Respondent owes only $38.24. The Arbitrator awards this amount, per the parties' stipulation.

The Arbitrator also awards the Midwest Anesthesia charges of $3,700.00 and the Midwest Orthopaedics at Rush charges of $34,004.65, subject to the fee schedule. These charges stem primarily from the surgery that Dr. Fernandez performed in August 2015. The Arbitrator has previously found that Petitioner established causation, as well as reasonableness and necessity, as to all aspects of this surgery.

What is the nature and extent of the injury?

Because Petitioner's accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in determining permanency. That section sets forth five factors to be considered in determining the level of permanent partial disability, with no single factor to be given more weight than any other. As for the first factor, any AMA impairment rating, the Arbitrator considers Dr. Vender's rating of 26% of the thumb, which equates to 9% of the upper extremity according to the 6th Edition of the AMA Guides. The Arbitrator notes that Dr. Vender based this rating on only one of the two diagnoses he stated in his report, specifically "left thumb CMC arthroplasty," indicating that he did so based on the Guides because he viewed the arthroplasty as "the highest causally related diagnosis." There is no other evidence in the record, such as deposition testimony, which would allow the Arbitrator to determine why the Guides apparently allow for no consideration of the other stated diagnosis, i.e., distal radius fracture. Dr. Vender also indicated he viewed the "GMCS," or "Grade Modifier Clinical Studies," as not applicable. His report refers to X-rays he obtained in his office but it is not clear to the Arbitrator whether he viewed the MRIs or CT scan since he does not mention these studies. RX 1. As for the second factor, "the occupation of the injured employee," the Arbitrator notes that Petitioner is a registered nurse who, due to her permanent restrictions, can no longer work in certain settings, such as a critical care unit or operating room. The Arbitrator assigns significant weight to this factor. As the Appellate Court observed in First Assist v. Industrial Commission, 371 Ill.App.3d 488, 495 (4th Dist. 2007), nurses are not akin to fungible goods. They do not all perform the same tasks or earn the same salary. Although Petitioner remains employed, due to Respondent's accommodation, it is clear to the Arbitrator that she views herself as having lost her chosen career, i.e., "hands on" nursing in a surgical or critical care setting. With respect to the third factor, "the age of the employee at the time of the injury," the Arbitrator notes that Petitioner was 56 years old as of the 2013 accident. The Arbitrator assigns weight to this factor. Petitioner's career choices are limited due to her injury and restrictions but she is an older worker. As for the fourth factor, "the employee's future earning capacity," there is no evidence that Petitioner's current base hourly rate is less now than it was at the time of the accident, although it

appears she no longer has access to a higher night differential rate. Regardless, the Arbitrator views the injury as having potentially affected Petitioner's future earning capacity since her career choices would be limited if her current job came to an end. With respect to the fifth and final factor, "evidence of disability corroborated by the treating medical records," the Arbitrator notes the operative findings of both surgeons along with the result of the various radiographic studies, including the MRIs and CT scan. The Arbitrator also notes the wrist range of motion, grip strength and three-pinch jaw measurements recorded by Dr. Vender one month before the hearing. RX 1.

In addition to the foregoing, the Arbitrator considers Petitioner's significant lifting restriction and credible testimony as to the various ways in which the injury has affected her work and non-work activities. The Arbitrator also considers Petitioner's testimony that her current accommodated position does not afford the same flexible schedule she enjoyed prior to the accident.

Finally, the Arbitrator considers Dr. Fernandez's examination findings of May 19, 2016 and his opinion that Petitioner "possibly or probably" will require additional nerve-related surgery in the future. PX 3, pp. 13-14.

The Arbitrator finds it appropriate to award permanency benefits under Section 8(d)2 rather than 8(e). Section 8(d)2 can apply to injuries covered by Section 8(e) if the injuries "partially incapacitate [the claimant] from pursuing the duties of his usual and customary employment but do not result in an impairment of earning capacity." The Arbitrator finds Petitioner's "usual and customary employment" to be "hands on" nursing in a surgical or critical care setting. In Vicki O'Leary v. City of Chicago, 2007 Ill. Work Comp LEXIS 795, a unanimous Commission (Lindsay, DeMunno and Pigott) upheld an 8(d)2 award in a case in which an ironworker's ankle injury resulted in permanent restrictions and a change to an accommodated office job with no salary diminution.

The Arbitrator awards permanency equivalent to 35% loss of use of the person as a whole, equivalent to 175 weeks, under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

George Skaggs,
Petitioner,

vs.

NO: 15WC 39644

State of Illinois,
Respondent.

17IWCC0703

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 25, 2017, is hereby affirmed and adopted.

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

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

No bond or summons required for State of Illinois cases.

DATED: NOV 6 - 2017
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LEC/jrc
043

L. Elizabeth Coppoletti
L. Elizabeth Coppoletti

Charles J DeVriendt
Charles J DeVriendt

Joshua D. Luskin
Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SKAGGS. GEORGE
Employee/Petitioner

Case# **15WC039644**

STATE OF ILLINOIS
Employer/Respondent

17IWCC0703

On 4/25/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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SPRINGFIELD, IL 62794-9255

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

APR 25 2017

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

17IWCC0703

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

GEORGE SKAGGS,
Employee/Petitioner

v.

STATE OF ILLINOIS,
Employer/Respondent

Case # 15 WC 039644

Consolidated cases: **N/A**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield**, on **February 27, 2017**. By stipulation, the parties agree:

On the date of accident, **July 28, 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 **$114,758.38,** and the average weekly wage was **$2206.89.**

At the time of injury, Petitioner was **70** years of age, ***married*** with **0** dependent children.

Necessary medical services, as set forth in PX 5, will be paid by Respondent pursuant to the Act and the medical fee schedule. Respondent will receive credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

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 **$755.22/week** for a further period of **32.25 weeks**, as provided in Section **8(e)12** of the Act, because the injuries sustained caused **15% loss of use of the right leg**.

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

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

Signature of Arbitrator

April 17, 2017
Date

ICArbDecN&E p.2

APR 25 2017

FINDINGS OF FACT AND CONCLUSIONS OF LAW

With regard to the nature and extent of Petitioner's injury, the Arbitrator finds:

Petitioner, a Section Chief for the Department of Public Aid, sustained an injury to his right knee on July 28, 2015 when he was walking to his car after a supervisors' meeting at the fairgrounds and he tripped, his right leg twisted, and he fell forward experiencing intense pain and a popping sensation in his right knee. (PX 1) Petitioner proceeded to Memorial Express Care on Dirksen Parkway to be examined. He reported that his knee had been bothering him for a week but that he had stepped in a hole earlier in the day. X-rays were taken and revealed nothing acute. No significant osteoarthritic changes were noted. Petitioner was diagnosed with a collateral ligament knee sprain and given instructions for home care. (PX 2)

Thereafter Petitioner followed up with his primary care doctor, Dr. Hansen, as his complaints and symptoms were not getting better. (PX 3) Dr. Hansen referred Petitioner to Dr. Karolyn Senica at the Orthopedic Center of Illinois. He began treating with her on August 5, 2015. Dr. Senica noted Petitioner was on meloxicam for generalized symptoms of arthritis and pain. Petitioner denied any catching, locking or giving way but was having trouble bending his knee and walking. Dr. Senica felt Petitioner was suffering from a right knee injury resulting in pain, effusion, possible meniscal pathology and moderate degenerative arthritis of the medal compartment. She ordered an MRI which she read as showing a significant bone contusion in the medial tibial plateau but no fracture line, some grade III chondromalacia in the medial compartment, grade II chondromalacia of the patella and a degenerative medial meniscus tear, effusion, and a moderate Baker's cyst. Dr. Senica felt Petitioner's arthritis and bone contusion were contributing to his symptoms and she recommended physical therapy and viscosupplementation. Petitioner underwent both the therapy and three injections to his right knee. While treating with Dr. Senica, he also used NSAIDs, a brace, and activity modification. (PX 3; PX 4; RX 5, RX 6)

After undergoing his third knee injection on October 21, 2015 Petitioner followed up with Dr. Senica on December 9, 2015 reporting he was very unhappy with the condition of his knee as it felt "horrid." Dr. Senica felt Petitioner's injury might have exacerbated his arthritis and he had a bone bruise and degenerative meniscus tear. They discussed surgery with Petitioner wishing to see Dr. Romanelli to address whether he needed an arthroscopy or knee replacement. (PX 4)

Petitioner retired from his employment with Respondent as of December 31, 2015. His retirement had nothing to do with his injury herein.

Petitioner met with Dr. Romanelli on January 6, 2016 who felt Petitioner was suffering from a meniscus tear and the start of osteoarthritis. He believed it was probably traumatic in nature given his knees looked "normal" when "he ha[d] the injury." He recommended a medial

meniscectomy which would probably get rid of the catching, locking, and pain but he might need a partial knee replacement in the future. (PX 4)

Petitioner underwent a medial meniscectomy, with repair of a large posterior medial meniscus root tear, on February 11, 2016. The tear extended from the posteromedial corner all the way back to the root.As of February 17, 2016 Petitioner was doing well with excellent pain control. He was given a home exercise program to work on range of motion and strengthening. Petitioner was advised he could advance activities as tolerated and return to see the doctor on an as-needed basis. (PX 4; RX 1)

Petitioner followed up with Dr. Romanelli on April 1, 2016 reporting ongoing tenderness in his knee, night time awakening, a little bit of swelling, and difficulty with long distance walking and twisting. On examination, some swelling was noted but range of motion was full. Petitioner was noted to be limping and the doctor suspected it and the swelling might be related to age and overdoing it. In any event, some formal therapy was ordered and weight loss was recommended. He was also told to continue taking Mobic to help with pain. (PX 4)

Petitioner underwent physical therapy in April and May of 2016. According to the discharge therapy note of May 9, 2016 Petitioner felt he was doing well and functioning with only occasional pain. Petitioner described sharp, stiff, and sore pain rated 4.5/10. He did have minimal pain and difficulty with squats and stairs and mild pain and difficulty going from kneeling to standing. A minimally antalgic gait was noted. His rehab potential was described as "fair to good" and he was discharged to continue on his home exercise program. (PX 4; RX 3)

Petitioner returned to see Dr. Romanelli on June 3, 2016. At that time he described his knee pain as a "5/10." He also reported a "pinching" sensation along the inside of his right knee with weight bearing and stiffness when sitting for a time as well as pain when descending stairs and getting out of a car. A mildly antalgic gait was noted. A little more swelling than expected was noted on exam. He also had tenderness on the medial joint line. Dr. Romanelli recommended a cortisone injection to help with swelling and inflammation as well as anti-inflammatories, exercise, and weight loss. (PX 4)

As of his July 29, 2016 visit with Dr. Romanelli, Petitioner reported his knee was doing well with some shooting pain once in a while. He indicated the cortisone injection at his last visit helped a lot but was still having pain with stairs. Dr. Romanelli performed an examination and noted no erythema was present, no swelling was noted, range of motion was full, neurovascular status was intact, there was no calf tenderness and negative Homan's sign on the right. He wished for Petitioner to continue with the home exercise program for strengthening and range of motion. He was to return as needed. (PX 4)

Petitioner testified that he returned to see Dr. Romanelli in December of 2016 and received another injection.

Petitioner testified that the injections are helping.

Petitioner testified that he was able to continue working in his regular job after the accident. He described the job as supervisory in nature with a great deal of sitting. He would wear a brace but was able to perform his job duties. He made the same amount of money after the accident up until the time of his retirement.

Petitioner testified that he enjoys working in his yard. However, he has noticed some difficulties associated with those activities since his injury. He has a pond in his back yard and testified to falling into it on two occasions because he has difficulty rising from a squatting or kneeling position and loses his balance. Petitioner testified that he often uses a rake or shovel to assist him with getting up as the knee is unstable. Petitioner testified to having to hire out the mowing activities for his yard last summer because he was unable to push the mower around the yard. Petitioner further testified that he used to walk about four miles at a time; however, that is now reduced to ½ to ¾ of a mile. Petitioner also testified to walking his 55 lb. dog and noticing when he has to "yank back" on the leash, his leg will hurt. Petitioner also notices quite a bit of pain when descending steps and stairs and less difficulty going up them. He lives in a two story home.

Petitioner's medical bills are contained in PX 5.

With regard to the nature and extent of Petitioner's injury, the Arbitrator concludes:

Section 8.1(b) of the Act establishes the criteria for determining permanent partial disability. It states:

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

i. The reported level of impairment. No impairment rating was introduced by either party. Therefore, no weight is given to this factor.

ii. The occupation of the injured employee. Petitioner is currently retired and had planned to do so for reasons having no bearing on the nature and extent of his injury herein. Petitioner was released to return to work in the same job he had at the time of his accident and remained in that capacity, with no accommodation or need for restriction, up until the time of his retirement. This factor is given great weight.

iii. Petitioner's age at the time of the accident. Petitioner was 70 years of age at the time of his accident. He retired for reasons unrelated to his injury and has not sought other employment since then. This factor is given some weight.

iv. Employee's future earning capacity. Petitioner is retired and did not testify regarding any plans for further employment. Based upon his testimony he is enjoying the benefits of retirement with no expectation of working. The Arbitrator finds no loss of future earning capacity stemming from his injury herein and gives this factor great weight.

v. Evidence of Disability as corroborated by the treating records. Petitioner was a credible witness. He underwent surgery for a large medial meniscus tear followed by therapy and, more recently, ongoing injections. His testimony at arbitration regarding ongoing limitations and symptoms was corroborated by the doctor's records, including those of physical therapy.

Considering the five factors above, the Arbitrator concludes that Petitioner has sustained a loss of 15% loss of use of the right leg.

****

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

Jose Casimiro,
Petitioner,

vs.

NO: 04WC 33413

Midwest Carpentry,
Respondent.

17IWCC0704

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 prospective medical, temporary total disability, partial permenant 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 March 7, 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 $65,000. 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.

DATED: NOV 6 - 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

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CJD/rlc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CASIMIRO, JOSE
Employee/Petitioner

Case# **04WC033413**

MIDWEST CARPENTRY
Employer/Respondent

17IWCC0704

On 3/7/2016, 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 0.48% 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:

0800 BARRY E BLUMENFELD & ASSOC
3424 W 26TH ST
SUITE 200
CHICAGO, IL 60623

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

☐	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

JOSE CASIMIRO
Employee/Petitioner

Case #04 WC 33413

v.

17IWCC0704

MIDWEST 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 3, 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

- After multiple hearings ending on July 19, 2012, a Section 19(b) decision was filed on August 22, 2012, and a Decision and Opinion on Review affirming the Section 19(b) decision in its entirety was issued on April 16, 2013.

- The petitioner was awarded temporary total disability benefits from March 30, 2004, through December 25, 2005, and maintenance benefits from December 26, 2005, through March 26, 2006. Temporary total disability and maintenance benefits after March 26, 2006, were denied.

- The petitioner's medical care through December 26, 2005, was awarded and his request for medical care after December 26, 2005, was denied.

- The petitioner's request for the reasonable and necessary cost for a revision of his L3 through S1 fusion and a left L4-5 foraminotomy and decompression was denied.

ORDER:

- The respondent shall pay the petitioner the sum of $368.97/week for a further period of 175 weeks, as provided in Section 8d(2) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 35% loss of use of the man as a whole.

- The respondent shall pay the petitioner compensation that has accrued from March 29, 2004, through February 3, 2016, and shall pay the remainder of the award, if any, in weekly payments.

- The petitioner's claim for temporary total disability or maintenance benefits after July 19, 2012, is denied.

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

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

Robert E. Williams

Signature of Arbitrator

March 7, 2016
Date

MAR 7 - 2016

FINDINGS OF FACTS:

Subsequent to the Section 19(b) hearing on July 19, 2012, the petitioner saw Dr. Espinosa on January 22, 2013, who noted that the examination revealed an antalgic gait favoring his left leg, a positive left straight leg raise at 50°, heel-and-toe walking with increased left leg pain and normal strength and sensory testing. The doctor opined that EMG and NCV studies showed a mild chronic left L5 radiculopathy and a CT scan showed a solid fusion at L3-S1. On May 28, 2013, the petitioner reported approximately 80% improvement in his left leg pain with a trial spinal cord stimulator. On June 20, 2013, Dr. Espinosa implanted a permanent spinal cord stimulator. The petitioner reported back pain for two days to Dr. Rueda on October 2, 2014. A CT scan on October 16, 2014, showed no significant interval change with the petitioner's posterior fusion at L3-S1.

Julie Bose, a vocational rehabilitation counselor, opined that with the permanent work restrictions, the petitioner could anticipate an entry level wage of $10.68 per hour. The petitioner did not return to work after the Section 19(b) hearing in July 2012.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

Based on the law of the case, the petitioner failed to prove that the medical care he received after July 19, 2012, was casually related to his work injury and his request for medical costs is denied.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based on the law of the case, the petitioner proved that his current condition of ill-being with his low back is partially causally related to the work injury on March 29, 2004.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based on the testimony of petitioner and the evidence, the petitioner failed to prove that he is entitled to temporary total disability or maintenance benefits after July 19, 2012. The petitioner has not conducted a sufficient or genuine job search. The petitioner's claim for temporary total disability or maintenance benefits after July 19, 2012, is denied.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of increased back pain at night and with cold weather, humidity and prolonged sitting. He takes medication twice a day. The respondent shall pay the petitioner the sum of $368.97/week for a further period of 175 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 35% loss of use of the man as a whole.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHAD HENSON,

Petitioner,

vs. NO: 14 WC 36798

BARR CONSTRUCTION COMPANY,

17IWCC0705

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, prospective medical, and temporary total disability (TTD), and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner, Chad Henson, established that his current condition of ill-being is causally related to his undisputed, work-related injury of May 22, 2014.

The Commission finds that Petitioner is entitled to TTD benefits from June 22, 2014 through June 9, 2016, representing 102-5/7 weeks. The Commission awards Petitioner reasonable and related medical expenses totaling $127,419.01, and prospective medical treatment as recommended by Dr. Don Kovalsky including continued physical therapy. 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).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the

17IWCC0705

matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Petitioner filed an Application for Adjustment of Claim on October 29, 2014 alleging injury to his back while bending and lifting roofing material on May 22, 2014.

2. Chad Henson has worked for Barr Construction as a carpenter for 11 years. Henson described his relationship with the owner as "great" and "family like." Henson could perform all aspects of his job prior to May 22, 2014. T.16.

3. On May 22, 2014, Henson stopped by a job site and went onto the roof. While on the roof, Henson threw a bundle of shingles off the roof and felt a pull in his back. T.17. He had to be escorted off the roof. He then returned to the office and informed the office personnel that he was having some pain. T.18.

4. Chad Barr, Owner of Barr Construction, testified that Henson reported the May 22, 2014 accident that day. An accident report was not completed as Henson was not in the office for two weeks. T.98. Barr stated that his sister, Carissa Walton probably notified the insurance company of the May 22, 2014 accident. T.102.

5. Henson presented to Welty Chiropractic on May 22, 2014. Per the report, Henson indicated that he threw a bundle of shingles causing his back to go out. He complained of low back pain and issues with standing, leaning, walking, stooping, squatting, climbing, kneeling, bending, twisting, and carrying. His back pain came on immediately and had not changed. Examination revealed asymmetry/misalignment and myospasms of the lumbar spine. The diagnosis was sprains and strains of the lumbar spine. Chiropractic treatment for 3 times a week for 2 weeks was recommended. PX.2.

6. Petitioner followed-up at Welty Chiropractic on May 23, 2014 and reported that he was still hurting. He complained of 9 out of 10 sacrum pain, left buttock pain, hamstring pain, left calf pain, and 6 out of 10 neck pain. Examination revealed asymmetry/misalignment and myospasms of the lumbar spine. The diagnosis was sprains and strains of the lumbar spine. Chiropractic therapy was recommended 3 times a week for 2 weeks. PX.2.

7. Henson testified on cross-examination, that he did not undergo the recommended therapy. T.43.

8. Henson presented to Clay Hospital on May 27, 2014 for left chest pain. He reported that he was repairing shingles the other day and twisted his lower back and has had pain since.

Examination was positive for low back pain. He was prescribed, among other medications, Mobic for his back pain. PX.3.

9. Henson stated that he was then off work due to the chest pains. T.44.

10. Henson underwent a stress electrocardiogram on June 3, 2014. He exercised for 13 minutes and 26 seconds. His maximum heart rate was 175 beats per minute. RX.1. Petitioner stated that it was difficult to finish the test.

11. Henson presented to CCH Medical Clinic on June 6, 2014 complaining of some residual lower back pain and anterior chest discomfort s/p stress test that was negative for ischemia. He also had testicular pain. Under the comments section, it was noted he had musculoskeletal pain. He had an unspecified backache. PX.3.

12. Dr. Maria Perez allowed Henson to return to work full-duty on June 7, 2014. RX.5. Petitioner testified that he returned to work and did some lifting upon his return. T.21.

13. Henson testified that on June 22, 2014, he was home preparing for work the next day and went out to his company truck to get his water jug and experienced a sharp pain in his back when he went to dump the water from the jug. T.22. He went inside to lie down and realized he could not move, so an ambulance was called. *Id.*

14. Henson presented to Clay County Hospital ER on June 22, 2014 complaining of back pain. It was noted that he had chronic back pain with spasms, stiffness, and tenderness. The pain began after he twisted 3 hours ago. His pain was 9 out of 10. It was noted that 2 weeks ago, he threw a bundle of shingles off the roof and hurt his back, but he was not seen by a doctor. PX.3.

15. Henson testified that he contacted his boss, Chad Barr, on June 23, 2014 and informed him of the incident. He later went into work and filled out the paperwork. He testified that Mr. Barr or Ms. Walton told him to list June 9, 2014 as the accident as it had been so long since the May 22, 2014 incident, and he did not want to be penalized by the insurance company. Henson stated there was no incident on June 9, 2014 and only listed that date so he could just get it taken care of. T.24. Henson stated that the accident report was already filled out for him when he arrived in the office.

16. Mr. Barr stated that all the paperwork was handled by his sister, Carissa Walton. T.112. He stated that June 9, 2014 could have been the date Henson returned to work. T.123. He never instructed Henson to use June 9, 2014 as the accident date and never told Henson to lie. T.128. Henson worked between June 7, 2014 and June 20, 2014. T.131.

17. A First Report of Injury was prepared June 23, 2014. Per the report, it was noted that Henson was injured on June 9, 2014 when he picked up a paint "gal." He then had low back pain when he was pouring water out of a half-gallon jug on Sunday. RX.3.

18. Per Petitioner's exhibit 9, a First Report of Injury was completed by Carissa Walton on June 24, 2014. The date of accident was listed as "June 9, 2014???." The report indicated that the incident occurred on the employer's premises. It also indicated that he was pouring out a ½ gallon water jug on Sunday and had lower back pain. PX.9.

19. Henson provided a recorded statement on June 27, 2014 to Maria Howard of Iowa Mutual Insurance Company. Henson stated that his injury occurred "around the 9th." He had pain when he turned around to look at something and had a sharp pain in his back when he was leaving the lumber yard. He had just finished loading lumber and was going back to the job site when he went to pull out his water jug and pulled something in his back when he bent over to pour out the water. He stated the jug contained less than a half-gallon of water. He has been having sharp pain since. He went to Welty Chiropractor Center two times but it did not fully relieve the pain. He tried to continue to work, but his pain worsened the other day when he was sitting around the house. He had to call an ambulance as he could not get up. RX.2.

20. Henson presented to CCH Medical Clinic on July 1, 2014 for back pain. It was noted that he was seen last Sunday for back pain that had been present since throwing a bundle of shingles off the roof. PX.3

21. Henson underwent an MRI of the lumbar spine on July 10, 2014 at Clay County Hospital. The MRI revealed multilevel degenerative disc disease with central and paracentral disc herniations at L1-L2, L2-L3 and L5-SI. PX.3.

22. Petitioner was seen by Dr. Don Kovalsky on July 31, 2014 for low back pain radiating into his legs and up to his thoracic and cervical region causing headaches. He injured his back on May 22, 2014 while throwing some shingles. He woke up on June 22, 2014 in severe pain and was taken by ambulance to the ER. He had a minor episode of prior back pain, but nothing as severe. He was tender in the sciatic notches bilaterally. He had a mildly positive straight leg raise at 80 degrees on the right and 75 degrees on the left. Extension past 10 degrees caused moderate back pain with radiation into the buttocks bilaterally. He noted that the MRI revealed a small annular tear centrally at L4-L5. The diagnosis was preexisting degenerative disc disease with acute annular tear at L4-L5 on the left causing back and radicular symptoms. He was to remain off work. PX.4.

23. Petitioner underwent a bilateral L5-SI transforaminal epidural steroid injection at L5-SI on October 20, 2014. PX.4.

24. Henson underwent an MRI of the lumbar spine on February 24, 2015 that revealed a small left paracentral disc protrusion at T12-L1 with no impingement, a small central disc extrusion with 6 mm superior extension at L1-L2 with no impingement, and mild retrolisthesis, mild disc bulge, small central disc extrusion with 4 mm caudal extension and mild facet hypertrophy at L4-L5 causing mild bilateral lateral recess stenosis and mild bilateral neural foraminal stenosis without impingement. PX.4.

25. Henson was seen by Dr. Kovalsky on May 28, 2015 for continued back pain since the May 2014 incident. Dr. Kovalsky noted that the original MRI showed some degenerative changes and an annular tear at L4-L5 and the repeat MRI confirmed significant dehydration and internal derangement at L4-L5. The annular tear was now a small left central disc herniation with a small caudally migrated fragment. Examination revealed significant restriction of the lumbar spine. Henson reported that the therapy did not help much. He recommended an anterior disckectomy and interbody fusion. PX.4.

26. Henson underwent an L5-SI discogram on September 23, 2015 that was indeterminate for diskogenic pain at L4-L5. PX.4.

27. Petitioner underwent an MRI of the lumbar spine on October 9, 2015 that revealed a large central disc herniation. PX.4.

28. Respondent obtained a records review from Dr. Joseph Monaco on November 28, 2015. Dr. Monaco opined that Henson sustained a mild lumbar strain on May 22, 2014 that had since resolved. He was working until the second accident on June 22, 2014 and there was evidence, including the cardiac stress test, that he was functioning satisfactorily. Following June 22, 2014, there was an onset of much more severe symptoms and functional loss, which became chronic with the resultant use of high doses of opioids. Dr. Monaco opined that Henson's chronic low back pain was not consistent with any anatomic or physiologic abnormality, and not related to the May 22, 2014 incident. RX.4.

29. Dr. Kovalsky performed an anterior lumbar discectomy epidural decompression, L5-SI interbody fusion on January 26, 2016. PX.4.

30. Henson testified that he has smoked two packs of cigarettes per days since the age of 14, but he quit for the surgery. T.29. He has been off work since June 22, 2014 and has not received any benefits. T.31. He stated that his back now feels better since the surgery. Whereas before the surgery, he was miserable with a lot of pain. He had a sharp stabbing and burning pain in his lower spine and down his legs. T.32.

31. Henson further testified that he previously treated for back pain in 2012, but fully recovered. T.36. He only had some physical therapy and no issues thereafter.

17IWCC0705

32. On cross-examination, Henson stated that he received medical treatment 20 years ago to his back following a car accident. T.39. He has had some occasional back pain since. T.39.

33. Dr. Don Kovalsky was deposed October 28, 2015 and is board certified in spinal surgery. He first examined Henson on July 31, 2014. Henson reported the May 22, 2014 injury and that he attempted to continue to work light duty thereafter. Henson then had a severe exacerbation of pain on June 22, 2014. Dr. Kovalsky noted that Henson had an annular tear at L4-L5 with a small left sided disc herniation. PX.7. pg.10. He noted that oftentimes people with annular tears have significant symptoms. He felt that Henson had pre-existing degenerative disc disease at L4-L5, which was not unusual, but it was exacerbated by the twisting episode in May 2014 resulting in the annular tear on the left at L4-L5 and a small disc herniation at L4-L5 on the left. *Id.* Dr. Kovalsky opined that the May 2014 work accident caused the annular tear. PX.7. pg.18.

34. On cross-examination, Dr. Kovalsky noted Henson could work in some capacity from May 22, 2014 through June 22, 2014 and then had a severe exacerbation of pain and went to the ER. PX.7. pg.23. It was his opinion Henson had an annular tear in May 2014 and was functioning, then the annular tear tore completely in June causing the disc herniation. PX.7. pg.26. He did not know Henson complained of a twisting injury while lifting the two-gallon jug of water. PX.7. pg.30. He stated that there is no way to date the tear, while it could have occurred in June 2014, it likely occurred in May 2014 and the June event broke the camel's back. PX.7. pg.33.

35. Dr. Monaco was deposed March 8, 2016 and is an orthopedic surgeon. He performed a records review. He noted that Henson had some prior back pain. He then had the work accident in May 2014 for which he sought treatment and did not seek treatment until June 22, 2014 following the second episode. He worked from May 22, 2014 through June 22, 2014. Dr. Monaco opined Henson sustained a mild lumbar strain as the result of the May 22, 2014 accident, but it had since resolved. Henson had no significant treatment between May 22, 2014 and June 22, 2014 and he continued to work. RX.4. pg.15. He also noted Henson was able to complete a stress test without any significant back pain. RX.4. pg.16. Dr. Monaco stated that minor trauma such as the May 22 2014 incident would not lead to a higher risk of surgery. RX.4. pg.19. Henson's need for surgery was not related to the May 2014 accident. Henson had a mild lumbar strain only that had resolved. RX.4. pg.25. There was no evidence of an acute injury.

36. On cross-examination, Dr. Monaco testified that he has not performed a back surgery since 1991. RX.4. pg.61. He did not see any evidence of discogenic back pain. RX.4. pg.70.

In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397

Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

Henson sustained an undisputed work accident on May 22, 2014 when he threw the shingles off the roof. He experienced immediate pain and had to be escorted off the roof. He presented to the chiropractor that day complaining of back pain following his work accident and was diagnosed with a lumbar sprain. He then followed-up the next day complaining of 9 out of 10 back pain. The diagnosis was again a lumbar sprain.

The Arbitrator's Decision indicates that Henson was under no active medical care for his lumbar spine and was doing well until he developed incapacitating back pain while twisting at home on June 22, 2014. After its review of the record, the Commission finds that the Arbitrator's determination is not supported by the record. Rather, the evidence establishes that Henson presented to Clay Hospital on May 27, 2014 and reported that he injured his back the other day while working with shingles. He was diagnosed with low back pain and prescribed Modic for the pain. He was then seen at CCH Medical Clinic on June 6, 2014 for chest pain. Regarding the June 6, 2014 record, the Arbitrator noted that the examination of Henson's lumbar spine was normal. However, that record indicated that, while the musculoskeletal exam was normal, Henson did have musculoskeletal pain. He also complained of some residual lower back pain and was diagnosed with an unspecified backache. The medical records support that Henson was experiencing ongoing back pain following his May 22, 2014 injury that had not subsided.

While Henson did return to work and worked the next few weeks, it was his testimony that he continued to be in pain while working. The respondent did not rebut Henson's testimony. Based on the above, the Commission finds that Henson's back condition had not reached MMI as of May 23, 2014 as the medical records clearly indicate he continued to experience and treat for back pain that was related to the May 22, 2014 accident.

Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, ¶26, 993 N.E.2d 473, 373 Ill. Dec. 167. "Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred 'but for' the original injury." *Id.* "For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition." *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411, 911 N.E.2d 1042, 331 Ill. Dec. 812 (2009). As long as there is a "but for" relationship between the work-related injury and subsequent condition of ill-being, the employer remains liable. *Id.* at 412.

Causation, including the existence of an independent intervening cause, is a question of fact for the Commission, and its finding in that regard will not be reversed on appeal unless it is against the manifest weight of the evidence. *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d at 411.

The Commission finds that the June 22, 2014 accident was not an intervening accident. After reviewing the medical evidence and opinions, the Commission finds the opinion of Dr. Kovalsky more persuasive than Dr. Monaco's opinion. Dr. Kovalsky testified that the June 22, 2014 event was the straw that broke the camel's back, but it was the May 22, 2014 event that likely caused a partial annular tear which gave way on June 22, 2014. The Commission finds that Dr. Kovalsky's opinion is supported by the medical records that document ongoing back pain and Petitioner's subjective, but unrebutted testimony, that he continued to work despite ongoing back pain. Therefore, the intervening accident did not completely break the causal chain between the original work accident and the ensuing condition as there is clearly a "but for" relationship between the work-related accident and the subsequent condition of ill-being.

The Commission finds that Henson is, therefore, entitled to TTD benefits from June 22, 2014 through June 9, 2016, representing 102-5/7 weeks, and medical expenses totaling $127,419.01. Henson is also entitled to prospective medical treatment as recommended by Dr. Kovalsky including continued physical therapy.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 16, 2016, is hereby reversed for the reasons stated above.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $360.00 per week for a period 102-5/7 weeks, June 22, 2014 through June 9, 2016, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment as recommended by Dr. Kovalsky including continued physical therapy.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $127,419.01 under §8(a) of the Act and subject to the medical 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 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.

17IWCC0705

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: NOV 9 - 2017

Michael J. Brennan

MJB/tdm
O: 9/18/17
052

Thomas J. Tyrrell

Dissent

I respectfully dissent from the decision of the majority. I would affirm and adopt Arbitrator Hemenway's well-reasoned decision.

Kevin W. Lamborn

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

HENSON, CHAD
Employee/Petitioner

Case# **14WC036798**

17IWCC0705

BARR CONSTRUCTION COMPANY
Employer/Respondent

On 11/16/2016, 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 0.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2424 SATUER & SULLIVAN LLC
MICHAEL L KNEPPER
3415 HAMPTON AVE
ST LOUIS, MO 63139

0734 HEYL ROYSTER VOELKER & ALLEN
JON FLODSTROM
102 E MAIN ST SUITE 300
URBANA, IL 61801

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)

CHAD HENSON
Employee/Petitioner

v.

BARR CONSTRUCTION COMPANY
Employer/Respondent

Case # 14 WC 36798

Consolidated cases: _____

17IWCC0705

An *Application for Adjustment 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 **June 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 **Admissibility of Petitioner's Exhibit 9**

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHAD HENSON
Employee/Petitioner

v.

Case #: 14 WC 36798

BARR CONSTRUCTION COMPANY
Employer/Respondent

17IWCC0705

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulated that on May 22, 2014, Petitioner sustained an accident which arose out of and in the course of his employment with Respondent, resulting in an injury to his lumbar spine. On the date of accident Petitioner was 39 years old, married, with no dependent children. He was employed by Respondent as a carpenter and supervisor, and had been employed by Respondent since 2004. Petitioner testified that his duties included carpentry work, supervising crews, keeping the work on time, ensuring materials were on hand, and making sure the job was done right. These duties involved lifting work materials. He had his own crew and took direction from Chad Barr, the owner. He testified that prior to May 22, 2014, he had a good relationship with Mr. Barr, and that it was "just like family". He had no restrictions on his ability to work, and had never had any kind of complaint or reprimand regarding his work.

Petitioner testified that on May 22, 2014, he stopped by a crew that was working on a roof. While on the roof, he saw a leftover bundle of shingles that needed to be returned for credit. He picked up the bundle and threw it off the roof, and felt something pull in his back. The members of the crew stood in front and behind him on the ladder and helped him down off the roof. He returned to the office and informed Mr. Barr of the injury that day. While driving home after work, the pain in his back got worse and he stopped at the local chiropractor's office, Welty Chiropractic. They were able to treat him, which allowed him to drive home. He testified he was unable to work the next day and called Chad Barr to advise him he would not be in.

Petitioner testified that on May 27, 2014, he presented to Clay County Hospital with complaints of chest pain and back pain, and informed the hospital he had thrown the shingles off the roof. He remained off work through June 5, and returned on June 6, 2014. He testified that when he returned to work he mostly supervised at a job in Greenup, Illinois, and other workers performed any lifting that was needed.

On Sunday, June 22, 2014, Petitioner was at his home. He got his water jug out of his company truck and dumped it out. As he was doing so, he had a sharp pain in his low back. He went inside to lie down for an hour or two and could not get out of bed when he woke up. An ambulance was called and he was transported to Clay County Hospital. He was given injections and medication and discharged. Petitioner testified he called Mr. Barr the next morning to let him know about his back condition, and Mr. Barr told him to come into the office when he felt better. He went in later that day and discussed the situation with Mr. Barr. Petitioner testified Mr. Barr told him he would need to report the accident as occurring on June 9, 2014, "...because of how long it had been since we did the roof and everything, so we was going to go with it as happening on the Greenup job, which I was told to do that so it would get taken care of...." He testified that there was in fact no accident on June 9, 2014, despite his recorded statement to the insurance company to the contrary, and that he reported it as June 9 because Mr. Barr would have been penalized if he used the correct date. Petitioner has been off work since that time.

Petitioner testified he ultimately had back surgery on January 26, 2016, by Dr. Kovalsky, and began physical therapy in May. Prior to surgery he had sharp, stabbing, burning pain in his low back and down his legs, as well as weakness. He is much better since surgery.

On cross- examination, Petitioner acknowledged he was in a motor vehicle accident in 1995 and received some treatment for his low back. He also injured his back in 2012 while working for Respondent and received treatment. Following the current accident on May 22, 2014, Petitioner had a chiropractic adjustment that day and also on May 23. He agreed he was instructed by Dr. Welty to return for two weeks of treatment, but he did not return, as did not see a reason to. He further agreed that in May and June 2014 he was being treated for chest pains and had to miss some work for his heart problems. He also treated for testicular pain in early June. He agreed that on June 6, 2014, Dr. Perez released him to return to work without restrictions for these health problems. He returned to work on June 7 and continued working through June 20, 2014.

Petitioner acknowledged that June 22, 2014, was a Sunday and that he did not work for Respondent that day or the day before. He was at home, went to empty a small thermos that weighed a pound or two, and when he twisted to pour it out he had back pain. He later had to call an ambulance due to the pain, and he reported to the emergency room what had happened. Petitioner asserted that when he gave a recorded statement to the insurance company later that week, he told them what his employer had instructed him to say with regard to what and when he was injured. The Arbitrator notes that throughout his cross-examination, Petitioner appeared to be confused with the questions, specifically when asked about dates. He was consistent in his testimony, however, that he went into his employer's business and filled out a Report of Injury dated June 23, 2014, admitted as Respondent's Exhibit 3, and that this occurred prior to giving his recorded statement to the insurance company. With regard to the Report of Injury, the top half of the report is typewritten, and Petitioner testified it was completed before he got the report. The bottom half is hand-written, and he testified he wrote most of it, but not all. Specifically, he did not write the date of accident of June 9, did not write "picking up paint gal.", and did not write "Sunday". In response to how the accident occurred he wrote, "I was pouring water out

water jug ½ gal." In response to object that harmed employee he wrote, "When I poured my water out of jug ½ gal". He wrote the part of body injured was "lower back". RX3.

Petitioner called Mr. Chad Barr as a witness. He is the owner of Barr Construction and is responsible for the operation of the business. His sister Carissa Walton is co-owner and handles the office portion. He described Petitioner as a good employee with no reprimands. He agreed that Petitioner sustained an injury on May 22, 2014, while lifting shingles and that Petitioner reported the accident to him either that day or the following day. He agreed Petitioner missed some time following the accident of May 22, but did not know how many days. He assumed an accident report was filled out, but that would have been handled by Carissa. He did not know why the report for May 22 was not produced with materials subpoenaed by Petitioner. He also did not know whether the accident was reported to his insurance company.

Petitioner presented Mr. Barr with a Report of Injury dated June 24, 2014, marked as Petitioner's Exhibit 9, received pursuant to subpoena issued to Mr. Barr in May 2015. The Report differed from the Report admitted as Respondent's Exhibit 3, in that it was typewritten and signed by Carissa Walton rather than handwritten and signed by Petitioner, and dated June 24 rather than June 23. The date and description of accident, however, are the same. Respondent objected to the admission of Petitioner's Exhibit 9, and the Arbitrator reserved ruling on the issue. With regard to Petitioner's testimony that he met with Mr. Barr on June 23, 2014, Mr. Barr did not recall whether that occurred or not. With regard to the accident date on the Report of Injury, he testified he did not think his sister "would rather care that it was 6/23, 6/24, or June the 9th, as long as she got it filled out, turned in, and done her duty to do it".

On cross-examination, Mr. Barr testified he did not complete any portion of either Report of Injury (PX9 and RX4), nor did he meet with Petitioner to complete them. That would have been done by Carissa Walton. He testified he did not instruct Petitioner to use an accident date of June 9, 2014, or to fabricate any other facts about what happened, including while giving his recorded statement. He was aware Petitioner had an accident on May 22, 2014, that he missed some work for other reasons, returned to work on June 7 and continued working his regular job through June 21, 2014.

Following the accident on May 22, 2014, Petitioner presented to Welty Chiropractic and was treated by Dr. Dianna Welty. He reported he had thrown a bundle of shingles and his back went out, resulting in lower back pain. Examination revealed misalignment of the lumbar spine and spasms in the lumbar region, and there was tenderness to palpation on both sides of the lumbar spine. Diagnosis was lumbar strain and Dr. Welty recommended chiropractic treatment three times a week for two weeks. Petitioner returned on May 23 and reported he was hurting. He complained of pain in the sacrum, left buttock, left hamstring, and left calf and rated the pain at 9/10. He also had neck pain of 6/10. Examination continued to reveal misalignment and spasms, and Dr. Welty recommended continued treatment. The Arbitrator notes this is the last record of treatment from Dr. Welty. PX2.

On May 27, 2014, Petitioner presented to the emergency room at Clay County Hospital with complaint of left side chest pain which radiated to his right chest and down his left arm to the wrist. He also reported he was "repairing roof shingles the other day and twisted lower back

and has had back pain since". He admitted to marijuana use, which he stated helped with his back pain. The musculoskeletal examination was positive for low back pain. Petitioner underwent testing with respect to his chest pain and was eventually discharged. He was also prescribed Mobic for his back pain. On June 3, 2014, he returned to Clay County Hospital for a stress electrocardiogram, which was normal and it was noted he had "excellent exercise capacity". PX3, RX1.

On June 6, 2014, Petitioner presented to Dr. Maria Perez at the CCH Medical Clinic with complaint of abdominal pain off and on, and reported history of a hernia. He also complained of residual low back pain, as well as chest pain and testicular pain with a left testicular nodule. He also noted he was bitten by a tick just prior to his recent hospitalization and was not sure if he removed the head when he pulled the tick off. He reported he recently had to lock up his pain medication, as his wife had taken too much Oxycontin. He stated he was "ok with Tramadol in the house". Examination was normal and, in particular, the musculoskeletal examination showed normal range of motion, muscle strength and stability. Dr. Perez noted Petitioner was "stable with musculoskeletal pain. The diagnoses included "backache, unspecified". Petitioner underwent a scrotal ultrasound, as ordered by Dr. Maria Perez for his testicular pain. PX3, RX1. He was given a full release for work by Dr. Perez at that time. RX5.

On Sunday, June 22, 2014, Petitioner was taken by ambulance from his home to Clay County Hospital at approximately 2:45 p.m. with complaint of back pain. He presented with "chronic back pain", spasm, stiffness, and tenderness in the left and right low back. He described sharp, stabbing pain that he rated at 9/10. He also reported numbness and tingling to his hands and feet. There are conflicting statements within the record as to the history: sustained while twisting; did not suffer any apparent associated injury; twisted the wrong way at noon today and aggravated chronic back pain; two weeks ago threw a bundle of shingles off a roof and hurt his back then also; was picking up a two gallon water jug when he felt pain; first hurt back two weeks ago throwing a bundle of shingles on his job; was not seen by doctor two weeks ago. Examination revealed bilateral low back pain with rest and movement. Range of motion was painful with all movement. Petitioner was given injections of Toradol, Norflex, and Nubain, which resulted in marked improvement. Petitioner was prescribed Flexeril, Naprosyn, and Norco. He was instructed to follow up with his family physician in two to three days and to avoid lifting and bending until he felt better. PX3, RX1.

On June 27, 2014, at 1:18 p.m. Petitioner gave a recorded statement to Marla Howard of Iowa Mutual Insurance Company. He reported that on June 9, 2014, he was driving his company truck back to a job site after leaving the lumber yard and loading lumber in the back of the truck. A co-worker named Bob was with him. As he was driving he looked over at a new building or something and when he turned to look he felt a sharp pain in his lower back. He was not able to work very well when he got to the job site at around 1:30 p.m. He reported the incident to his employer (Chad and Clarissa) that day. He continued to work after that day but had pain off and on, and the guys on his crew did most of the work. He went to the chiropractor a couple of times following the incident, someone he had seen a year or two before for his arm. He did not recall the dates he was seen. RX2.

Petitioner stated to Ms. Howard that on Sunday June 22, 2014, he was home and pulled his water jug out of his work truck to empty out the water. The jug was small, probably two gallons. As he bent over to pour out the water, he felt something pull in his back. The pain was strong so he rested in bed for awhile. He woke up an hour or two later and was in so much pain he had to call an ambulance because he could not walk. The hospital gave him injections and sent him home with muscle relaxers and pain medication. He was told to stay off work and his last day of work was Friday June 20, 2014. He continued to have pain and swelling and wanted to see a doctor who specialized in treatment of the back. RX2.

Petitioner stated to Ms. Howard that he had been in an auto accident in 1995. He was hit by another vehicle and injured his back and knee. He was treated for his injuries but did not recall the names of any of his doctors. Surgery was discussed but the doctors told him he should live with it as long as he could. He stated he had not seen a doctor in the past year for his back pain, but had been seen for other health issues. RX2.

On July 1, 2014, Petitioner presented to Dr. Perez at CCH Medical Clinic in follow up to his emergency room visit of June 22. The history noted is "states he threw bundle shingles off roof and had back pain since". He reported sharp pain in his back and examination revealed a mild antalgic gait and mild lower back pain. His examination was otherwise unremarkable. It was noted he would be referred to orthopedics. On July 10 Petitioner underwent a lumbar MRI, noting low back and leg pain for three weeks following a lifting injury. The MRI revealed multilevel degenerative disc disease with central and paracentral disc herniations at L1-2, L2-3, and L5-S1. PX3.

On July 31, 2014, Petitioner presented to Dr. Don Kovalsky, of Orthopaedic Center of Southern Illinois, upon referral by Dr. Perez. He reported he was injured at work on May 22 while throwing shingles off a roof. He continued working restricted duty and woke up on June 22 in severe pain and was taken by ambulance to the emergency room. He reported prior "minor episodes" of back pain, but nothing this severe. On examination, there was tenderness at the lumbosacral junction and in the sciatic notches bilaterally. He had a mildly positive straight leg raise test, as well as positive Valsalva and Bowstring tests on the left. Strength and reflexes were normal. Lumbar x-rays showed a transitional L5 vertebrae which was partially sacralized, but were otherwise normal. Dr. Kovalsky reviewed the MRI and noted mild narrowing at L4-5 with a small annular tear centrally and to the left, with no neural compression. There were degenerative changes at T11-12, T12-L1, and L1-L2. Diagnosis was preexisting degenerative disc disease with acute annular tear at L4-5 on the left, causing back and radicular symptoms. Dr. Kovalsky ordered a Prednisone taper followed by Naprosyn, Flexeril, and Norco, and instructed Petitioner to remain off work. He was to return in three weeks, for possible steroid injections and/or therapy. On September 10, 2014, Dr. Kovalsky completed a referral form to pain management for injections. The record does not contain an office note from an examination of this date. PX4.

On October 20, 2014, Petitioner underwent bilateral L5-S1 transforaminal epidural steroid injections by Dr. Aiping Smith, upon referral by Dr. Kovalsky. He returned to Dr. Kovalsky on November 14, 2014, with reported rash on his face for two weeks, which he attributed to a new blood pressure medicine. He was referred to his primary care physician for

this issue. On November 19 he presented to Dr. Smith for a second epidural injection. Noting the rash and the possibility of shingles, Dr. Smith cancelled the injection. PX4.

On February 20, 2015, Petitioner returned to Orthopaedic Center and was seen by Physician's Assistant Devin Haertling. It was noted he had been seen by Dr. Kovalsky one time in July, had one injection, and had been continuing to call the office for Norco refills. Dr. Kovalsky had agreed to continue seeing him and PA Haertling noted he was seeing Petitioner for medication management. Petitioner was not working, had filed for disability, and reported his wife was also on disability. He stated he wanted to return to work at some point in the future, but could not work with the pain he was having. He complained of pain in the left SI joint, occasional radicular left leg pain, and occasional pain in the midline of his lumbar spine. On examination, he had pain with extension, tenderness in the left SI joint, and positive SI testing. Reflexes were normal. Assessment was, "Very mild degenerative disc disease of L1 to L3 with a previous disc protrusion of L4-5 to the left." PA Haertling ordered a new lumbar MRI to check status of the L4-5 herniation and assess Petitioner's ability to return to work. Petitioner's Norco was refilled and he was instructed to undergo physical therapy. PA Haertling noted, "I told him that based off of his last MRI, I think it would be something that he could get back to work for. I do not think that he necessarily needs to be applying for disability." PX4.

On February 24, 2015, Petitioner underwent a lumbar MRI, which revealed: (1) T12-L1 small left paracentral disc protrusion with no impingement; (2) L1-2 small central disc extrusion with no impingement; (3) L4-5 mild disc bulge, small central disc extrusion, mild facet hypertrophy causing mild bilateral lateral recess and foraminal stenosis with no impingement; (4) transitional L5 vertebral body. PX4.

On March 6, 2015, Petitioner returned to PA Haertling with continued complaints of low back pain and left leg pain. It was noted he was trying to apply for disability. Examination revealed low back pain which was exacerbation with flexion and extension. He had mild tensions signs of the left leg and some tenderness in the SI joint on the left. Prescription for Norco was refilled and Petitioner was to return in two months. PX4.

On March 9, 2015, Petitioner presented for physical therapy evaluation at Clay County Hospital, upon referral of PA Haertling. He reported low back pain since throwing roofing shingles at work in May 2014. The pain radiated down his left leg to the foot, and symptoms were aggravated by sitting, standing, walking, and driving. It was noted he was not working. On examination he had tenderness in the lumbar spine and bilateral SI joint. Straight leg raise was negative. Therapy was recommended two to three times a week for four to six weeks. Petitioner attended physical therapy on March 9, 11, 13, 16, 17, 18, and 20. His complaints and improvement waxed and waned throughout the treatment. PX3.

On May 6, 2015, Petitioner returned to PA Haertling. He reported to the nurse that he had attended physical therapy for three weeks and sharp pains started in his right leg so he stopped. He stated he had occasional numbness and tingling in his legs. He reported to PA Haertling that most of his pain was his in low back, but he was "now complaining of bilateral leg pain as well, not just the left". On examination, he did not have any specific tension signs in his legs. He had axial back pain with flexion and extension and tenderness at the lower lumbar

spine. Assessment was degenerative disc disease at L4-5 with herniation lateralizing to the left with low back pain predominantly. PA Haertling refilled Petitioner's Norco and indicated he would review the latest MRI with Dr. Kovalsky to see if he recommended surgery or pain management with injections. He noted if he continued to follow Petitioner he would have him sign an Opiate Agreement and do a urine drug screen. PX3.

On May 28, 2015, Petitioner was examined by Dr. Kovalsky. He noted that Petitioner's initial MRI showed some degenerative changes and annular tear at L4-5, whereas the recent MRI in February showed the annular tear was now a small left central disc herniation with a small caudally migrated fragment. He clarified that the original MRI stated the abnormality was at L5-S1 but it was probably at L4-5, as L5-S1 was a transitional segment. On examination, Petitioner had significant restriction in lumbar motion with pain and positive straight leg raise on the left. Reflexes and strength were normal. Dr. Kovalsky noted Petitioner had been off work for a year and that therapy and one epidural injection had given only minimal relief of pain. His impression was persistent back and radicular left leg pain due to degenerative disc disease and left central herniation at L4-5. He noted this was the first normal lumbar level, as Petitioner had a transitional L5-S1 segment. He recommended surgery of anterior discectomy and interbody fusion. Petitioner was advised the surgery would not go forward until he quit smoking and passed nicotine screens. Dr. Kovalsky recommended an anesthetic discogram prior to scheduling surgery. On September 23, 2015, Petitioner underwent a diagnostic discogram at L5-S1 by Dr. Aiping Smith, upon referral of Dr. Kovalsky. PX4.

On October 9, 2015, Petitioner underwent a lumbar MRI, which revealed: (1) mild facet hypertrophy with no spinal or foraminal stenosis at L1-2, L2-3, L3-4, and L4-5; (2) large central disc herniation at L5-S1, touching the S1 nerve roots, with mild bilateral foraminal stenosis. It was noted the spinal count was difficult with transitional S1. PX4.

Dr. Kovalsky testified by way of deposition on October 18, 2015. He is a Board Certified Orthopedic Surgeon with a subspecialty in spinal surgery and the treatment of spinal injuries. He testified consistent with his treating records. He obtained a history from Petitioner that while working for Barr Construction Company on May 22, 2014, he threw a bundle of shingles off a roof and twisted and felt immediate pain in his back. He reported it to his employer, and was put on restricted duty. On June 22, 2014, he had a severe exacerbation of the pain when he awoke in the morning. Dr. Kovalsky testified there was no history of a lifting episode or trauma on that day. He reviewed the record from Welty Chiropractic dated May 22, 2014, and noted the history of accident was consistent regarding throwing shingles off a roof. He reviewed the record from Clay County Hospital dated May 27, 2014, and noted the history of accident was consistent. PX7.

Dr. Kovalsky testified Petitioner had a transitional L5-S1 vertebral segment, which was an incidental finding on the MRI scans. He noted some radiologists referenced the transitional vertebra and some did not, but Petitioner's problem was at the level above, which he referenced as L4-5. He had some pre-existing degenerative changes at L4-5, not related to the work accident. He also had an annular tear at L4-5 with a small herniation to the left, which Dr. Kovalsky opined was a new injury caused by the twisting episode in May 2014. He opined the annular tear, rather than the herniation, was the major problem and would not resolve with

conservative treatment. He recommended anterior fusion, which would remove both problems, and had a high likelihood of resolving Petitioner's symptoms. Petitioner had been scheduled for the surgery in November 2015, but it was postponed as Petitioner had not completely quit smoking yet. Petitioner's most recent MRI of October 9, 2015, showed that the disc herniation at L4-5 had gotten larger, when compared to the MRI from 2014. Dr. Kovalsky opined this was because the weakness in the annulus allowed the herniation to enlarge, which was a natural progression of the problem. He explained the disc herniated because of the annular tear, which allowed the disc material to escape. He did not feel Petitioner could work regular duty, but could work "very sedentary duty", which he understood was not available. Dr. Kovalsky opined the annular tear, disc herniation, and need for surgery were related to Petitioner's work accident of May 22, 2014. PX7.

On cross-examination, Dr. Kovalsky acknowledged he did not have any records for Petitioner that predated May 2014. He further acknowledged that, although he was shown records from Clay County Hospital and Dr. Welty during direct examination, he had not previously seen those records and they were not part of his chart. Further, although Petitioner reported previous minor episodes of back pain, Dr. Kovalsky had no details as to dates, severity of pain, or traumatic events in connection with the episodes. It was his understanding that following the incident at work on May 22 Petitioner returned to work on restricted duty, then he had a severe exacerbation of pain on June 22, causing him to go to the emergency room, and he had not worked since then. PX7.

Dr. Kovalsky testified he relied upon the accuracy of the history given to him by Petitioner in formulating his opinions. Petitioner admitted he had prior episodes of low back pain, which was not surprising given his age and profession, but never had extensive treatment for it. He had an exacerbation on May 22, 2014 with twisting and throwing shingles off the roof. The symptoms persisted but were not completely disabling and he was working in a light duty capacity. Petitioner then woke up on June 22, 2014, with severe pain. Dr. Kovalsky testified the imaging studies showed he had an annular tear, which was usually a relatively acute problem, and which usually produced significant back pain. He believed the annular tear occurred with the May 22 incident and on June 22 it tore completely, resulting in the actual disc herniation. He testified that once the annulus is torn it does not take a lot of energy to increase the pressure and cause the disc to herniate. Twisting, coughing, or even bending over to pick up a piece of paper off the floor, could cause such pressure. He noted Petitioner did not do anything in June that would significantly increase the pressure, and that the annular tear just progressed. Since that time the tear had gotten bigger and the disc herniation developed. Dr. Kovalsky conceded that, given Petitioner's history of chronic back problems, it was possible the annular tear was present prior to May 2014. Dr. Kovalsky acknowledged Petitioner did not give him a history of picking up a two-gallon water jug on June 22, nor did he give him a history of driving down the road and experiencing sharp back pain when he turned to look at something. PX7.

On November 28, 2015, a report was issued by Dr. Joseph Monaco following a records review at the request of Respondent. In addition to Petitioner's treatment records since May 22, 2014, Dr. Monaco also reviewed records from Bonutti Clinic and Clay County Hospital for treatment in 2012, including a lumbar x-ray of May 30, 2012, following a work accident. At that time, Petitioner complained of a sharp burning pain in his low back and down his left leg to the

foot. Assessment was lumbar back pain. Petitioner worked light duty for a time, underwent physical therapy for approximately one month and took prescription medication. He was released on an as needed basis after approximately one month of treatment. RX4, Dep. RX2.

Dr. Monaco next turned to Petitioner's treating records from May 22, 2014, forward, including MRI scans and lumbar x-rays. He also reviewed Dr. Kovalsky's deposition. He noted that Dr. Kovalsky was unaware of Petitioner's history of low back pain and treatment in June 2012, and was unaware of Petitioner's report on June 22, 2014, that he felt pain when he picked up a two gallon water jug. Dr. Monaco noted that Petitioner had no complaint of back pain during or after the stress test of June 3, 2014. He further noted there was no record of back pain after the May 22 incident of the severity noted after the June 22 incident, and no MRI was done until after the June 22 incident. Dr. Monaco agreed with Dr. Kovalsky that there was no nerve root impingement with radiculopathy. RX4, Dep. RX2.

Dr. Monaco opined that as a result of the work accident on May 22, 2014, Petitioner sustained a mild lumbar strain which had resolved. He noted that from May 22 until the incident on June 22, 2014, Petitioner was functioning satisfactorily. He was working and was able to complete a cardiac stress test without back complaints. When hospitalized for chest pain on May 27, 2015, he reported he was only taking Mobic (similar to Aleve) for his backache. He reported the same thing when taken to the hospital on June 22, 2014. Dr. Monaco noted that following the June 22, 2014, incident, there was an onset of much more severe symptomatology and functional loss which became chronic, with resultant use of high doses of Norco, an opioid. He opined Petitioner's current chronic low back pain was not consistent with any anatomic or physiologic abnormality and was not related to the minor trauma of May 22, 2014. He noted medical evidence did not support minor trauma as a cause of serious low back illness. He opined that Petitioner's work injury of May 22, 2014, resulted in only a mild lumbar strain, which had resolved, and that his current chronic non-specific low back pain was unrelated to the accident. No medical treatment or restrictions were needed in reference to the May 22, 2014, incident. RX4, Dep. RX2.

On January 26, 2016, Petitioner was admitted to SSM Good Samaritan Hospital and underwent an anterior lumbar discectomy and decompression at L5-S1 with interbody fusion by Dr. Kovalsky. Postoperative diagnoses were degenerative disc disease and left central disc herniation at L5-S1, transitional segment, chronic low back pain, and left lumbar radiculopathy. The history noted on the operative report was that Petitioner had injured himself over a year ago lifting roofing tiles at a roofing job. Petitioner remained hospitalized until January 29, 2016, and participated in physical and occupational therapy while inpatient. It was noted he had no help at home, as his wife was disabled with MS and able to help only minimally. PX5.

On February 4, 2016, Petitioner had a postoperative exam by FNP Melanie Cross. He reported pain in his left leg to his ankle and knee and denied any numbness or tingling. His pain ranged from 4/10 to 7/10. Lumbar x-rays showed the plate and screws at L5-S1 in an acceptable position and alignment. He returned to FNP Cross on March 3, 2016, and reported he had fallen in his driveway a week before but did not sustain any injury. He rated his pain at 9/10, and his wife added that he had not been up and moving around much. FNP Cross instructed Petitioner to be up and walking, and advised he should be walking 30 minutes a day by the next visit. PX4.

Dr. Monaco testified by way of deposition on March 8, 2016. He is a Board Certified Orthopedic Surgeon. His opinions were based on an analysis of records rather than a physical examination of Petitioner. Dr. Monaco testified consistent with his report of November 28, 2015. He opined that on May 22, 2014, Petitioner sustained a mild lumbar strain which had resolved. He diagnosed a strain based on the fact that there was no significant treatment between May 22 and June 22, other than the use of an NSAID, and Petitioner continued to work during that time. There was no evidence that between these dates Petitioner had any ongoing treatment or use of opioids or muscle relaxants. Dr. Monaco noted Petitioner's incident two years prior was very similar, in that it resolved quickly with minimal treatment. Dr. Monaco found significant that Petitioner's treadmill test did not produce significant back complaints, as that is a stressful activity and back pain could have impaired his performance. RX4.

He testified that as of June 22, 2014, Petitioner needed no further treatment related to the May 22, 2014, incident. He testified that the surgery recommended by Dr. Kovalsky was not related to his work accident was not related to his work accident of May 22, 2014. He cited several medical references in support of his opinion that there was no evidence to link minor trauma such as Petitioner's accident of May 22 to the development of serious low back illness or disability. He further opined, citing medical references, that the surgery recommended would offer a poor prognosis for improvement, due to several factors including Petitioner's history of smoking and narcotic dependency, his compensation litigation, and his chronic pain syndrome. He also noted that the result of Petitioner's discogram was indeterminate, further indicating he was a poor candidate for surgery. Even if he were a viable candidate for surgery, Dr. Monaco testified it would not be related the mild lumbar strain he sustained on May 22, 2014. Further, Petitioner did not require any work restrictions related to the May 2014 incident. RX4.

On cross-examination, Dr. Monaco confirmed and agreed with Dr. Kovalsky that Petitioner has a transitional vertebra at L4-5 and that all of the radiologists agree with that as well, though they may have referred to it as L5-S1. He believed the annular tear shown on Petitioner's MRI was a degenerative change rather than acute, and he did not believe that Petitioner's herniated disc was causing his pain. He testified surgery for a herniated disc was appropriate if there are objective findings such as absent reflex or reflex asymmetric from the opposite side and a pinched nerve with resultant muscle weakness and sensory deficit. These objective findings were not present in Petitioner's case. RX4.

Regarding the accident of May 22, 2014, Dr. Monaco acknowledged he did not know how much the bundle of shingles weighed. He further acknowledged that after the accident Petitioner complained of continuous pain at a level of 10/10. He was not aware of whether Petitioner was off work following the accident or whether he was working light duty or full duty. He acknowledged that when Petitioner was in the hospital for chest pain May 27-28, 2014, he also complained of back pain and referenced the incident of throwing the shingles off the roof. Dr. Monaco testified that the histories he received were all contained in the medical records, and he did not review an accident report, First Report of Injury, or recorded statement. RX4.

Dr. Monaco testified he is a practicing surgeon primarily specializing in the knee and shoulder. He performs three to four surgeries a month. He has not performed back surgery since 1991. He currently sees patients two days a week. RX4.

On March 31, 2016, Petitioner returned to FNP Melanie Cross for a post-operative evaluation. He reported he was increasing his ambulation time and decreasing his pain medication and felt he was doing much better. He rated his pain at 6/10. On examination, he had mild point tenderness over the incision but the examination was otherwise normal. He was to further reduce his narcotic usage, continue use of the TLSO brace, and avoid lifting, bending, and twisting. He returned to FNP Cross on April 28, 2016, and reported he was doing well. He continued to rate his pain at 6/10. Examination was normal. He was to begin physical therapy three times a week for one month, and was given a low profile back brace to replace the TLSO brace. He was to remain off work until seen again on May 26, 2016. The Arbitrator notes this is the last medical record from the Orthopaedic Center of Southern Illinois, although there is a submitted bill for a visit on May 26, 2016. PX4, PX8.

Petitioner submitted medical records from Bonutti Orthopedic Clinic for treatment rendered for low back pain from May 30, 2012, through June 20, 2012. Treatment included medication and physical therapy. PX6.

CONCLUSIONS OF LAW

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

The parties stipulated that Petitioner sustained an accident which arose out of and in the course of his employment on May 22, 2014, which caused injury to his lumbar spine. The parties dispute whether Petitioner's complaints, medical treatment, and temporary total disability as of June 22, 2014, are related to said accident. The parties further dispute the admissibility of Petitioner's Exhibit 9, an Employer's First Report of Injury dated June 24, 2014.

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 Commission*, 265 Ill.App.3d 681, 685 (1st Dist. 1994).

The Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that his current complaints with regard to his lumbar spine are causally related to his accident of May 22, 2014. In so concluding, the Arbitrator finds significant the inconsistent

histories given by Petitioner, the minimal treatment Petitioner sought following the May 22, 2014, incident, and the subsequent intervening incident at home on Sunday June 22, 2014.

Inconsistent histories

When a petitioner provides inconsistent evidence at arbitration that undermines the chain of events of a claimed injury, that evidence will not support a finding of causal connection. *Meers v. GSI Group*, 15 IWCC 639 (August 20, 2015).

The Arbitrator finds significant the following inconsistent histories given by Petitioner. (1) When Petitioner was taken by ambulance to Clay County Hospital on June 22, 2014, he reported he twisted his back dumping water out of a jug at home and felt immediate back pain. He also reported that two weeks prior he had thrown a bundle of shingles off a roof and hurt his back but was not seen by a doctor. The record is clear that the incident throwing shingles was four and one half weeks prior, not two, and he did, in fact, see a doctor. (2) Petitioner completed a portion of the Report of Injury dated June 23, 2014, and stated his problem was due to the incident at home on June 22 when he was pouring out his water jug. In his recorded statement on June 27, 2014, Petitioner reported he was first injured on June 9 when he was driving back to a job site, twisted to see something, and had severe pain after twisting. He also reported pain while dumping out his water jug on Sunday June 22, but made no mention of throwing shingles off the roof on May 22, 2014. (3) When he first presented to Dr. Kovalsky on July 31, 2014, he reported the May 22 shingles incident, but did not mention twisting while driving on June 9 or dumping out a water jug on June 22.

The Arbitrator finds that Petitioner's inconsistent and contradictory medical histories do not support a finding of a causal relationship between the work injury of May 22, 2014, and the medical care that was initiated with the visit to the emergency room on June 22, 2014.

Incident of May 22, 2014

It is undisputed that Petitioner sustained a low back strain on May 22, 2014. Treatment consisted of only two chiropractic adjustments, on May 22 and May 23, 2014. Although Dr. Welty recommended treatment three times per week for two weeks, Petitioner testified he did not see a reason to continue treatment, and discontinued care. There is no indication Dr. Welty restricted Petitioner's work activity as of May 23. Shortly thereafter Petitioner began treating for unrelated medical conditions, including heart problems and a testicular issue, and missed some work due to those problems. He was examined by Dr. Perez for these issues on June 6, 2014, and Dr. Perez noted incidentally that examination of Petitioner's lumbar spine was normal. He eventually returned to work without any restrictions on June 7, 2014, and continued to work his regular job through Friday June 20, 2014. There is nothing in the record to suggest that Petitioner would have had any further care for his back injury of May 22, 2014, had he not experienced the new injury at his home on Sunday June 22, 2014. It would be conjecture to state otherwise, and the Arbitrator declines to so speculate.

Incident of June 22, 2014

The record is clear that on Sunday June 22, 2014, Petitioner had a new injury while at home. He twisted his back dumping water out of a jug and felt immediate back pain. The pain was so severe and debilitating that he called an ambulance and was taken to the hospital. The Arbitrator finds this twisting incident at home on June 22, 2014, was an intervening accident that breaks any causal connection between the work accident of May 22, 2014, and any medical treatment thereafter, beginning with the emergency room treatment at Clay County Hospital on June 22, 2014.

The opinion of a physician on the issue of causation can be disregarded if it is not supported by the credible evidence at arbitration. *Meers v. GSI Group*, 15 IWCC 639 (August 20, 2015). Further, greater weight should be given to a contemporaneous medical history because it is inherently more reliable than a history given at a later time. *Figueroa v. Frontline Communications*, 13 IWCC 71 (January 25, 2015), citing *Vargas v. Millard Maintenance Service Company*, 03 IIC 0013 (2003).

The Arbitrator is mindful that Dr. Kovalsky opined that Petitioner sustained an annular tear in his lumbar spine in the work accident of May 22, 2014, which thereafter progressed. However, his opinion was based upon the history given to him by Petitioner. Dr. Kovalsky testified he relied upon the accuracy of the history provided by Petitioner in formulating his opinion with regard to causation. He further testified he had no knowledge of Petitioner's treatment prior to seeing him on July 31, 2014, and had not seen the records from Welty Chiropractic or Clay County Hospital. The history given to Dr. Kovalsky by Petitioner was that he had progressive symptoms following the work accident of May 22, 2014, and that he woke up on June 22, 2014 in severe pain. The record is clear, however, that Petitioner had a very short term problem following the incident on May 22, 2014, went to the chiropractor only twice and "didn't see a reason" to continue treatment, and was able to resume working at his regular position. Petitioner was under no active medical care for his lumbar spine and was doing well until he developed incapacitating back pain while twisting at home on June 22, 2014.

There was a great deal of testimony at trial regarding Petitioner's assertion that he was encouraged by Mr. Chad Barr of Barr Construction to make up an accident date of June 9 to help Respondent avoid getting in trouble for late reporting of a work injury. The testimony from both Petitioner and Mr. Barr was confusing and convoluted, but ultimately this dispute does not have any bearing on the outcome of the case. It is clear that a superseding, intervening incident occurred while Petitioner was at home on Sunday June 22, 2014, and that this incident was responsible for all medical care thereafter, beginning with the emergency room visit on June 22, 2014. This is consistent with the opinion of Dr. Monaco that Petitioner suffered only a mild lumbar strain on May 22, 2014, that had resolved.

Based on the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being and need for treatment are causally related to his work accident of May 22, 2014. The Arbitrator further finds that Petitioner reached maximum medical improvement on May 23, 2014, that being the second and final treatment by Dr. Welty.

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:

In light of the Arbitrator's findings with respect to issue (F), the Arbitrator finds that medical services rendered on May 22 and May 23, 2014, were reasonable and necessary in Petitioner's care and treatment relative to his accident of May 22, 2014. The Arbitrator finds that Respondent is liable for outstanding medical bills to Welty Chiropractic in the amount of $64.00, for dates of service May 22 and May 23, 2014, as set forth in Petitioner's Exhibit 1, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent is not liable for the remaining bills, as they were incurred subsequent to May 23, 2014.

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 findings above with respect to issue (F), the Arbitrator finds that Petitioner is not entitled to ongoing medical care.

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 findings above with respect to issue (F), the Arbitrator finds that Petitioner is not entitled to temporary total disability, as was not authorized off work.

In support of the Arbitrator's decision relating to issue (O), the admissibility of Petitioner's Exhibit 9, the Arbitrator finds the following:

At arbitration Petitioner sought to introduce Petitioner's Exhibit 9, Illinois Form 45 Employer's First Report of Injury dated June 24, 2014, obtained from Respondent prior to trial pursuant to subpoena. The exhibit was offered to impeach Respondent's Exhibit 3 and to establish a timeline by using the dates on the two documents. Respondent objected to the admission of Petitioner's Exhibit 9 on the basis that it was privileged and inadmissible by statute.

The Arbitrator finds Petitioner's Exhibit 9 is admissible and hereby enters same into evidence. In so concluding, the Arbitrator notes Petitioner laid foundation for the admission of the exhibit and established the document as a business record produced in the ordinary course of business. Parties are free to offer evidence to discredit or impeach the other party's evidence. Further, the Arbitrator finds that no privilege prevents the use of a completed Form 45 in a workers' compensation arbitration proceeding. The form is routinely presented as evidence by both parties. Although Section 6(b) of the Act states that all reports filed shall be confidential, this pertains to and prohibits disclosures by state employees to third parties. Section 6(b) does not prohibit disclosure to Arbitrators of the Commission or the Worker's Compensation Commission itself, who may review the evidence in a case. Even assuming arguendo that the document was privileged, as Respondent asserted, any such purported privilege was waived when Respondent provided a copy to Petitioner's attorney prior to trial.

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

CRUZ ZUNO,

Petitioner,

vs.

NO: 08 WC 47856
08 WC 52385

VETERAN'S TRUCKING, INC.,

Respondent.

17IWCC0706

DECISION AND OPINION ON REVIEW

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

The Arbitrator awarded Petitioner 42.5% loss of use of the right leg and 3.5% loss of use of the left leg under Section 8(e) of the Act. The Arbitrator also found that Respondent was entitled to a credit of 24.68% loss of use of the right leg, which Petitioner had previously received in settlement of claim number 05 WC 40777.

The Commission hereby modifies the Arbitrator's Decision relative only to the nature and extent of Petitioner's right leg condition. The Commission finds the Petitioner to be permanently partially disabled to the extent of 30% loss of use of the right leg, with a credit to Respondent of 24.68% loss of use of the right leg, and otherwise affirms and adopts the remainder of the Arbitrator's Decision.

17IWCC0706

The Arbitrator noted that the July 18, 2008 work accident completely severed the pre-existing, partial ACL tear in Petitioner's right knee, and caused new tears in the meniscus; Petitioner's condition necessitated surgery in the form of right knee arthroscopy, debridement, autograft, hamstring and ACL reconstruction, as well as partial medial and lateral meniscectomies. (T.19-20; PX2; PX4). Following surgery, Petitioner's right knee was aspirated to reduce fluid and swelling; he also underwent work conditioning. A valid functional capacity evaluation (FCE) demonstrated that Petitioner was capable of a very heavy physical demand level, and Petitioner indeed returned to his regular duties with Respondent in May 2009. (T.21-22; PX2). Petitioner did return to Dr. Michael Durkin for follow-up appointments; he returned in July 2009 for a cortisone injection to his right knee, and received synvisc injections to the right knee in March and April 2010. (T.24).

By April 2011, Petitioner testified that he was working for a new employer, and was no longer with Respondent. (T.25). Thereafter, while at his new place of employment, Petitioner sustained another work injury involving his right knee. (T.25-26; T.35).

The Commission finds that following the July 18, 2008 accident, and Petitioner's related medical treatment, Petitioner recovered and returned to work without restriction for Respondent until such time that he voluntarily left Respondent's employ and re-injured his right knee in a subsequent, intervening injury with his new employer. Based on the totality of the evidence, the Commission finds an award of 30% loss of use of the right leg more appropriate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 11, 2016, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses of $90,863.46, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $565.72/week for 21 weeks, commencing December 22, 2008 through May 18, 2009, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $509.15 per week for a period of 72.025 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused 30% loss of use of the right leg (64.5 weeks) and 3.5% loss of use of the left leg (7.525 weeks).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of 24.68% loss of use of the right leg received in settlement of claim number 05 WC 40777.

17IWCC0706

Accordingly, Respondent is liable to pay Petitioner 5.32% in permanent partial disability benefits to the right leg (11.438 weeks). Therefore, the total weeks of permanency benefits for the right leg and left leg is 8.82% (18.963 weeks).

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

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

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: NOV 9 - 2017

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/pm
D: 9-12-17
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZUNO, CRUZ
Employee/Petitioner

Case# **08WC047856**

08WC052385

VETERANS TRUCKING INC
Employer/Respondent

17IWCC0706

On 8/11/2016, 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 0.44% 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:

0328 LEWIS & DAVIDSON LTD
RICHARD C SHOLLENBERGER
ONE N FRANKLIN ST SUITE1850
CHICAGO, IL 60606

1120 BRADY CONNOLLY & MASUDA PC
MARK F VIZZA
TEN 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

Cruz Zuno
Employee/Petitioner

v.

Veterans Trucking, Inc.
Employer/Respondent

Case # **08** WC **47856**

Consolidated cases: **08 WC 52385**

17IWCC0706

An *Application for Adjustment 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 **May 11, 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 _____

17IWCC0706

FINDINGS

On **7/18/08 and 11/12/08**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$44,126.25**; the average weekly wage was **$848.58**.

On the date of accident, Petitioner was **42** 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 **$10,149.40** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $90,863.46, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $565.72/week for 21 weeks, commencing 12/22/08 through 5/18/09, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $509.15/week for because the injuries sustained caused the 42.5% loss of the right leg (91.375 weeks) and 3.5% loss of the left leg (7.525 weeks), as provided in Section 8(e) of the Act.

Respondent is entitled to a credit of 24.68% loss of use of a right leg received in settlement of claim number 05 WC 40777. Accordingly, Respondent is liable to pay Petitioner 17.82% permanent partial disability to the right leg (38.313 weeks).

Therefore, the total weeks of permanency benefits awarded for the current claims are 45.838 weeks or $23,338.42.

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

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

08-06-16
Date

AUG 11 2016

Zuno, C. v. Veteran's Trucking Corp
08 WC 47856 & 08 WC 52385

Addendum to Arbitration Decision

I. Summary of Evidence Presented

Per stipulation, this claim involves accidents of July 18, 2008 and November 12, 2008. Petitioner testified that prior to these accidents; he injured his right knee while playing soccer and received surgery for the knee in 2000. (PX3, p.2) An MRI of October 3, 2000 revealed a right medial meniscus tear, posterior lateral meniscus tear, and an ACL tear. (PX3, p.4) Petitioner received surgery and made a full recovery. (PX3 p.5)

Petitioner also testified that he sustained a right knee injury while working for Respondent on August 25, 2005. On November 2, 2005, Dr. Eric Chassin performed surgery for this injury consisting of arthroscopic and partial medial and lateral meniscectomy. (PX2, p.13) The post-operative diagnosis was right knee medial meniscus tear and lateral meniscus tear. (PX2, p.13) On January 3, 2006, Dr. Chassin last saw Petitioner at which time he was already back to work full duty. (PX2, p.24) The discharge note contains Petitioner's statement that "He is doing well. Little aches and pains occasionally, but overall feels satisfactory." A settlement for the August 25, 2006 was approved on July 3, 2006 in the amount of 24.68% of the right leg. (RX#5)

Petitioner testified that at the time of the prior settlement, he was having no problems with his right knee. At that time, he testified his regular job duties were to deliver exercise machines to homes and businesses. He testified that the machines weighted between 500 and 1000 pounds. He would move the machines with two other co-workers using only a non-motorized dolly with wheels. He would sometimes move the machines up and downs stairs. Despite the physical demands of this job, he did not seek any medical attention for his right knee until after the accident of July 18, 2018.

Petitioner testified that on July 18, 2008, he and two-coworkers were in the back of a truck preparing to unload a machine. The machine was on a dolly. Without warning, a co-worker spun the machine, which struck his right knee which bent inward. He testified that immediately thereafter, he notice severe pain in his right knee.

Respondent sent Petitioner to Concentra Medical Center on July 23, 2008. (PX1, p.6) The initial report quoted Petitioner as saying "while moving a machine it stop and I hurt my right knee." It further stated that Petitioner reported he forcefully struck the front of his right knee on some exercise equipment. The report neither confirms nor denies that the knee bent or twisted when it was struck. (PX1, p.6) The note does confirm exacerbation of knee symptoms with bending, squatting, kneeling, pivoting, walking, stair climbing and lifting. He also reported "something feels loose in there." The assessment was cruciate ligament strain, and "Abnormal posterior drawer exam with possible

cruciate laxity. Old? New? History right knee arthroscopy in 2007 for 'ligament injury.' Cannot r/o: acute trauma to posterior cruciate ligament." (PX1, p.7) Petitioner was referred for physical therapy and given work restrictions. Petitioner testified that work was initially provided within the restrictions.

Also on July 23, 2008, Petitioner was initially seen by a physical therapist at Concentra. (PX1, p.12) The therapist documented that Petitioner reported "banging his R knee onto a metal machine also twisting the knee at the same time." (PX1, p.12)

Following four therapy sessions, Petitioner returned to the Concentra physician on August 28, 2008. (PX1, p.28) Petitioner reported unresolved right knee pain and a give way sensation. (PX1, p.28) The doctor recommended an MRI for the right knee. (PX1, p.29) The MRI was performed on September 20, 2008 reported as revealing an extruded and partial macerated medial meniscus with a fluid filled defect suggestive of a meniscal flap tear. The report stated "an acute meniscal flap tear is possible." The report further noted anterior cruciate ligament fibers appeared discontinuous, consistent with history of old ACL tear. (PX1, p.33) On September 24, 2008, Concentra advised Petitioner to consult an orthopaedic surgeon. (PX1, p.35) The doctor continued his restrictions of sitting 80% of the time, wear brace, no climbing stairs or ladders, no squatting, no kneeling." (PX1, pp.29, 35)

On October 6, 2008, Petitioner consulted orthopaedic surgeon, Dr. Michael Durkin. (PX2, p.26) Petitioner provided a history of an old injury and arthroscopy. (PX2, p.26) Dr. Durkin commented that at the time of prior surgery there had been an ACL tear which had not been repaired by Dr. Chassin. (PX2, p.26) Dr. Durkin later reviewed the films from the prior surgery and confirmed that there had been a partial ACL injury but no definite ACL tear at that time. (PX2, p.72) The note states that "Unfortunately, he has developed more and more pain in the knee and difficulty in that he recently twisted his knee while working. He has a new tear and has difficulty with the use of this knee. He has difficulty playing soccer. He has difficulty being athletic at all since his last injury. He feels as though his knee pivoted and that is when he tore his lateral meniscus just recently." (PX2, p.26) Dr. Durkin diagnosed tears of the lateral meniscus, medial meniscus and ACL. (PX2, p.26) He recommended surgery for these injuries. (PX2, p.26) He ordered light duty restrictions. (PX2, p.26)

On November 2, 2008, Petitioner was seen for a Respondent's IME by Dr. David Trotter. (RX4, p.6) Dr. Trotter claims Petitioner provided a history that "he had been moving a machine which suddenly stopped, and he smashed his right knee onto the machine." (RX4, p.6) The point of impact was the outer aspect of the tibia at the lower aspect of the knee joint. (RX4, p.6) Petitioner's complaints since the accident of July 18, 2008, were easy fatigue in the knee, burning, cracking and popping of the knee. (RX4, pp.6-7) Dr. Trotter's diagnosis was a knee contusion based upon the injury mechanism and the history and the exam findings and the review of records." (RX4, p.8) He further stated that the injury "appeared to have superimposed upon a preexisting abnormal knee which did not appear to have been affected at all by that contusion sustained on July 18,

2008." (RX4, p.8) Dr. Trotter testified that no further treatment was necessitated by the July 18, 2008 accident. (RX4, p.8)

While awaiting approval for surgery, Petitioner continued to perform work. Petitioner testified that on November 12, 2008, he was moving a 500 pound machine up a flight of stairs with two co-workers. He stated that he and one co-worker were above the machine pulling and a third co-worked was below the machine pushing. The co-worker next to him stumbled on a stair and the weight shifted to him. He twisted his left knee and felt a pop in this left knee.

For this new accident, Respondent sent Petitioner to Concentra on November 20, 2008. Concentra took a work accident history of "I was moving a cross trainer and injured my left knee." (PX1, p.38) The note stated Petitioner felt a pop in the left knee and a gradual onset of pain. (PX1, p.38) He was diagnosed with a knee strain, given light duty work restrictions, and advised to return for follow up. (PX1, p.39) On November 23, 2008, Petitioner reported to Concentra that there was no improvement in his left knee. (PX1, p.42) The doctor commented that no physical therapy was ordered because he was awaiting surgery for the right knee. (PX1, p.42) On November 30, 2008, Petitioner returned to Concentra with unresolved left knee pain and an MRI of the left knee was recommended. (PX1, p.47) On December 3, 2008, Petitioner returned to Concentra where he was again referred for an MRI of the left knee. (PX1, p.49)

On December 12, 2008, Petitioner consulted Jacqueline Martinez, D.C., for his accident of November 12, 2008. (PX3, p.67) He provided a history of "carrying a cross trainer exercise machine to a second floor with 3 co-workers. He felt a pull and pain in his left knee." (PX3, p.67) Dr. Martinez diagnosed a left knee sprain r/o meniscus injury with MRI. (PX3, p.67) Dr. Martinez provided electrical stimulation and rehabilitation exercises on December 29 and 31, 2008. (PX3, pp.73-74)

On December 22, 2008, Dr. Durkin performed the surgery on the right knee. (PX2, p.32) The surgical indication was described as old knee injury with surgery on November 2, 2005 and unfortunately since that time he developed increasing pain, locking and catching. At that time, he had a work injury, had a medial meniscal tear and MRI. Petitioner recently twisted his knee, most approximately 05/16/08 at work, had pain, locking and catching and obvious ACL injury as well. (PX2, p.32) Surgery consisted of a right knee arthroscopy, debridement, autograft, hamstring ACL reconstruction and partial medial and lateral meniscectomies. (PX2, p.32) The post-operative diagnoses were right anterior cruciate ligament tear plus medial and lateral meniscus tears. (PX2, p.32) Starting on December 22, 2008, Petitioner was certified off work by Dr. Durkin. (PX2, p.34)

On December 31, 2008, Dr. Durkin ordered physical therapy at ATI. (PX2, p.37) ATI performed an initial evaluation on January 2, 2009. (PX6, p.6) A therapy progress report of January 23, 2009, stated that Petitioner was receiving treatment only to the right knee, that he was improving and that additional therapy was required to address strength

and motion deficits. (PX6, p.6) On January 26, 2009, Dr. Durkin recommended continued therapy and no work. (PX2, p.41)

On January 26, 2009, Petitioner returned to Dr. Trotter for a second IME. (RX4, p.10) Per Dr. Trotter, Petitioner reported an injury to the left knee of November 2008. (RX4, p.10) The accident description was that he was carrying a large object, and he had twisted and jolted the left knee. (RX4, p.10) Dr. Trotter's diagnosis regarding the November 2008 accident was a sprain strain of the left knee superimposed on pre-existing wear and tear and degenerative changes. (RX4, p.13) Dr. Trotter stated Petitioner required no further treatment as a result of the November 2008 left knee accident. (PX4, p.13) On cross-examination, Dr. Trotter agreed that he had reviewed no operative reports. (RX4, pp.13-14)

On February 19, 2009, ATI performed another progress evaluation. (PX6, p.30) The evaluation again noted improvement with treatment to the right knee only. (PX6, p.30) The therapist again recommended additional therapy to address strength and motion deficits. (PX6, p.30) On February 23, 2009, Dr. Durkin noted continued fluid in the right knee impeding endurance. (PX2, p.44) Dr. Durkin aspirated the knee and injected cortisone. (PX2, p.44)

On March 23, 2009, ATI performed another progress evaluation. (PX6, p.39) The note stated that Petitioner was improving but recommended continued therapy for strength deficits and to prepare him for work conditioning. (PX6, p.39) The note stated that Petitioner would require work conditioning to return to his customary employment which was classified as very heavy work. (PX6, p.39) Dr. Durkin approved this recommendation on March 24, 2009. (PX6, p.41)

On April 2, 2009, ATI recommended a discharge from physical therapy and transition to ATI's work conditioning program. (PX6, p.44) The initial evaluation for work conditioning was done on April 6, 2009. (PX6, pp.46-50) On April 12, 2009, ATI's work conditioning progress report stated he entered the program functioning at a light-medium level. (PX6, p.59) ATI stated additional conditioning would be required to return Petitioner to a very-heavy level. (PX6, p.59) ATI's April 20, 2009, progress report stated that Petitioner had improved to the medium physical demand level and recommended addition conditioning to return him to a very-heavy level. (PX6, p.71)

On April 20, 2009, Petitioner returned to Dr. Durkin. Dr. Durkin noted improvement in the right knee with unresolved medial aspect pain and swelling. (PX2, p.46) Dr. Durkin also noted that Petitioner's left knee pain had remained unresolved since his work injury to the left knee. (PX2, p.46) Petitioner was given Voltaren gel for both knees and requested that the work conditioning therapist address his left knee issues. (PX2, p.46) Petitioner was directed to remain off work. (PX2, p.46)

On April 26, 2009, ATI reported improvement in work conditioning to the medium-heavy physical demand level and recommended continued work conditioning. (PX6, p.83) On April 30, 2009, Dr. Durkin agreed with this recommendation. (PX6, p.84)

On May 12, 2009, ATI reported improvement in work conditioning to the heavy physical demand level and recommended continued work conditioning to achieve a very-heavy physical demand level followed by a functional capacity evaluation. (PX6, p.106) On May 12, 2009, Dr. Durkin agreed with this recommendation. (PX6, p.107)

On May 15, 2009, ATI performed a functional capacity evaluation concluding that the evaluation was valid and that Petitioner had demonstrated the capacity for the very-heavy physical demand level. (PX6, p.118) On May 18, 2009, Dr. Durkin noted that Petitioner reported his right knee felt great, but that his left knee had not improved since he has been doing the physical therapy and work hardening. (PX2, p.58) Dr. Durkin found medial and lateral joint line tenderness in the left knee and some crepitus behind the patella. (PX2, p.58) Dr. Durkin recommended an MRI for the left knee to rule out chondral injuries or meniscus tears. (PX2, p.58) In terms of the right knee, Dr. Durkin released Petitioner to return to his regular job. (PX2, p.58)

On July 18, 2009, a left knee MRI was done at MRI Lincoln Imaging Center. (PX2, p.74) The impression was unremarkable MRI knee. (PX2, p.74)

On December 23, 2009, Petitioner returned to Dr. Durkin for unresolved bilateral knee pain, right worse than left. (PX2, p.75) In the right knee, Dr. Durkin found medial side tenderness adjacent to a chipped off bone spur. (PX2, p.75) He also confirmed post-traumatic arthritis related to the two meniscectomies and ACL reconstruction. (PX2, p.75) He stated Petitioner had spurring and was almost bone on bone in the medial aspect of the right knee. (PX2, p.75) He administered a cortisone injection to the right knee and provided an unloader brace. (PX2, p.75) In the left knee, Dr. Durkin noted tenderness over the distal pole of the patella. (PX2, p.75) He diagnosed patellar tendonitis and inflammation for which he recommended Aleve. (PX2, p.75)

On February 15, 2010, Petitioner returned to Dr. Durkin for his medial knee tenderness. (PX2, p.77) He found a lot of pain on palpation, range of motion of the medial joint. (PX2, p.77) He recommended a Synvisc injection to the right knee. (PX2, p.77) The Synvisc injection was given on March 15, 2010. (PX2, p.80)

On April 21, 2010, Petitioner returned to Dr. Durkin reporting six weeks of relief following the Synvisc injection. (PX2, p.83) Dr. Durkin recommended a second Synvisc injection and stated that after that injection, Petitioner would be released to return as needed. (PX2, p.83) He stated Petitioner would likely eventually require a unicompartmental versus a total knee arthroplasty to be done hopefully in his sixties. (PX2, p.83)

On June, 7, 2010, Petitioner returned to Dr. Durkin who again recommended a second Synvisc injection. (PX2, p.85) He also stated Petitioner suffered from post-traumatic osteoarthritis in his right knee from his ACL injury and the meniscectomy he had done on this knee from his work related accidents. (PX2, p.85) At that time, Dr. Durkin stated Petitioner would be a candidate for a unicompartmental knee replacement, however given Petitioner's ability to work comfortably with his unloader brace, he recommended postponing surgery. (PX2, p.85)

Petitioner testified that he suffered a subsequent accident while working for McCollister Transportation on April 29, 2011. He received immediate care at Alexian Brothers Medical Center for his right knee. (PX3, p.76) He was seen by Dr. Meisels and referred for physical therapy. (PX3, p.76) On June 17, 2011, he consulted Dr. Martinez for unresolved right knee pain. (PX3, p.76) Dr. Martinez diagnosed a right knee sprain strain and lateral meniscus injury. (PX3, p.76) She recommended conservative care. (PX3, p.77) On July 18, 2011, Dr. Martinez noted Petitioner's condition had improved, he had returned to work, and reached a stable phase of care. (PX3, p.87) She discharged him from care to return if an exacerbation should occur. (PX3, p.87)

On February 20, 2015, Petitioner returned to Dr. Durkin for his right knee. (PX2, p.87) Petitioner described a two week history of swelling in the knee and occasional popping noises when he stands for a while. (PX2, p.87) He stated his pain was worst when walking and standing for a long period of time. (PX2, p.87) Dr. Durkin repeated his prior diagnosis of right knee osteoarthritis. (PX2, p.88) Dr. Durkin provided a cortisone injection to the right knee to help with pain and inflammation. (PX2, p.88) He also gave Petitioner a medial unloader brace to help in his job which required standing all day. (PX2, p.88)

On April 9, 2015, Petitioner returned to Dr. Durkin for both knees. (PX2, p.99) He described 10/10 right knee pain only when he stands or sits for long periods of time. (PX2, p.99) Petitioner reported relief after the last injection and when using his brace. (PX2, p.99) He also described a one month history of left knee pain. (PX2, p.99) Dr. Durkin again diagnosed right knee osteoarthritis. (PX2, p.99) He also diagnosed a possible lateral meniscus tear, and left knee patellar tendonitis from compensating for his right knee. (PX2, p.99) He recommended a right knee MRI. (PX2, p.99)

Dr. Durkin was deposed on September 11, 2011. (PX7) On direct examination, Dr. Durkin opined that the accident of July 18, 2008 was the cause of the injuries he treated in surgery. (PX7, pp.12-13) Dr. Durkin basis for this opinion was that "he was pretty fully functioning prior to that in terms of a fairly high demand job, hurt his knee, and it sounds like he completed the partial ACL tear he had before and then he had a very unstable knee and he had new tears in the meniscus related to that injury." (PX7, p13) Dr. Dunkin stated that the ACL injury identified in 2005 was a questionable partial tear meaning there is a little bit of fraying, but in 2008 the ACL was completely severed." (PX6, p.14) Regarding the left knee, Dr. Durkin testified to a diagnosis of chondral injury related to the accident of November 12, 2008. (PX6, p.14) On cross-examination, Dr.

Durkin testified that meniscus and ACL tears are classically twisting injuries. (PX6, p.19) When asked if a direct blow to the anterior aspect of the knee could cause these tears, he responded "it's possible because it's fairly difficult – you know, we're not in a physics lab. So it's fairly difficult to just have a pure force. I would say that's not the most obvious way to tear an ACL." (PX6, p.19)

Petitioner testified that for the past two years he had been working for an iron factory in Chicago making minimum wage. He worked 10 hours per day and his duties required constant standing. He explained that during the day his leg would swell up and become painful. He stated that he wore a metal reinforced knee brace while working and would alternate using the brace on his knees. He also stated that he would rest to massage his knee and regularly use a cooling gel on his knee.

II. Findings of Fact and Conclusions of Law

A. As to the issue, "F. Is Petitioner's current condition of ill-being causally related to the injury?," the Arbitrator makes the following findings of fact and conclusions of law:

1. Is Petitioner's right knee condition causally related to the accident of July 18, 2008?

An issue raised regarding causal connection is whether Petitioner's right knee twisted at the time of the accident. The Arbitrator notes that the first date of treatment was on July 23, 2008 at Concentra and that Petitioner was sent to Concentra by Respondent. (PX1, pp.6-15) On this date, Petitioner was seen by two professions, Dr. Charles Carlton, and Pappu Patel, P.T. (PX1, pp6-15) Dr. Carlton claims Petitioner described that "he was forcefully struck on the front of his right knee." (PX1, p.6) Dr. Carlton does not state that Petitioner claimed his knee twisted nor that he denied that his knee twisted. (PX1, p.6) On this same date, Mr. Patel took a history from Petitioner. (PX1, p.12) Under the section labeled "Subjective" and "Therapy Initial Evaluation" Mr. Patel describes the mechanism of injury provided by Petitioner as "banging his R knee onto a metal machine also twisting the knee at the same time." (PX1, p.12)

In Dr. Durkin's initial evaluation of October 6, 2008, Petitioner gave a history of twisting his right knee at work. (PX2, p.26) Dr. Durkin confirmed this history in his deposition when he opined that the July 18, 2008 accident caused Petitioner's right knee injury. (PX6, p.7)

In Dr. Trotter's testimony, he stated Petitioner described the accident as "moving a machine which suddenly stopped, and smashed his right knee onto the machine." (RX4, p.6) Dr. Trotter did not state whether he asked petitioner to admit or deny that he twisted

his knee. (RX4) Instead, Dr. Trotter relied upon the history taken by the doctor's at Concentra. (RX4, po.7)

The Arbitrator notes that Petitioner testified that when his right knee was struck his knee bent inward. This impact followed by rotation of the knee is corroborated by Concentra's physical therapy note of July 23, 2018, and by Dr. Durkin's note of October 6, 2008. (PX1, p.12; PX2, p.26) Based on Petitioner's testimony and these records, the Arbitrator finds as fact that at the time of the accident Petitioner's right knee twisted.

In his testimony, Dr. Durkin testified that meniscus and ACL tears are classically twisting injuries. (PX6, p.19) He further stated that the accident of July 18, 2008 was the cause of the injuries he treated in surgery. (PX7, pp.12-13) The basis for this opinion was that "he was pretty fully functioning prior to that in terms of a fairly high demand job, hurt his knee, and it sounds like he completed the partial ACL tear he had before and then he had a very unstable knee and he had new tears in the meniscus related to that injury." (PX7, p13) Dr. Dunkin stated that the ACL injury identified in 2005 was a questionable partial tear meaning there is a little bit of fraying, but in 2008 the ACL was completely severed." (PX6, p.14)

In his testimony, Dr. Trotter's opinion was based in part on the premise that the July 18, 2008 accident was a contusion trauma only and that the knee did not twist. (RX4, p.8) Dr. Trotter also stated that the accident of July 18, 2008, did not cause internal derangement because no swelling was present according to the Concentra note of July 23, 2008 indicating that the injury was not acute. (RX4, p.9-10)

The Arbitrator finds Dr. Durkin's opinion more persuasive than Dr. Trotters for the following reasons. First, as stated above Dr. Durkin's opinion takes into consideration that Petitioner's knee twisted and Dr. Trotter's opinion does not. Second, Dr. Durkin based his opinion on Petitioner being able to perform heavy work prior to the July 18, 2008, which is consistent with an acute injury. Third, Dr. Trotter offers no explanation as to how Petitioner was able to work with a complete separation of his ACL and tears of the medial and lateral meniscus, if they were chronic and present prior to the accident of July 18, 2008.

Accordingly, the Arbitrator finds as fact that Petitioner sustained a complete tear of the ACL and new tears of the meniscus in his right knee and concludes as a matter of law that these conditions were causally connected to the accident of July 18, 2008.

2. Is Petitioner's left knee condition causally related to the accident of November 12, 2008?

As to the left knee, Petitioner was sent to Concentra six days after the accident, where the physician took a history of injury at while moving a cross-trainer, a pop sensation in the left knee, followed by an onset of pain. (PX1, p.38) There was no prior

medical history related to the left knee. (PX1, p.38) He was diagnosed with a knee strain. (PX1, p.39) On November 30, 2008, and December 3, 2008, Petitioner returned to Concentra with unresolved left knee pain and on both dates an MRI of the left knee was recommended. (PX1, pp.47-49)

On December 12, 2008, Petitioner consulted Jacqueline Martinez, D.C., who diagnosed a left knee sprain related to the November 12, 2008 accident. (PX3, p.67) She recommended an MRI to rule out meniscus injury.

On May 18, 2009, Dr. Durkin noted that Petitioner reported his left knee had not improved with physical therapy and work hardening. (PX2, p.58) Dr. Durkin found medial and lateral joint line tenderness in the left knee and some crepitus behind the patella. (PX2, p.58) Dr. Durkin recommended an MRI for the left knee to rule out chondral injuries or meniscus tears. (PX2, p.58)

On July 18, 2009, left knee MRI was done at MRI Lincoln Imaging Center. (PX2, p.74) The impression was unremarkable MRI knee. (PX2, p.74)

On December 23, 2009, Petitioner returned to Dr. Durkin for unresolved bilateral knee pain, right worse than left. (PX2, p.75) In the left knee, Dr. Durkin noted tenderness over the distal pole of the patella. (PX2, p.75) He diagnosed patellar tendonitis and inflammation for which he recommended Aleve. (PX2, p.75)

On September 11, 2009, Dr. Durkin testified that petitioner suffered from chondral injury related to the accident of November 12, 2008. (PX6, p.14) The basis for the causation opinion was that the symptoms began around the time of a significant trauma. (PX6, p.15)

On November 10, 2009, Dr. Trotter testified that "the left knee has a similar injury, a sprain, strain injury, it appeared sustained in November of 08." He stated this condition was superimposed upon pre-existing wear and tear, degenerative abnormalities of the knee. (RX4, p.13) He concluded stating "there was an improbable relationship between his left knee condition and the workplace injury that had occurred in November of /08" (RX4, p.13)

The Arbitrator finds the opinions of Dr. Martinez and Dr. Durkin more persuasive than the opinion of Dr. Trotter for the following reasons. First, the opinion of Drs. Durkin and Martinez take into account the lack of prior injury to the left knee and acute onset of pain following the accident. Second, the opinions of Drs. Durkin and Martinez are consistent with new findings of tenderness, decreased motion and slight swelling six days after the accident. (PX1, p.39) Finally, Dr. Trotter confirms a diagnosis of strain sprain indicating a traumatic event, but fails to identify any traumatic event other than the accident.

Accordingly, the Arbitrator finds as fact that Petitioner sustained a condral injury to the left knee, and concludes as a matter of law that this condition is causally connected to the accident of November 12, 2008.

B. As to the 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?

1. Is Respondent liable for medical expenses related to the right knee injury?

Initially, the Arbitrator notes that Respondent's expert Dr. Trotter offered no opinion regarding the necessity of the treatment provided for the ACL and meniscus tears in Petitioner' right knee. Only Dr. Durkin provided an opinion on this issue and testified that the treatment was necessary. (PX6, p.15)

Petitioner provided itemized bills from the providers as follows:

For services at Hinsdale Orthopaedic Services from October 6, 2008 through July 5, 2010, Petitioner presented a bill with a balance due after payments by the workers' compensation insurer of $37,941.52. (PX2, pp.103-106)

For services at Salt Creek Surgical Center for surgery on December 22, 2008, Petitioner presented a bill for $8,816.00 with no payments. (PX4, p.43)

For services at ATI Physical Therapy for rehabilitation from January 2, 2009 through May 15, 2009, Petitioner presented a bill for $42,090.94 with no payments.

The Arbitrator incorporates here by reference the above medical summary showing that the above surgery involved repair of substantial internal derangement and that the result of rehabilitation resulted in a successful release to very-heavy work duties.

Accordingly, in light of Dr. Durkin necessity opinion, the lack of a contrary opinion, and the successful release to very-heavy work, the Arbitrator finds that the treatment rendered for Petitioner right knee was necessary, and concludes that Respondent is liable for these expenses subject to the Illinois Worker's Compensation Fee Schedule.

2. Is Respondent liable for medical expense related to the left knee injury?

As to the left knee, Petitioner presented Dr. Martinez' bill for office visits and conservative care in the amount of $315.00. (PX3, p.75) These services were provided on

December 29, 2008 and December 31, 2008. (PX3, pp.67-74) Per Dr. Martinez records, this treatment was necessary to treat a left knee sprain-strain. (PX3, p.67)

Respondent's medical expert, Dr. Trotter, examined Petitioner for this injury on January 26, 2009. (RX4, p.10) Dr. Trotter opined that Petitioner required no future treatment for the left knee. (RX4, p.13) Dr. Trotter did not offer an opinion regarding the necessity of the treatment previously provided by Dr. Martinez.

Accordingly, based on the unrebutted opinion of Dr. Martinez, the Arbitrator finds that the treatment rendered by Dr. Martinez was necessary, and concludes that Respondent is liable for these expenses subject to the Illinois Worker's Compensation Fee Schedule.

Regarding the left knee, Petitioner also presented a bill in the amount of $1,700.00 from MRI Lincoln Imaging Center for a left knee MRI of July 18, 2009. (PX 5) This MRI was ordered by Dr. Durkin on May 18, 2009. (PX2, p.58) Dr. Durkin's note of this date shows complaint of unresolved catching and popping sensation in the left knee and tenderness of the medial and lateral joint line. (PX2, p.58) Dr. Durkin recommended this MRI to look for chondral injuries or meniscus tears. (PX2, p.58)

The Arbitrator notes that the doctor at Concentra previously recommended an MRI on December 3, 2008. (PX1, p.59) The Arbitrator further notes that Dr. Martinez recommended a left knee MRI on December 12, 2008. (PX3, p.68)

In his deposition, Dr. Trotter testified that Petitioner required no further diagnostic services for his left knee. (RX4, p.13)

The Arbitrator finds Petitioner's evidence to be more persuasive for the following reasons. First, three doctors, including the Concentra doctor, were in agreement that a left knee MRI was necessary. Second, Dr. Durkin was aware from his ongoing treatment that Petitioner's left knee remained symptomatic six months after the accident. Accordingly, the Arbitrator finds that the left knee MRI provided at MRI Lincoln Imaging Center was necessary, and concludes that Respondent is liable for this expense subject to the Illinois Worker's Compensation Fee Schedule.

C. <u>As to the issue "K. What temporary benefits are in dispute?," the Arbitrator makes the following findings of fact and conclusions of law.</u>

Petitioner claims temporary total disability benefits are due for the period December 22, 2008 through May 18, 2009 (21 weeks). In support of this claim Petitioner offered Dr. Durkin's initial off work note of December 22, 2008, the date he underwent surgery for his right knee. (PX2, p.34) Petitioner also offered Dr. Durkin's May 18, 2009 note in which he first released Petitioner to return to work. (PX2, p.59)

In rebuttal, Respondent offered the testimony of Dr. Trotter. However, Dr. Trotter testified that Petitioner had sustained only a contusion injury to the right knee on July 18, 2008. (RX4, p.9) Dr. Trotter offered no opinion as to Petitioner's need to be off work for the ACL and meniscus repaired by Dr. Durkin.

In light of the above finding that Petitioner did sustain ACL and meniscus tears as a result of the July 18, 2008 accident, Dr. Durkin's notes taking Petitioner off work, and the lack of rebuttal evidence, the Arbitrator finds that Petitioner was temporarily totally disabled from December 22, 2008 through May 18, 2009 (21 weeks) and concludes that Respondent is liable to pay benefits for this period under Section 8(b) of the Act.

D. As to the issue "L. What is the nature and extent of the injury?," the Arbitrator makes the following finds of fact and conclusion of law.

1. What is the nature and extent of injury to the right knee?

Based on the opinion of Dr. Durkin and for the reasons stated above, the Arbitrator finds that as result of the accident, Petitioner completed the partial ACL tear he had before had new tears in the meniscus. (PX7, p13) This injury required surgery consisting of a right knee arthroscopy, debridement, autograft, hamstring ACL reconstruction and partial medial and lateral meniscectomies. (PX2, p.32)

Despite a release to regular work, Petitioner required subsequent treatment including a Synvisc injection. (PX2, p.83) Ultimately, Dr. Durkin stated Petitioner would benefit from additional Synvisc injections for post-traumatic osteoarthritis in his right knee from his ACL injury and the meniscectomy he had done on this knee from his work related accidents. (PX2, p.85) He further stated that Petitioner will likely require a knee replacement, but should delay undergoing treatment so long as he can comfortably work with his unloader brace. (PX2, p.85)

Petitioner testified credibly that he is currently working a job that requires standing 10 hours per day, and that this causes him knee pain for which he wears a brace, regularly massages his knee, and regularly uses topical medication.

Accordingly, the Arbitrator finds that Petitioner has a current 42.5% permanent partial loss of use of the right leg. The Arbitrator further finds that Respondent is entitled to a credit of 24.68% loss of the right leg received in settlement of his claim number 05 WC 40777. (RX#5). Accordingly, Respondent is liable to pay to Petitioner 17.82% permanent partial disability to the right leg as a result of his accident of July 18, 2008.

2. What is the nature and extent of injury to the left knee?

Based upon the above described medical evidence and based on the opinion of Dr. Durkin, Petitioner sustained a chondral injury to the left knee related to the accident of November 12, 2008. (PX6, p.14) For this condition, Petitioner received physical therapy and work conditioning. Petitioner credibly testified that he continues to have pain in the left knee while standing at work 10 hours per day. For this pain, he uses a brace, regularly massages the knee and regularly uses topical medication.

Accordingly, the Arbitrator finds that Petitioner has a current 3.5% permanent partial loss of use of the left leg.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DOLLY PATEL,

Petitioner,

vs. NO: 14 WC 21474

COMPASS GROUP USA,

17IWCC0707

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, temporary total disability (TTD), penalties, and permanent partial disability (PPD), and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner, Dolly Patel, sustained a left hip fracture that arose out of and in the course of her employment on May 7, 2014.

The Commission further finds that Patel is entitled to TTD from May 8, 2014 through February 15, 2015, representing 40-4/7 weeks. She is entitled to all reasonable and related medical expenses. The Commission finds that Petitioner sustained 25% loss of use of the left leg pursuant to Section 8(e) of the Act.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Dolly Patel filed an Application for Adjustment of Claim on June 24, 2014 alleging injury to the left hip while at work on May 7, 2014.

2. Patel began working for the Respondent as a cafeteria worker two weeks prior to her May 7, 2014 accident. She would stock the shelves with coke, coffee, cups, etc. and work the cash register. T.11.

3. Patel began working at 6:00 a.m. on May 7, 2014. At approximately 6:05 a.m. she bent down to get the coffee cups and she twisted her leg and felt a pop in her left hip. T.12. She testified that she could not walk following the incident so she sat on her step stool from 6:05 until 7:30 as no one was in the cafeteria and no one came to the register.

4. Her supervisor, Chris arrived at 7:30 a.m. T.15. She informed Chris that she could not walk as she had just hurt her leg. Chris informed Petitioner to wait for the next supervisor. Her second manager arrived and told her to punch out and go home. As she could not walk, the Director was contacted and a wheelchair was brought to her and she was taken to the ER. T.16. Patel testified that she informed the ER that she twisted her leg and it popped as she was bending down to get the coffee cups. She did not tell anyone she hurt her hip at home. T.18.

5. Respondent's witness, Ms. Kelly Hoffman has worked in the cafeteria for 31 years. Hoffman testified that she spoke with the Patel around 5:20 a.m. on the day of the accident. T.35. Patel told her that she did not feel good and thought she pulled a muscle. T.36. Hoffman did not see Patel the rest of the day. *Id.* On cross-examination, Hoffman noted Patel thought she pulled her hip muscle. T.39.

6. Respondent's second witness, Mr. Rolando Chavez worked as the chef manager. He saw Patel limping around 5:15 a.m. T.44. He asked Patel why she was limping and Patel indicated to him that she fell at home. *Id.*

7. Patel was seen by Dr. Gretchen Sanford at Alexian Brothers on May 7, 2014 at 10:01 a.m. Patel reported that she bent over to pick something up when she felt a pop in the outer lateral area of the left hip. Her past medical history included diabetes. Her pain was 10/10. X-ray revealed a fracture of the neck of the femur with varus angulation without dislocation of the femoral head. There were also degenerative changes of the hip joint, which were symmetric and mild. PX.1.

8. Patel underwent a cardiology consultation on May 8, 2014 with Dr. Robert Mazurek. It was noted that she had twisted and fallen at home. She heard a pop and sustained a hip fracture. PX.1.

9. Patel was seen by Dr. Fernando Soruco on May 8, 2014. It was noted that she sustained a fracture of the neck of the left femur while at work. PX.1.

10. Dr. Tom Karnezis performed left hip bipolar hemiarthroplasty on May 8, 2014. It was noted that Patel had fallen at her place of work and sustained a hip fracture. The post-operative diagnosis was displaced left hip femoral neck fracture. PX.1.

11. Patel was discharged to a nursing home on May 12, 2014. Per Dr. Thakkar, it was noted Patel fell in the Alexian Brothers' cafeteria and sustained a left hip fracture. PX1.

12. Patel was seen by Dr. Raj Patel of Bartless Medical Associates on May 21, 2014. It was noted that Patel fell at work while trying to lift a coffee cup from the floor. She fractured her left hip and had surgery. PX.5.

13. Patel was seen by Dr. Karnezis on June 16, 2014. He noted that Patel fell at her place of work when she was leaning forward to pick up a coffee cup and her leg twisted. She fell to the ground and suffered a fracture of the left femoral neck. The alignment to the hip was excellent. Discomfort was noted and typical. PX.1.

14. Per the ATI physical therapy report dated June 18, 2014, it was noted that Patel went to bend down to get a coffee mug on the floor when her leg twisted and she fell. She was unable to walk after the injury. She went to the ER and the x-ray revealed a hip fracture that was surgically repaired on May 8, 2014. She currently had left leg weakness and pain with prolonged standing and walking. PX.4.

15. Per the ATI discharge summary dated August 27, 2014, Patel reported less pain to the anterior thigh and ITB but fatigue with prolonged walking. She could complete her ADLs at home with occasional left hip pain/fatigue. She reported 75-80 percent improvement overall. She could not stand for greater than 2-3 hours and could not do repetitive standing for working as a cashier. PX.4.

16. Patel was seen by Dr. Karnezis on September 8, 2014. It was noted that she wished to continue her current work duties, anticipating that she should be at full-duty without any restrictions within 4 to 8 weeks. She could perform sedentary duty and walk from time to time, but lifting heavy objects would be difficult. PX.2. A note was provided indicating that Patel would be able to work full-duty with no restrictions as of November 2014.

17. Patel was seen by Dr. Karnezis on February 11, 2015. She could return to work Monday, February 16, 2015. Dr. Karnezis noted that Patel may have difficulty lifting anything over 30 pounds and difficulty kneeling or crawling. RX.2.

18. Patel testified that she was off work from May 2014 through February 15, 2015. She currently works for Metro Politician driving and cooking for elderly patients. T.26. She

still has left hip and thigh pain. She has difficulty performing laundry and dishes. She takes Advil twice a day. T.27.

19. Dr. Tom Karnezis was deposed on September 14, 2015. He is board certified. Dr. Karnezis opined Patel sustained an injury because of her May 7, 2014 work accident. He opined that Patel's fracture was consistent with a torsion injury. PX.6. pg.12. He noted that Patel's injury was unusual as she was only 50 and he does not typically see a displaced fracture at this level. It was his opinion that Patel must have strained it significantly. PX.6. pg.13. Dr. Karnezis noted that with a displaced femoral neck fracture, the patient will present with a lot of pain, but not always. *Id.* Her 10 out of 10 pain was consistent with her injury. PX.6. pg.14. An immediate onset of this fracture could result in an inability to ambulate unassisted. *Id.* It would be very hard to walk. *Id.* Dr. Karnezis noted that people with this injury would have to really try hard not to complain of pain, but it is almost impossible. PX.6. pg.16. He thought Patel's injury was an acute fracture. PX.6. pg.15.

20. Dr. Karnezis testified that there was no evidence that her fracture was an old fracture or that it occurred earlier in the day. PX.6. pg.16. He stated it would be very hard for an individual to stand with this injury. If they were walking, which he did not think they could do, they would ambulate with a limp, hunched over or with severe pain and grasping their leg. PX.6. pg.15. He testified that while they could be weight bearing on that side, it is not common. Dr. Karnezis testified that had she fractured her hip before work, she would not have been able to ambulate from the parking lot to work. He stated that whether she fell or just twisted her leg would not change his opinion as both could result in the fracture. PX.6. pg.18. He returned her to work February 16, 2015. PX.6. pg20.

21. On cross-examination, Dr. Karnezis testified that it was possible that her injury could have occurred from a fall earlier that day outside of the workplace. PX.6. pg.37. He reviewed the cardiology note indicating she fell at home. He stated that was unlikely as she was at work when she was brought to the ER. He stated that it is very unusual for a person to ambulate with this injury. PX.6. pg.40. Her age would not make it more likely that she could ambulate with this injury. PX.6. pg.41. He has never had a young patient with a displaced hip fracture that could walk on it. *Id.* While it was possible she could walk, she would be very unstable and likely would have to have someone holding her up. PX.6. pg.42.

The Commission is not bound by the Arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991). It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972).

In denying the claim, the Arbitrator gave great weight to the perceived discrepancies contained within the medical records and found the Respondent's witnesses credible. However, after reviewing the medical records and the testimony of Dr. Karnezis, the Commission finds that the discrepancies do not negatively impact Patel's testimony relative to accident. The Commission notes that the history of a work-related accident is well-documented in the medical records and is largely consistent with Patel's testimony.

More convincingly, the Commission finds the testimony of Dr. Karnezis compelling and more persuasive than the testimony of Respondent's witnesses. Dr. Karnezis indicated that he has never seen a person that could walk with Petitioner's injury. While possible theoretically, Dr. Karnezis noted that a displaced hip fracture would cause a person a lot of pain. Also, he noted that Patel would have had a hard time not complaining of pain and would likely have needed assistance walking. If Patel had fractured her hip at home, Dr. Karnezis did not believe she would have been able to ambulate to work and would not have been able to walk through the parking lot to the cafeteria. Patel testified that she could only sit there after the accident. When she was finally told to leave, a wheelchair had to be called as she could not walk. Dr. Karnezis' opinions bolster Patel's testimony that the fracture occurred at work.

Furthermore, while the Respondent's witnesses' testimony may be indicative that Patel fell at home, it does not establish that she fractured her hip at home. Rather, Dr. Karnezis' testimony convincingly establishes that Patel's displaced hip fracture occurred at work and that it would have been very difficult, if not impossible, for her to walk with her injury. Dr. Karnezis' opinion is premised upon his significant experience treating this type of injury. The Respondent offered no medical opinion to counter Dr. Karnezis' compelling testimony.

The Commission must now determine whether the injury arose out of the claimant's employment by categorizing the risk to which the claimant was exposed in light of its factual findings relevant to the mechanism of the injury. *First Cash Financial Services*, 367 Ill. App. 3d at 105. There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523, 317 Ill. Dec. 355 (2007); *Homerding v. Industrial Comm'n*, 327 Ill. App. 3d 1050, 1056, 765 N.E.2d 1064, 262 Ill. Dec. 456 (2002).

With respect to the third category, "[i]njuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284, 371 Ill. Dec. 384. The increased risk may be either qualitative (*i.e.*, when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than members of the general public by virtue of his employment).

Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800, 348 Ill. Dec. 559 (2011).

The Commission finds that act of bending over to get the coffee cups was an employment related risk that is distinctly associated with her employment; thus compensable. The Commission further finds that Patel's injury would be compensable under the neutral risk analysis as well.

Qualitatively, the Commission finds that Patel's job required her to bend and lift items to stock the shelves. She was bending down and reaching for the coffee cups when she twisted and injured her hip. The act of bending down to retrieve the coffee cups to stock the shelves contributed to her risk of injury. Thus, her injury is compensable under the qualitative analysis.

Quantitatively, Patel was required to bend and lift items to stock the shelves on a regular basis as part of her job duties. The Commission finds that Patel was exposed to a greater risk of injury from bending, twisting, and lifting than was the general public. Thus, her injury is compensable under the quantitative analysis as well.

The Commission finds that Patel is entitled to TTD benefits from May 8, 2014 through February 15, 2015, representing 40-4/7 weeks. She is entitled to reasonable and related medical expenses totaling $85,321.78.

The Commission also finds that Patel sustained disability to the extent of twenty-five percent (25%) loss of use of the left leg pursuant to Section 8(e) of the Act. In consideration of the five factors listed under Section 8.1(b) of the Act:

(i) Impairment Rating: No weight was given to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of Injured Employee: Following Patel's discharge from treatment, she left Respondent's employment and now cares for the elderly by driving and cooking for them. The Commission assigns minimal weight to this factor.

(iii) Petitioner's Age: Patel was 50 years old on the accident date. At this age, Patel will have to deal with her disability for a significant period of time. The Commission assigns some weight to this factor.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to reduced earning capacity. The Commission assigns no weight to this factor.

(v) Evidence of Disability: Evidence of disability was corroborated by the treating medical records. Patel sustained a displaced left hip femoral neck fracture that required a left hip bipolar hemiarthroplasty on May 8, 2014. As a result of the work injury, Dr. Karnezis noted that Patel would have difficulty lifting heavier objects and difficulty

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kneeling or crawling. Patel also testified that she still has left hip and thigh pain, and has difficulty performing laundry and dishes. She takes Advil twice a day. The Commission assigns great weight to this factor.

Based on the totality of the evidence, the Commission finds Patel to be permanently partially disabled to the extent of 25% loss of use of the left leg pursuant to Section 8(e) of the Act.

Lastly, the Arbitrator did not award penalties and attorney's fees. As actual questions existed in terms of accident and causal connection in this claim, and there was no evidence that Respondent was unreasonable or vexatious in denying benefits to Petitioner, the Commission hereby denies any award for penalties and attorney's fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on October 21, 2016, is hereby reversed as stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 40-4/7weeks (May 8, 2014 through February 15, 2015), that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 53.75 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused the 25% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses totaling $85,321.78 pursuant to Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: NOV 9 - 2017

Michael J. Brennan

MJB/tdm
O: 9/12/17
052

Thomas J. Tyrrell

Dissent

I respectfully dissent from the decision of the majority. I would affirm and adopt Arbitrator Thompson-Smith's well-reasoned decision.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PATEL, DOLLY
Employee/Petitioner

Case# **14WC021474**

COMPASS GROUP USA INC
Employer/Respondent

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On 10/21/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% 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:

1938 ALEKSY BELCHER
MATTHEW G GORSKI
350 N LASALLE ST SUITE 750
CHICAGO, IL 60654

1120 BRADY CONNOLLY & MASUDA PC
MARK F VIZZA
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

DOLLY PATEL
Employee/Petitioner

v.

COMPASS GROUP USA, INC.
Employer/Respondent

Case # 14 WC 21474

Consolidated cases: N/A

17IWCC0707

An *Application for Adjustment 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 **9/27/2016**. 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 ____

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FINDINGS

On 5/07/2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $17,160.00; the average weekly wage was $330.00.

On the date of accident, Petitioner was 50 years of age, ***single*** with 1 dependent child.

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

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

Respondent shall be given a credit of $1,144.00 for TTD, for a total credit of $1,144.00.

ORDER

The petitioner has not proven by a preponderance of the evidence, that she suffered an accident arising out of and in the course of her employment with the 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.

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FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; 5) attorney's fees; 6) penalties; and 7) the nature and extent of Petitioner's injury. *See*, AX1.

Petitioner's testimony

The petitioner testified that she began working for Compass Group in April 2014 in the position of a cashier in the cafeteria. The cafeteria was located at Alexian Brothers Hospital in Elk Grove Village. Her job duties included stocking goods and products such as Coke bottles and coffee cups. She also worked as a cashier. The heaviest thing she had to lift was a 24-pack of Coca Cola. She had to bend and stoop. She worked in the morning, sometimes from 5:30 a.m. to 1:30 p.m.; and at other times 6:00 a.m. to 2:30 p.m. She worked 30 to 35 hours per weeks. Tr. pp. 9-12.

On May 7, 2014, she went to work at 6:00 a.m., punched in and went to the cafeteria. At approximately 6:05 a.m. or 6:10 a.m., she bent down to get coffee cups and when she got up, she twisted her leg and felt a pop and pain in her left hip. She did not fall to the ground. She was unable to walk and sat on a stool until she was provided a cane. Her manager came by at 7:30 and she told her what happened. She was told to wait for another manager to come. No one came to the cash register between 6:05 a.m. and 7:30 a.m. There was a lady working in the kitchen at the time; her name was Kelly. She did not say anything to Kelly about her injury. Tr. pp. 12-16.

The second manager told her to punch out and go home. She testified that she was unable to walk therefore a lady brought her a computer chair so she could sit down. They took her to the office and called emergency personnel who took her, in a wheelchair, to the emergency room of Alexian Brothers Hospital.

The doctors took x-rays and told her she had a fracture of the hip; and that she was going to have surgery the next day. She told the doctors and nurses at Alexian Brothers that she twisted her leg and felt a pop while bending down to get coffee cups. Dr. Karnezis did the surgery and she was in Alexian Brothers until May 12, 2014. From May 7 to May 12, 2014, she did not tell any of the doctors she fell at home and hurt her hip. According to Petitioner, prior to May 7, 2014, she did not have any left hip issues and never sought treatment from a doctor for her left hip. Tr. pp. 17-18.

After release from Alexian Brothers on May 12, 2014, she went to Manor Care Rehab. She stayed there from May 12, 2014 through June 13, 2014, receiving therapy for her left hip. While she was there, she saw her primary care doctor, Raj Patel. She was discharged from Manor Care on June 13, 2014; and was told to stay off work until she saw Dr. Karnezis on June 16, 2014. Tr. pp. 19-20.

She followed-up with Dr. Karnezis on June 16, 2014, complaining of thigh and hip pain. Dr. Karnezis prescribed pain medication, sent her to ATI for physical therapy and kept her off work. She attended

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physical therapy at ATI from June 18, 2014 to August 27, 2014; and followed-up with Dr. Karnezis on July 28, 2014; at which time, he kept her off work. She was discharged from physical therapy and followed-up with Dr. Karnezis on September 8, 2014. At that time, she was still having left hip pain, but Dr. Karnezis allowed her to return to work with sedentary duty restrictions. She never contacted her employer at this time to seek sedentary employment.

She next presented to Dr. Karnezis on February 11, 2015, who allowed her to return to work in a full duty capacity, as of February 16, 2015. She followed-up with Dr. Karnezis again on March 13, 2015 and June 12, 2015 and he kept her on full duty. She was supposed to follow-up with Dr. Karnezis in September 2015 however, she testified that she did not go because his bill had not been paid. She did see him on September 2, 2016, when he told her she was at maximum medical improvement ("MMI") and that she could continue to work full duty. Tr. pp. 21-25.

Currently, she works for Metro Politician, caring for elderly people; cooking and shopping for them. She still has pain in her left hip and has difficulty doing laundry and dishes. She takes Advil twice a day. Tr. pp. 26-27.

Respondent's Witnesses

Ms. Kelly Hoffman testified she is currently employed by Touch Point, which is part of Compass Group, through Alexian Brothers. She works in the cafeteria at Alexian Brothers and has been doing this job for 31 years. Her job duties are to run the cafeteria and fill in when needed. On May 7, 2014, she worked 5:00 a.m. to 1:30 p.m. and worked with Dolly Patel on that date. She spoke with the petitioner at approximately 5:30 a.m. in the cafeteria. According to Ms. Hofmann, the petitioner made a statement that she didn't feel good, that she thought she had pulled a muscle. After the conversation, Ms. Patel walked away from her. Tr. pp. 34-40.

Mr. Rolando Chavez testified he is currently employed by Compass Group as a chef manager/ supervisor. On May 7, 2014, the petitioner had been working approximately two to three days and on that date, he was working at about 5:00 a.m. in the storeroom. Petitioner came by the storeroom and he saw that she was limping. He asked her why she was limping and she told him she had fallen down at home. After this conversation, she walked away from him. Tr. pp. 43-45.

The records of Dr. Robert Mazurek, dated May 8, 2014, note that the petitioner presented to him that day because she "had twisted and fallen at home. She heard a pop, and she suffered a hip fracture, which required surgical repair". The records of Dr. Patel indicate that the petitioner fell down at work while trying to lift a coffee cup from the floor. Dr. Karnezis' records indicate that the petitioner told him she had fallen at her place of work, i.e., when she was leaning forward to pick up a coffee cup, her leg twisted and she fell to the ground. The records of Alexian Brothers Medical Center indicate that the petitioner gave a history of bending over to pick something up and feeling a pop in her left hip.

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Dr. Karnezis testified that the records of Alexian Brothers indicate that the petitioner twisted her leg and that his records indicate that the petitioner fell. Dr. Karnezis opined that it must have happened this way, because it is unusual. The immediate onset of this type of fracture is often accompanied by the inability to ambulate unassisted. The person could ambulate with a limp. He recorded the mechanism of injury as Petitioner falling at work when she was leaning forward, twisting her leg and falling to the ground. He notes there is a discrepancy between his records and the records of the ER doctor. Dr. Karnezis testified it is possible that her injury could have occurred from a fall earlier that day. RX1-3; PX6.

Petitioner denied that she told any of her doctors or anyone else that she fell at home and hurt herself.

CONCLUSIONS OF LAW

C. Did an accident occurred that arose out of and in the course of the petitioner's employment with the respondent?

Petitioner brought this case before the Arbitrator based upon a request for hearing on all issues. As in any case, the burden of proof is on a claimant to establish the elements of her 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).

It is the burden of every Petitioner before the Worker's Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. *Board of Trustees of the University of Illinois v. Industrial Commission,* (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, *Edward Don v. Industrial Commission,* (2003) 344 Ill.App.3d 643, 801 N.E.2d 18.

For an employee's workplace injury to be compensable under workers' compensation, Petitioner must establish the injury is due to a cause connected with the employment such that it arose out of the employment. *Hansel & Gretel Day Care Center v. Industrial Commission*, (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. It is not enough Petitioner is working when accidental injuries are realized; Petitioner must show the injury was due to some cause connected with employment. *Board of Trustees of the University of Illinois v. Industrial Commission,* 44 Ill.2d 207.

It is well established that a claimant seeking benefits under the Act must establish that the injury arose out of and in the course of the employment. An injury arises out of the employment if its origin is a risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. v. Industrial Commission,* 58 Ill.App.2d 226, 317, N.E.2d 515 (1974). Further, an injury occurs in the course of the employment

when one is performing an assigned employment task or something incidental thereto. *Homerding v. Industrial Commission*, 327 Ill.App.3d 1050, 765 N.E.2d 1064 (2002).

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, 44, 509 N.E.2d 1005, -4- 1008 (1987).* "Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." *Johnson v. Illinois Workers' Compensation Comm'n,* 2011 IL App (2d) 100418WC, ¶ 21, 956 N.E.2d 543."

The records, in the subject case, contain different histories as to the mechanism of injury. The emergency room records indicate that the petitioner fell. Dr. Karnezis' records indicate that the petitioner was bending and twisted her leg. Dr. Mazurek's records indicate that the petitioner fell at home. Rolando Chavez testified that the petitioner told him she fell at home. The petitioner testified that she bent down and twisted her leg. She also testified that she bent to retrieve coffee cups and her leg popped, without any mention of a twist.

The petitioner testified she told the doctors at Alexian Brothers that she twisted her leg. She testified she was bending over to pick up a coffee cup when this happened. The petitioner testified after this alleged injury, she could not walk at all. Kelly Hofmann testified that the petitioner told her that her hip was bothering her, but saw her walking after that conversation. Rolando Chavez testified that after asking why she was limping, the petitioner told him she had fallen at home and walked away from him.
The burden of establishing the elements of a disability claim is on the employee and not the employer. *Heston v. Industrial Comm'n*, 164 Ill.App.3d 178 (1987). The burden is on the plaintiff seeking an award to prove by preponderance of credible evidence, that all elements of his claim including the requirement that the injury complained of arose out of and in the course of his employment. *Martin v. Industrial Comm'n*, 91 Ill.2d 288 (1982).

In this case, there are different histories given by the petitioner and based upon these discrepancies and inconsistent statements regarding mechanism of injury; and the credible testimony of Respondent's witnesses, the Arbitrator finds that the petitioner has not proven, by a preponderance of the evidence that an accident occurred, on May 7, 2014, which arose out of and in the course of her employment by the respondent. Therefore the Arbitrator does not award any benefits pursuant to the Act. As the Petitioner failed to prove a compensable accident, all other disputed issues are moot and will not be addressed.

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ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC21471
SIGNATURE PAGE

Signature of Arbitrator

October 20, 2016
Date of Decision

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

JETTON RICHARD,

Petitioner,

vs. NO: 11 WC 46811

U.S.F. HOLLAND,

Respondent.

17IWCC0708

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability (TTD), and prospective medical, and being advised of the facts and applicable law, modifies the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Arbitrator found that the October 22, 2011 work accident, wherein Petitioner was involved in a highway collision with two other vehicles, exacerbated Petitioner's pre-existing autofusion from C2 to C4, and his post-C4 to C6 anterior cervical discectomy and fusion (ACDF) condition. The Arbitrator also found that Petitioner's persistent cervicalgia, myofascial pain of the neck, and lumbar pain were causally related to the accident. The Arbitrator noted that Petitioner's treating neurosurgeon, Dr. Dean Karahalios, was more persuasive than Respondent's Section 12 examiners, and further noted that Petitioner was able to work full duty for three years prior to October 22, 2011, and Petitioner did not receive a recommendation for a second surgery until after the October 22, 2011 accident.

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It is well-established that an accident need not be the sole or primary cause—as long as employment is a cause—of a claimant's condition. *Schroeder v. Ill. Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, ¶ 28; citing *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003). Furthermore, an employer takes its employees as it finds them. *Id.*; citing *St. Elizabeth's Hosp. v. Ill. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 888 (5th Dist. 2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Id.*; citing *Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d 30, 36 (1982). In other words, an accident need only be *a* cause of a condition of ill-being for a claimant to recover under the Act and, correlatively, a preexisting condition will not prevent recovery. *Id.* at 29; citing *Sisbro, Inc.*, 207 Ill. 2d at 205; *Caterpillar Tractor Co.*, 92 Ill. 2d at 36. *Schroeder* further instructs, "The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." *Id.* at 26.

While the Commission agrees with the Arbitrator that the October 22, 2011 work accident aggravated Petitioner's pre-existing cervical condition, the Commission does not find Petitioner credible as to his ongoing complaints and current condition. 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). The Commission finds that the aggravation sustained by Petitioner was temporary and Petitioner reached maximum medical improvement (MMI) on July 10, 2012, the date of Petitioner's second Section 12 examination with Dr. Sean Salehi, who was Respondent's Section 12 examiner.

In reaching its Decision, the Commission finds Dr. Salehi's opinions more persuasive. Dr. Salehi concluded that the October 22, 2011 work accident resulted in a temporary exacerbation of Petitioner's pre-existing cervical spondylosis, and he was not myelopathic. Dr. Salehi's review of the medical records and diagnostic tests, including an EMG/NCV dated December 19, 2011, indicated no evidence of radiculopathy or neuropathy. Dr. Salehi also noted central canal stenosis from C2 to C4 and C6-7, but opined that the condition was not beyond a moderate degree. Dr. Salehi did not see any cord compression, and opined similarly to Dr. Karahalios that any evidence of ossification of the posterior longitudinal ligament (OPLL) was a pre-existing condition. (PX8, pg. 15; RX1). Dr. Salehi reviewed the lumbar spine MRI of November 23, 2011 and found nothing to explain Petitioner's ongoing low back pain or leg pain. He recommended that Petitioner undergo 12 sessions of physical therapy. Dr. Salehi stated that once Petitioner completed physical therapy, he would be at MMI and could return to work full duty. (RX1).

Dr. Salehi examined Petitioner a second time on July 10, 2012. Petitioner reported the same complaints, and that physical therapy did not improve his condition. Dr. Salehi reviewed updated medical records, including the January 13, 2012 somatosensory evoked potential (SSEP) report.

Dr. Salehi's findings on examination, diagnoses, and opinions were unchanged from his previous April 17, 2012 Section 12 report. He stated that Petitioner had positive Waddell signs. Dr. Salehi recommended a functional capacity evaluation (FCE) and that Petitioner could work with restrictions. He stated that Petitioner would be at MMI following the FCE. (RX2). Petitioner never underwent the FCE.

The Commission further finds that Dr. Salehi's opinions are supported by Respondent's second Section 12 examiner, Dr. Daniel Troy. Dr. Troy conducted an additional Section 12 examination of Petitioner on March 26, 2013, and noted the same history of accident and injury, medical treatment to date, and Dr. Salehi's Section 12 reports.

Like Dr. Salehi, Dr. Troy believed Petitioner demonstrated significant symptom magnification during examination. (RX4, pg. 12). Dr. Troy indicated that Petitioner's reduced range of motion appeared to be self-limiting; his pain description was extremely confusing, and Petitioner's subjective complaints were not consistent with Dr. Troy's findings. (RX4, pgs. 11-12). For example, Petitioner reported tingling and numbness in his right hand and fingers, but Phalen's and Tinel's signs were negative. (RX4, pgs. 12-13, Deposition Exhibit 2).

Petitioner underwent x-rays of his cervical spine at the March 26, 2013 Section 12 examination. The study revealed the prior fusion from C4 to C6. There was also an autofusion from C2 to C4, secondary to anterior spurring that appeared to be degenerative and long-standing. Minimal degenerative changes and no gross instability was indicated on the lumbar spine x-rays. (RX4, pg. 15, Deposition Exhibit 2). Dr. Troy defined autofusion, which was "a long-standing progressive degenerative process of the cervical spine. When you have bridging osteophytes going from one bone to another bone, those two bones can autofuse." This was a chronic finding. (RX4, pg. 16).

Dr. Troy opined that Petitioner suffered "from subjective complaints of discomfort without any discrete objective findings." (RX4, pg. 17). In line with Dr. Salehi's findings, Dr. Troy noted that the MRI and CT myelography of the cervical spine showed no acute trauma, the EMG/NCV test was negative, and the SSEP study "demonstrated a prior history of myelopathy and which appeared to be residual." (RX4, pg. 17).

Dr. Troy therefore concluded that Petitioner's current cervical spine condition was secondary to his long-standing natural degenerative process that pre-existed the October 22, 2011 accident. "The claimant's limitations and range of motion of the cervical spine are pre-existing this motor vehicle accident and he is functioning well with these limitations of motion." He believed that Petitioner did not require surgery or an FCE, was at MMI, and could return to full duty work. (RX4, pgs. 18-19; 36, Deposition Exhibit 2).

Dr. Troy questioned the need for additional surgery and testified that since Petitioner was already fused from C2 to C4, "fusing him is not going to make him any better; therefore, you have to look at a neurological compression. Is there any compression on the neurological elements that

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you could decompress and therefore relieve his symptomatology." (RX4, pg. 19; 31). Dr. Troy noted no compression at C2-3 or C3-4. (RX4, pgs. 31-32).

> The only area that one could possibly intervene at would be the C6-7 level. The C6-7 level demonstrates no herniation or stenosis. There's mild narrowing of the canal and mild narrowing of the foramina. So therefore if one did surgery at that level, his neurological complaints, theoretically, to his upper extremities should not be improved from surgery at that level. (RX4, pg. 32).

On June 6, 2016, approximately four months prior to arbitration, Dr. Troy evaluated Petitioner for a second time. X-rays were taken at this examination, which demonstrated the same autofusion from C2 to C4, the fusion at C4 to C6, and now a "questionable autofusion process present at the C6-7 level" with significant osteophyte formation at C6-7. Despite the updated information, including additional 2016 medical records from Dr. Karahalios, Dr. Troy's opinions remained the same as previously stated. "It is my opinion that the claimant's subjectively based complaints of symptoms are related to the natural progression of degenerative changes to his cervical spine. I do agree with Dr. Sean Salehi's IME of April 17, 2012." (RX5).

Based on the totality of the evidence, the Commission finds that the Petitioner sustained a temporary aggravation to his pre-existing cervical condition, and reached MMI on July 10, 2012. Any subsequent deterioration of Petitioner's condition, as opined and explained by Drs. Salehi and Troy, is the result of Petitioner's long-standing natural degenerative process that pre-existed the October 22, 2011 accident.

Consequently, Petitioner is only entitled to reasonable, necessary, and related medical expenses incurred from October 22, 2011 through July 10, 2012; Petitioner's claim for prospective medical is denied. Petitioner is also entitled to TTD from October 25, 2011 through May 21, 2012, and from May 24, 2012 through July 10, 2012. By Respondent's own Exhibit 10, Respondent was willing to accommodate restrictions following the April 2012 IME, and ordered Petitioner to report to work on May 22, 2012. (RX10). Petitioner indeed returned to light duty office work with Respondent on May 22, 2012. (T.22; T.40). Two days later, however, on May 24, 2012, Petitioner presented to the emergency department at Adventist La Grange Memorial Hospital and was taken off work by Dr. Karahalios. (T.13; T.40; PX4). Thus, the Commission finds that the record supports an award of TTD from October 25, 2011 through May 21, 2012, and from May 24, 2012 through July 10, 2012, the date of Dr. Salehi's second Section 12 report.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed November 1, 2016, is hereby modified as stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses incurred from October 22, 2011 through July 10, 2012, as provided in Sections 8(a) and 8.2 of the Act.

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IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is not entitled to any further prospective treatment as recommended by Dr. Karahalios.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $1,026.77/week, for 36 5/7 weeks, commencing October 25, 2011 through May 21, 2012, and from May 24, 2012 through July 10, 2012, as provided in Section 8(b) 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 $4,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

DATED: NOV 9 - 2017
MJB/pm
O: 9-12-17
052

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

RICHARD, JETTON
Employee/Petitioner

Case# **11WC046811**

USF HOLLAND
Employer/Respondent

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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:

1315 DWORKIN AND MACIARIELLO
GERALD CONNOR
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
CHRISTOPHER L JARCHOW
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jetton Richard
Employee/Petitioner

v.

U.S.F. Holland
Employer/Respondent

Case # 11 WC 046811

Consolidated cases: _____

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An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **10/13/16**. 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 _____

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FINDINGS

On the date of accident, **10/22/11**, 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 **$80,088.33**; the average weekly wage was **$1,540.16**.

On the date of accident, Petitioner was **41** 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 **$32,187.36** for TTD, **$178.88** for TPD, **$0.00** for maintenance, and **$6,957.80** for other benefits, for a total credit of **$$39,324.04**.

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

ORDER

Respondent shall authorize the "the cervical laminectomy and fusion" surgery as well as reasonable treatment following the procedure.

Respondent shall pay Petitioner temporary total disability benefits from 10/25/11 to 10/13/16 or 259 weeks at a TTD rate of $1,026.77.

Respondent shall pay medical expenses of $10,984.56 pursuant to the medical fee schedule, and shall receive credit for any sums previously paid hereunder.

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

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

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

Robert E Dalton

Signature of Arbitrator

October 31 2016

Date

NOV 1 - 2016

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FINDINGS OF FACT

Petitioner works as a truck driver for Respondent. Petitioner has been employed since 1997, or approximately nineteen years. Petitioner testified that he was number one on the seniority list at his job.

On 10/22/11, Petitioner was involved in a truck accident with two other vehicles on a U.S. highway. Petitioner testified that he felt immediate pain to his shoulders, low back and neck.

Immediately following the accident, Petitioner presented to the emergency department of St. Elizabeth Boardman Health Center. The record states, "At the time of the accident, he was located in the driver's seat (semi-truck driver)." (P. Ex. 1). Ct scans and x-rays were obtained, Petitioner was diagnosed with a neck injury and ordered to follow up with his primary doctor. (P. Ex. 1).

On 10/24/11, when symptoms persisted, Respondent drove Petitioner to Concentra Immediate Care. The record states, "Patient is an employee of USF Holland McCook for the last 15 years driving a truck. On 10-22-11, while he was driving a truck, his truck was hit by a tractor from passenger side. He started to have pain at back of neck and lumbar spine area." (P. Ex. 2). Petitioner was diagnosed with cervical and lumbar strain, given a no lifting or pulling over 10 lbs work restriction, and ordered to follow up with his primary doctor." (P. Ex 2).

On 11/3/11, Petitioner followed up with his primary doctor, who referred Petitioner to an orthopedic doctor that Petitioner had treated with before, Dr. Dean Karahalios. (P Ex. 3).

On 11/21/11, based on the referral, Petitioner presented to Dr. Karahalios. (P. Ex. 4). The record states, "He had an MVA since his last visit which occurred on October 22, 2011." Petitioner thereafter began a regular course of treatment, injections, and therapy from Dr. Karahalios. (P. Ex. 4 & 8). Petitioner was ordered to remain off work (P. Ex 4 and 8, pg. 11)). Dr. Karahalios recommended the following diagnostic tests: An MRI of the lumbar, thoracic, and cervical spine, X-rays, a Myelogram test, SSEP studies, as well as an EMG test. (P. Ex. 4 & 8).

On 11/23/11, the MRI of the cervical spine was obtained which revealed "That demonstrated OPLL, which stands for the posterior longitudinal ligament at the C3 level extending to C2-3 to C4 it appeared to be somewhat prominent." (P. Ex. 8, pg. 8).

On 12/27/11 a myelogram study was obtained. The study revealed, "He had acquired cervical spinal stenosis C2-3, C3-4 and C6-7, and then acquired thoracic spinal canal stenosis T2-3." (Ex. 8, pg. 15).

On February 17, 2012, the record of Dr. Karahalios states, "After careful review of imaging and tests I have recommended pt undergo a cervical laminectomy and fusion. Pt. will

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return to clinic to discuss and schedule surgery. The pt is to remain off of work." (P. Ex. 9). Later in a note of 5/24/12, Dr. Karahalios clarified, "patient remain off work until patient has surgery due to exacerbation of neck pain and arm numbness." (P. Ex. 4).

On 1/6/13, based on being on a "light duty" work status by Respondent's IME Dr. Salehi, Petitioner returned to work light duty, despite the fact that Dr. Karahalios did not clear Petitioner to return to work light duty. (P. Ex. 4 & 8; R. Ex. 1-3).

On 1/8/13, after going back to work light duty, Petitioner could not bear the pain and presented to Adventist La Grange Memorial Hospital with complains of neck and lower back pains. (P. Ex. 6). Petitioner thereafter followed the advice of Dr. Karahalios and remained off work.

In August of 2006, Petitioner underwent a cervical fusion and laminectomy with Dr. Karahalios. Petitioner had returned to work for Respondent full duty in early of 2008, and had worked full duty for Respondent for over three and a half years up until the accident of 10/22/11. Petitioner received a "1 Million Mile Safe Driving Award" from Respondent after he returned to work full duty and before the accident of 10/22/11.

Dr. Karahalios testified that he had Petitioner on an off work status following the accident of 10/22/11 (P. Ex. 8, pgs. 10-11). In addition, Dr. Karahalios opined that Petitioner should remain off work until the recommended cervical laminectomy and fusion was conducted. (P. Ex. 8, pg. 18).

With respect to causal connection, Dr. Karahalios had regularly treated Petitioner for years leading up to the 10/22/11 accident. (P. 6). Dr. Karahalios opined that the accident of 10/22/11 aggravated and exacerbated Petitioner's pre-existing condition to the point where the second fusion surgery and an off-work status was required:

> It exacerbated his underlying condition which was a postoperative condition. He also had OPLL, which can be a progressive problem in and of itself . . . But certainly in this case, the accident exacerbated his condition and prompted the need for that diagnosis and recommendation. (P. Ex. 8, pg. 16).

Dr. Karahalios based his opinion on several post 10/22/11 accident diagnostic studies such as MRIs, X-rays, a Myelogram test, SSEP studies, as well as an EMG test in concluding that Petitioner's condition was aggravated by the 10/22/11. (P. Ex. 8 pgs. 8-10, 14-15). Dr. Karahalios further testified that the medical treatment as well as the surgery was reasonable and necessary to cure Petitioner's condition. (P. Ex. 8, pg. 18).

Dr. Troy examined Petitioner on June 6, 2016 per Respondent's section 12 exam. Dr. Troy agreed with Dr. Karahalios that surgery was needed, and agreed that Petitioner was

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incapable of working full duty. However, Dr. Troy opined that Petitioner's condition was not related to the work accident of 10/22/11. (R. Ex. 5).

CONCLUSIONS OF LAW

With respect to part F, is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator concludes as follows:

The Petitioner's current condition of "C4-6 ACDF with persistent cervicalgia, myofascial pain . . . Bridging disc osteophytes in the cervical spine with cervical stenosis" and "lumbar pain" (P. Ex. 4) is causally related to the accident.

The Arbitrator notes the causation opinion of the treating physician, Dr. Karahalios in that the accident of 10/22/11 aggravated Petitioner's pre-existing condition to the point where the second cervical fusion surgery and off work recommendation was required:

> It exacerbated his underlying condition which was a postoperative condition. He also had OPLL, which can be a progressive problem in and of itself . . . But certainly in this case, the accident exacerbated his condition and prompted the need for that diagnosis and recommendation. (P. Ex. 8, pg. 16).

The Arbitrator relies upon the opinion of Dr. Karahalios based on two primary factors. 1) Petitioner was working full duty for over three years prior to the accident and a second surgery was never recommended until after the 10/22/11 accident. 2) Unlike Respondent's IME doctors, Dr. Karahalios has regularly treated Petitioner since 2006 and was in a better position to assess whether the 10/22/11 aggravated Petitioner's pre-existing condition to the point a second surgery and an off work status was required.

First, Petitioner had returned to work for Respondent full duty for over three and a half years after the 2006 surgery and before the accident of 10/22/11. Dr. Karahalios performed the first cervical fusion on Petitioner and regularly treated Petitioner thereafter. Prior to the 10/22/11 accident, Dr. Karahalios had always cleared Petitioner to work full duty and did not recommend a second surgery until after the 10/22/11 accident. The Arbitrator also notes the mechanism of injury was a two car collision on a U.S. highway, supporting an aggravation theory. Therefore, the Arbitrator finds Petitioner's current condition causally related to the 10/22/11 accident.

Second, Dr. Karahalios is more familiar with Petitioner's condition than the Respondent's IME doctors. Dr. Karahalios had regularly examined Petitioner since at least 2006, and performed the first cervical fusion surgery and post-op care. Dr. Karahalios was in a better position to determine whether the post 10/22/11 diagnostic studies (MRIs, X-rays, a Myelogram test, SSEP studies, and EMG test) showed an aggravation of Petitioner's pre-existing condition to the point where a second surgery and off work status was now recommended. Thus, the Arbitrator finds Petitioner's current condition causally related to the 10/22/11 accident.

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Also, the Arbitrator notes that post accident, Petitioner clearly had an increase in the severity of his symptoms as reported to his medical providers, and an accelerated need for medical care, i.e. the surgery recommended by his treating physician.

Wherefore, based on the record as a whole, the Arbitrator finds that Petitioner has proven that a causal connection exists between his current condition of ill being as alleged herein and the accident which occurred on October 22, 2011.

With respect to part J, were the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator concludes as follows:

The Arbitrator's conclusions regarding part (F) are adopted and incorporated herein. Therefore, Respondent is ordered to pay for the following medical expenses per the Illinois fee schedule, and to recoeve credit for all sums previously paid hereunder:

Provider	Balance
1) St. Elizabeth Boardman Health Center	$3,536.00
2) Northshore University Medical Center	$1,722.00
3) Omega Rehabilitation Center	$2,504.06
4) Adventist La Grange Memorial Hospital	$2,585.61
5) Results Physiotherapy	$636.89
TOTAL:	**$10,984.56**

With respect to part K, is Petitioner entitled to prospective medical care, the Arbitrator concludes as follows:

The Arbitrator's conclusions regarding part (F) is adopted and incorporated herein. Respondent shall authorize the "the cervical laminectomy and fusion" surgery as well as reasonable treatment following the procedure as prescribed by his treating neurosurgeon.

With respect to part L, the Arbitrator concludes as follows what TTD benefits Petitioner is entitled to, the Arbitrator concludes as follows:

The Arbitrator's conclusions regarding part (F) is adopted and incorporated herein. As of 10/24/11, the records of Concentra Immediate Care show that Petitioner was on "modified activity" of no lifting or pushing/pulling over 10 lbs. Respondent did not offer light duty until 5/22/12. (R. Ex. 10). As of 11/29/11, Petitioner was taken off work by Dr. Karahalios. (P. Ex. 4). Dr. Karahalios opined that Petitioner should remain off work until the surgery (P. Ex. 4, 9). Petitioner has not had the surgery and is not receiving TTD benefits. Dr. Karahalios has never returned Petitioner to work in any capacity. Respondent's IME doctors opined that there was no causal connection, and that Petitioner could return to work full duty, but for the reasons stated

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above, the Arbitrator finds Dr. Karahalios' opinion more credible and finds that Petitioner was TTD as follows:

Respondent shall pay Petitioner temporary total disability benefits from 10/25/11 to 10/13/16, minus the two days he worked light duty or 259 weeks at a TTD rate of $1,026.77

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

Herbert Mueller,

Petitioner,

vs. NO: 15WC 24912

Jewel Food Stores Inc,

17IWCC0709

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 24, 2017, is hereby affirmed and adopted.

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

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

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

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: NOV 9 - 2017
MJB/bm
o-11/7/17
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

MUELLER, HERBERT
Employee/Petitioner

Case# **15WC024912**

17IWCC0709

JEWEL FOOD STORES INC
Employer/Respondent

On 1/24/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.60% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0612 DWYER AND COOGAN PC
PATRICK E DWYER
140 S DEARBORN ST SUITE 1603
CHICAGO, IL 60603

1120 BRADY CONNOLLY & MASUDA PC
WILLIAM DEWYER
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
CORRECTED ARBITRATION DECISION
19(b)

HERBERT MUELLER
Employee/Petitioner

v.

JEWEL FOOD STORES, INC.
Employer/Respondent

Case # **15** WC **24912**

Consolidated cases: _____

17IWCC0709

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **November 29, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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FINDINGS

On the date of accident, **September 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$97,864.00**; the average weekly wage was **$1,882.00**.

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

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

Respondent shall be given a credit of **$0** for TTD, **$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 his current condition of ill-being is causally related to the September 22, 2014 accident therefore, no benefits are awarded, 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.

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FINDINGS OF FACT

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

Testimony of Petitioner

Herbert Mueller (the "petitioner"), a 58-year old pipefitter for Jewel Food Stores, (the "respondent") had been an employee since February 1993. He testified that on September 22, 2014, while on the roof of a Lemont store, lifting debris, i.e. a part of a cedar fence, off the heating and cooling equipment, he felt a sharp pain in his back which radiated down his left leg. Petitioner has had previous treatment for his lower back in 1997, when he was involved in a motor vehicle accident and denied having any other treatment to his lower back. Petitioner testified that he called his dispatcher, told him about the condition of the roof and that he had hurt his back. He stayed on the job after the accident on September 22, 2014. Petitioner testified, on direct examination, that he had no intention of leaving the workforce, after this accident. He testified that on several occasions, after leaving the Respondent's employ, he sought employment elsewhere. He further denied that he asked Dr. Pinozzo to remove him from work.

Petitioner's treatment

On September 30, 2014, he sought care with an orthopedic specialist, Dr. Carey Templin. The petitioner underwent conservative treatment including an MRI of the lumbar spine on October 14, 2015; and an EMG study on December 20, 2014. Dr. Templin referred the petitioner to Dr. Najera, for pain management.

On January 2, 2015, the petitioner voluntarily removed himself from his employment duties at Jewel Food Stores. There was a gap in treatment with Dr. Templin until October 9, 2015 when indicated, for the first time, that Petitioner was disabled and taken off work. RX7.

As of the last visit with Dr. Templin on December 14, 2015, the recommendation was to perform a L4-5 lumbar fusion, based upon Petitioner's claim of a work injury. The petitioner is requesting prospective medical care in the form of a surgical recommendation as well as interim TTD benefits from April 23, 2015 to the present.

The petitioner was seen by Dr. Thomas Gleason, a board certified orthopedic surgeon, by request of Respondent, on May 17, 2016. RX1.

Deposition of Dr. Cary Templin dated April 22, 2016

According to Dr. Templin's testimony, the petitioner saw him five (5) times for treatment and the doctor reviewed two (2) MRI's dated October 4, 2014 and November 16, 2015. The petitioner's first visit was on September 30, 2014; he came in complaining of lower back pain, extending into the left leg, with tingling in his foot. As to mechanism of injury, Petitioner gave a history of the pain presenting a week before when he was "leaning over to pick up a piece of fence off of some cooling

lines and when he was lifting the fence up he felt severe pain in the back extending into the left leg." His pain level was 6 out of 10.
Petitioner "reported a previous injury to his back in 1997, but noted that over the last few years he had had no problems". Dr. Templin found a disc protrusion at the L4-5 level and that the petitioner walked with antalgia on the left side. X-rays showed "loss of disc height at L5-S1" with "some degenerative change at L3-4 and L4-5".

Dr. Templin ordered an MRI which showed "a left foraminal and extra foraminal disc protrusion at L4-5 causing left foraminal stenosis, there were degenerative changes at L3-4 and L5-S1 causing mild neural foraminal stenosis, there was a tiny posterior central disc annular tear at L1-2, and there was a small cyst noted in the kidney".

A left L4 transforaminal injection was recommended, which was apparently preformed and as of October 9, 2015, Petitioner continued to have pain into the left leg and giving way of the leg. An October 28, 2014 examination showed "some buttock pain on straight leg rising; plus 1 reflexes at the knees, 1 at the right ankle, blunted at the left ankle; sensation was diminished over the foot".

On December 15, 2015, Petitioner's complaints included "numbness to his distal leg. Petitioner told the doctor that he had had the injection at the left L4-5 with improvement, however the pain returned. Dr. Templin's recommendations were "to decompress the L4 nerve root either through a far lateral decompression versus a transforaminal lumbar interbody fusion, ("TLIF")" if he could access that area. Dr. Templin also testified that the petitioner injuries were causally related to his work on September 22, 2014. PX1.

Deposition of Dr. Thomas F. Gleason, dated August 30, 2016
On May 17, 2016, Dr. Gleason examined the petitioner, who was complaining of "left-sided low back pain with spasms going into the upper outer left thigh. He had numbness in the left calf and some tingling in the entire left foot." The doctor had the petitioner perform several tests, i.e. the Britton test, straight leg raising, FABER and palpations to various areas of the body. All tests were negative or suggested a result that was inconsistent with Petitioner's treating doctor's findings.

Upon taking x-rays, Dr. Gleason found that "the lumbar spine demonstrated degenerative disc disease, severe at L5-S1, moderate at L1-2 and at L3-4, with disc space narrowing and spurring. Dr. Gleason also reviewed a CD-ROM containing an MRI of Petitioner's lumbar spine, performed April 15, 2015 from Hinsdale Orthopedics, demonstrating "degenerative disc disease, severe, L5-S1 with disc space narrowing and end plate reaction. There existed moderate degeneration L1-2 and L3-4, more mild at L2-3 and L4-5, with associated disc space narrowing and bulging and overall good alignment. At L5-S1 there existed a broad-based posterior protrusion with a right central disc annular tear. The scan was otherwise unremarkable."

Dr. Gleason reviewed an EMG/NCV study of Petitioner's lower left extremity and lumbosacral paraspinal area, performed on November 11, 2015; which was interpreted as being normal. There was no evidence of entrapment or peripheral neuropathy and no changes consistent with denervation. Dr. Gleason opined that Petitioner had trochanteric bursitis, with age-related degenerative changes; unrelated to his work injury of September 22, 2014.

The doctor reviewed Petitioner's medical records from Dr. John Panozzo, dating from approximately February 6, 2008, reporting a history of an L4-5 herniated nucleus pulposus, with radicular pain persisting until approximately October 2013; with similar symptoms present into June 10, 2015. Dr. Gleason testified that not only did the petitioner never indicate prior treatment or care regarding his lumbar spine, he specially denied such treatment.

Lastly, Dr. Gleason opined that the petitioner was capable of returning to work in a full-time capacity, with home exercises and over-the-counter medications or alternatively, a nonsteriodal anti-inflammatory. At the most, he may have suffered a "temporary exacerbation of his pre-existing condition and not in need of any future, formalized, institutionalized medical treatment being causally related to any work event of September 22, 2014". RXs 1 & 2.

Testimony of Respondent's witness, Brian Kropel

Mr. Kropel testified that he is the director of facilities and maintenance for Respondent and used to be Petitioner's supervisor. He further testified that the petitioner retired from service to Respondent, at which time he spoke to Petitioner and told him that he was ordering a plague to celebrate his retirement. The petitioner never mentioned a work accident to him; that he had no knowledge of Petitioner's medical treatment or back condition.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent on September 22, 2014?

The petitioner testified in a credible and unrebutted manner, that an accident occurred on September 22, 2014, of which he gave timely notice.

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

It is the burden of every Petitioner before the Worker's Compensation Commission (the "Commission") to establish with evidence every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. *Board of Trustees of the University of Illinois v. Industrial Commission,* (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, *Edward Don v. Industrial Commission,* (2003) 344 Ill.App.3d 643, 801 N.E.2d 18.

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission,* 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before

17IWCC0709

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 the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin 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).

Petitioner's medical records from Dr. John Panozzo document a history of a deteriorating back condition since on or about 2008. Dr. Gleason reviewed an EMG/NCV study of Petitioner's lower left extremity and lumbosacral paraspinal area, performed on November 11, 2015; which was interpreted as being normal. There was no evidence of entrapment or peripheral neuropathy and no changes consistent with denervation. Dr. Gleason opined that Petitioner had trochanteric bursitis, with age-related degenerative changes; unrelated to his work injury of September 22, 2014.

The doctor reviewed Petitioner's medical records from Dr. John Panozzo, dating from approximately February 6, 2008, reporting a history of an L4-5 herniated nucleus pulposus, with radicular pain persisting until approximately October 2013; with similar symptoms present into June 10, 2015. Dr. Gleason testified that not only did the petitioner ever indicate prior treatment or care regarding his lumbar spine, he specially denied such treatment.

Lastly, Dr. Gleason opined that the petitioner was capable of returning to work in a full-time capacity, with home exercises and over-the-counter medications or alternatively, a nonsteriodal anti-inflammatory. At the most, he may have suffered a "temporary exacerbation of his pre-existing condition and not in need of any future, formalized, institutionalized medical treatment being causally related to any work event of September 22, 2014". The Arbitrator finds Dr. Gleason's opinion to be more persuasive than Dr. Templin's. The petitioner has not proven, by a preponderance of the evidence, that his current condition of ill-being is causally related to the September 22, 2014 accident therefore, no benefits are awarded, pursuant to the Act. In that the petitioner has not proven that his condition is related to the accident, the remaining disputed issues are moot and will not be addressed.

17IWCC0709

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
15WC24912
SIGNATURE PAGE

L Thompson Scott
Signature of Arbitrator

January 19, 2017
Date of Decision

JAN 24 2017

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

JOSE PENA,

Petitioner,

vs. NO: 08 WC 14133

WELLS MANUFACTURING COMPANY,

Respondent.

17IWCC0710

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to the Appellate Court's order filed February 5, 2016. In its order, the Appellate Court dismissed the case for lack of appellate jurisdiction on the basis that the employer's notice of appeal was untimely. The Appellate Court found that the Circuit Court's order remanding the matter to the Commission did not have the effect of rendering its order interlocutory and non-final.

Under these circumstances, the Appellate Court held that the Circuit Court's November 14, 2014 decision was final for purposes of appeal and the Circuit Court's remand language had no effect on the Appellate Court's finding that the employer's notice of appeal was untimely.

The Circuit Court agreed with the Commission Decision, dated November 8, 2013, relative to the medical expenses owed by Respondent to Petitioner in the amount of $24,523.03. The Circuit Court further found that Respondent was entitled to a credit of $18,045.19 for previous payments, and indicated that the net amount due to Petitioner was $6,477.84. The Circuit Court remanded the matter to the Commission with instructions to revise its Decision and Opinion to specifically reflect the $6,477.84 amount owed by Respondent to Petitioner for medical expenses. The Circuit Court affirmed the Decision of the Commission in all other respects.

17IWCC0710

It should be noted that the Circuit Court erroneously wrote $25,523.03 in its order instead of $24,523.03. The Commission finds that the correct amount of the outstanding medical expenses is $24,523.03. This amount less the credit of $18,045.19 equals $6,477.84, the amount determined by the Circuit Court's order.

Consistent with the mandate from the Circuit Court, the Commission hereby modifies its Decision, dated November 8, 2013, to indicate that Respondent shall pay to Petitioner $6,477.84 in medical expenses pursuant to Sections 8(a) and 8.2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Commission, dated November 8, 2013, is hereby modified per the Circuit Court's order of November 14, 2014.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for medical expenses in the amount of $24,523.03 and is entitled to a credit of $18,045.19 for previous payments. Therefore, the net amount owed for medical expenses is $6,477.84. The remainder of the Commission's Decision, dated November 8, 2013, remains unchanged.

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 $6,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: NOV 9 - 2017
MJB/pm
D: 11-7-17
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

STATE OF ILLINOIS)	☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF DUPAGE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD GRUBB,

Petitioner,

17IWCC0711

vs. NO: 09 WC 47900

PEACOCK COLORS, INC. AND
CNA/CONTINENTAL CASUALTY CO.,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact and Conclusions of Law

The Commission affirms and adopts the Arbitrator's Decision with respect to the award of permanent and total disability and denial of penalties and attorneys' fees.

The Commission further finds Respondent is liable for medical bills related solely to Petitioner's lumbar spine condition pursuant to the provisions of Section 8(a) and subject to Section 8.2 of the Workers' Compensation Act (Act). Respondent is not liable for medical bills incurred for treatment unrelated to Petitioner's lumbar spine including, but not limited to, treatment for Petitioner's cervical spine condition, diabetes, gout, glycosuria, dermatitis, facial numbness, abdomen and/or injury to his small intestine or any treatment that exceeds Petitioner's two doctor choices and respective chain of referrals. The Commission notes the medical evidence is replete with references to Petitioner's long standing pre-accident history of high glucose and obesity with

recommendations for weight loss. Therefore, the Commission vacates the Arbitrator's award of $67,550.04 to Petitioner for lumbar spine medical expenses listed on page 2 of the Arbitrator's Decision. The Commission also adds the words "listed in" after the parenthesis and before the parenthetical exhibit numbers listed in the last sentence on page 15 and on the first line of page 16. The Commission also strikes the phrase "which totals $67,550.04" listed on the second line of page 16.

The Commission notes many medical bill exhibits were introduced into evidence without CPT codes identifying the medical, surgical, and diagnostic services billed making it virtually impossible to determine relatedness. As the Court held in *Springfield Urban League v. Ill. Workers' Comp. Comm'n*, "Pursuant to the Act, the employer must adjust the medical bills to conform to the fee schedule of section 8.2 of the Act. 820 ILCS 305/8.2 (West 2006). We note in response to the employer's concerns regarding coding and bundling that the fee schedule requires that services be reported with the "Current Procedural Terminology" (CPT) codes and in accordance with the HCPCS Level II, United States Department of Health and Human Services, Centers for Medicare and Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244 (2006), no later dates or editions. See 50 Ill. Adm. Code 7110.90 (2012). If the claim does not contain substantially all the required data elements necessary to adjudicate the bill, or the claim is denied for any other reason, in whole or in part, the employer or insurer shall provide written notification, explaining the basis for the denial and describing any additional [***17] necessary data elements, to the provider within 30 days of receipt of the bill." 820 ILCS 305/8.2(d)(2) (West Supp. 2011). *Springfield Urban League v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC, P38, 990 N.E.2d 284, 292, 371 Ill. Dec. 384, 392.

With respect to Petitioner's choice of medical providers, Petitioner chose to treat with Dr. Jerry Bauer a neurosurgeon, for his lumbar back condition. Dr. Bauer referred Petitioner to Dr. Steven Mardjetko for surgical consultation. Petitioner also chose to treat with his primary care physician (PCP) to obtain prescriptions for Hydrocodone and subsequently oxycodone after Dr. Bauer released him from his care. Petitioner's PCP prescribed Xanax since 2007 and Ambien since 2008, long before the subject work accident. (Px4) The Commission notes that Petitioner denied taking hydrocodone before he hurt himself in 2009. (T, p. 143) The Commission also notes the discrepancy between Petitioner's testimony and the April 16, 2014 Medical Progress note at Rehabilitation Institute of Chicago (RIC). The RIC entry states they "reviewed that he would not be able to take both long acting opioids and the benzodiazepines together and he has been on the benzos for a long time, pre-dating his injury. We also reviewed the presence of THC in his urine and that he cannot do illicit substance with any of the controlled meds." (Px18)

Petitioner chose not to return to RIC. Petitioner testified on direct examination the three medications he takes are hydrocodone, oxycodone and Xanax. "Three times a day for Xanax and six times a day for hydrocodone" and he is trying to get off of them. (T, p. 94) On cross-examination Petitioner testified he has "hydrocodone for emergency, but the oxycodone is about all" he takes and Xanax every day. (T, pp. 148-150). The Commission finds the Petitioner had been taking Xanax and Ambien for years predating the July 14, 2009 work accident and those prescription drugs are not causally related to the subject injury.

The Commission further finds that treatment at St. Alexius Medical Center on September

17IWCC0711

13, 2010 is unrelated. Petitioner's chief complaint was for dizziness and he described right sided headache, stiffness in his neck and right shoulder. Dr. Edward Goldberg credibly testified that Petitioner's pain complaints were not a normal anatomical pattern of complaints. Dr. Goldberg also credibly testified "If one is looking for lumbar etiology, it does not cause pain up to the neck and the subjective complaints of facial problems, seizures." (Rx1) In addition, the Commission finds there is no evidence that Petitioner was denied access to his lumbar spine treating doctor, Dr. Bauer or that he was referred by Dr. Bauer for emergency treatment related to his lumbar spine on that date.

The Commission also finds that the Petitioner's inpatient treatment at Lutheran General Hospital on November 16, 2010 was for Petitioner's gout condition. There is no evidence that the Petitioner did not have access to Dr. Bauer at that time or that he had a bona fide emergency related to his lumbar spine or that he was referred by Dr. Bauer for emergency treatment related to his lumbar spine.

In both instances, the September 13, 2010 and November 16, 2010 emergency room and subsequent inpatient admissions at St. Alexius Medical Center and Lutheran General Hospital respectively, Petitioner's lumbar spine complaints were incidental to the primary purpose of the emergency room presentations and therefore the respective medical bills are not causally related to the case at bar.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 21, 2016, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $469.72 per week for a period of 142 weeks, commencing September 1, 2009 through May 21, 2012 that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a credit for all TTD benefits they have paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $469.72 per week for 174-2/7 weeks, commencing May 22, 2012 through September 23, 2015 as provided in §8(a) of the Act. Respondent shall be given a credit for all maintenance benefits they have paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $469.72 per week for life, commencing September 24, 2015, as provided in §8(f) of the Act, for the reason that the injuries sustained caused the Petitioner permanent and total disability.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for the reasonable, necessary and related medical expenses for treatment to Petitioner's lumbar spine in accordance with §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that benefits are denied for medical treatment unrelated to Petitioner's lumbar spine treatment including treatment for Petitioner's

17IWCC0711

diabetes, gout, glycosuria, dermatitis, facial numbness, abdomen and/or injury to his small intestine, the emergency room and inpatient hospital admissions at St. Alexius Medical Center commencing September 13, 2010 and Lutheran General commencing November 16, 2010 and Respondent is not liable for Petitioner's prescriptions for Xanax and Ambien.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall be given credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving the credit, as provided in §8(j) of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's petitions for penalties and attorneys' fees are denied.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the rate adjustment fund, as provided in §8(g) of the Act.

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

DATED: NOV 9 - 2017
KWL/bsd
O: 9/12/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0711

GRUBB, RICHARD
Employee/Petitioner

Case# **09WC047900**

11WC038035

PEACOCK COLORS INC AND CAN CONTINENTAL CASUALTY CO
Employer/Respondent

On 7/21/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.43% 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:

1876 PAUL W GRAUER & ASSOC
EDWARD ADAM CZAPLA
1300 WOOD FIELD RD AUITE 205
SCHAUMBURG, IL 60173

0011 LAW OFFICES OF EDWARD J. KOZEL
MARCY SINGER-RUIZ
333 S WABASH AVE 25TH FL
CHICAGO, IL 60604

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 17IWCC0711

RICHARD GRUBB
Employee/Petitioner

Case # 09 WC 47900

v.

Consolidated Case # 11 WC 38035

PEACOCK COLORS, INC., and
CNA CONTINENTAL CASUALTY CO.
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 BRIAN CRONIN, Arbitrator of the Commission, in the city of WHEATON, on September 24, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

17IWCC0711

On 7/14/09, 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 an average weekly wage of $ 704.58.

On the date of accident, Petitioner was 46 years of age, ***single*** with 2 dependent children.

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

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

Respondent shall be given a credit for all TTD benefits paid. Respondent claims they have paid $150,021.29, which Petitioner disputes. Rx.5, the TTD Payout Query Results, total $141,058.59.

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 $67,550.04 for the reasonable, necessary and related medical expenses for treatment to Petitioner's lumbar spine, in accordance with Section 8(a) and subject to Section 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 the credit, as provided in §8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $469.72/week for 142 weeks commencing **September 1, 2009 through May 21, 2012,** as provided in §8(b) of the Act. Respondent shall be given a credit for all TTD benefits they have paid.

Respondent shall pay Petitioner maintenance benefits of $469.72/week for 174-2/7 weeks, commencing **May 22, 2012** through **September 23, 2015,** as provided in §8(a) of the Act.

Respondent shall pay Petitioner permanent total disability benefits of $469.72/week for life, commencing on **September 24, 2015,** as provided in §8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the rate adjustment fund, as provided in §8(g) 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.

Brian T. Cronin
Signature of Arbitrator

7-19-2016
Date

JUL 21 2016

FINDINGS OF FACT

Petitioner is a 52-year old gentleman who worked in the shipping and receiving department for Respondent for 23 years.

Petitioner presented at trial using a four-pronged cane.

On July 14, 2009, Petitioner injured his low back lifting a box onto a pallet on the back of a truck at work. The box weighed 60 pounds.

Petitioner reported the accident to his supervisor and was instructed to go to Concentra Medical Center for treatment. On July 16, 2009, Petitioner was seen at Concentra complaining of bilateral lumbar pain radiating to the right leg. (Px.1) X-rays of the lumbar spine were negative, and Petitioner was diagnosed with a lumbar strain. A course of physical therapy treatment along with Naproxen and Skelaxin were prescribed. (Px.1) Petitioner was issued work restrictions of no lifting over 10 pounds.

Petitioner completed a course of physical therapy at Concentra between July 21, 2009 and August 11, 2009. (Px.1) Initially, therapy helped relieve the symptoms. However, Petitioner continued to experience radiating right leg pain. Petitioner was prescribed a Medrol Dose Pak and Skelaxin, and a lumbar MRI study was ordered. (Px. 1)

The August 24, 2009 lumbar MRI revealed:

> L1-L2: Minimal bulging of the disk material and mild facet hypertrophy without significant impingement upon the thecal sac;
>
> L2-L3: Mild diffuse bulging of the disk material and moderate facet hypertrophy. Mild impingement upon the thecal sac and neural foramina bilaterally;

> L3-L4: Moderate bulging of the disk material with mild to moderate impingement upon the thecal sac and moderate to severe impingement upon the neural foramina bilaterally;
>
> L4-L5: Mild to moderate bulging of the disk material that is greater posterolaterally on the right. Mild facet hypertrophy and mild impingement upon the thecal sac on the right. (There appears to be a right hemilaminectomy at L4-L5); and
>
> L5-S1: A small right-sided disk herniation with mild impingement upon the thecal sac. There is mild bulging of the remainder of the disk material. (Px. 1)

Petitioner was seen at Concentra the following day complaining of low back and right leg radicular pain. (Px. 1) Petitioner was prescribed Darvocet and referred to a neurosurgeon for consultation. Petitioner's 10-pound lifting restriction remained in effect. (Px. 1)

On August 31, 2009, Dr. Onibokun, a neurosurgeon at Concentra, examined Petitioner, who reported low back pain with bilateral lower extremity radiculopathy. (Px. 1) Examination revealed tenderness to palpation of the mid and lower lumbar spine with diminished lumbar flexion and extension. (Px. 1) Dr. Onibokun's impression of the MRI was:

> "Broad-based L3-4 paracentral posterior disk bulge resulting in moderate to severe bilateral neuroforaminal stenosis. There is also right-sided posterolateral disk herniation resulting in moderate right-sided L4-L5 neuroforaminal stenosis. A right-sided L4-L5 hemilaminotomy defect is evident. The patient also has evidence of L3-L4, L4-L5 and L5-S1 lumbar degenerative disk disease with evidence of disk desiccation and loss of disk height." (Px.1)

Dr. Onibokun referred Petitioner to Dr. Heller for bilateral facet injections and bilateral transforaminal epidural steroid injections.

On September 9, 2009, Petitioner saw Jerry Bauer, M.D., a neurosurgeon, complaining of low back and sciatic pain radiating to the top of his right foot into the great toe. (Px.2) Dr. Bauer noted the MRI showed a small herniated disc at L4-L5 and L5-S1. Dr. Bauer restricted Petitioner from all work activity and recommended a transforaminal epidural steroid injection and physical therapy. (Px.2)

Petitioner received a right L4 transforaminal lumbar epidural steroid injection on September 11, 2009 which provided only temporary relief of the radicular leg pain. (Px. 2) Dr. Bauer recommended a lumbar myelogram/post myelogram CT scan, which revealed the following:

> L2-L3: Minimal posterior bulge and degeneration of the disc;
>
> L3-L4: Moderate diffuse posterior bulge of the disc with a broad-based degenerative osteophyte. There is moderate central canal narrowing caused by a congenitally small canal, posterior bulge of the disc and mild facet hypertrophic degenerative changes bilaterally;
>
> L4-L5: Moderate diffuse posterior bulging of the disc. Mild facet hypertrophic degenerative changes are present bilaterally. There is a broad-based degenerative osteophyte and bilateral lateral osteophytes. There is associated moderate bilateral foraminal stenosis;
>
> L5-S1: Mild diffuse posterior bulge of the disc with associated broad-based osteophyte and bilateral lateral osteophytes. There is moderate to severe right foraminal stenosis, moderate left foraminal stenosis.

Dr. Bauer referred Petitioner to Dr. Mardjetko for a surgical consultation. The history contained in Dr. Mardjetko's records reflects that Petitioner was injured lifting at work in July 2009. (Px.2) It also noted that Petitioner had a previous discectomy by Dr. Bauer in 1985 at L4-L5. (Px.2) Petitioner reported low back pain radiating down his lower extremities into the right foot and great toe. (Px.2) Examination revealed

tenderness in the lower lumbar region and limitations in flexion and extension. (Px.2) Petitioner was diagnosed with discogenic lumbar pain syndrome and prescribed aqua therapy and fitted for a lumbosacral corset. (Px.2)

Petitioner completed a course of physical therapy at NovaCare between November 6, 2009 and February 1, 2010 which failed to relieve his pain. (Px.11) Petitioner was prescribed an electrical stimulator for his lumbar spine. On November 25, 2009, Petitioner was examined by orthopedic surgeon Edward J. Goldberg, M.D., pursuant to Section 12 of the Act.

Petitioner claims that on January 6, 2010, he injured his neck lifting weights at physical therapy. The Arbitrator addresses this claim in his decision for case # 11 WC 38035.

The January 20, 2010 cervical MRI showed degenerative disc bulging with osteophytic ridges at C3-C4, C4-C5 and to a lesser extent C5-C6. The lumbar MRI revealed osteophytic ridges at L3-L4, L4-L5 and L5-S1, with slight canal stenosis. (Px.2)

Petitioner underwent a lumbar discogram on February 3, 2010. The radiologist stated:

> "that the L3, L4-L5/S1 levels act as the patient's primary pain generators. Injections at these levels produced typical and moderately severe symptomatology. Morphologically, there is clear radiographic evidence of diffuse degenerative and annular disruption at these levels. A mild degree of disc degeneration and annular disruption is also noted at the level of L2-L3 although injection of the disc did not reproduce typical symptomatology." (Px.2)

A CT lumbar spine post diskogram showed:

> "evidence of multilevel disc degeneration and degenerative spondylosis. These findings are most prominent at the

levels of L3/L4-L5/S1. These levels also demonstrate disc bulging with facet arthropathy. There is resulting significant central spinal stenosis at the levels of L3/L4 and L4/L5." (Px.2)

Dr. Bauer discussed the findings with Petitioner and recommended a four-level lumbar spine surgery and advised Petitioner to see Dr. Mardjetko prior to surgery. (Px. 2)

On May 18, 2010, Dr. Mardjetko and Dr. Bauer performed the following surgery:

1. Right hemilaminectomy L3-4 and L5-S1;
2. Revision right hemilaminectomy L4-5;
3. Bilateral facet joint osteotomies L3-4, L4-5, L5-S1;
4. Bilateral posterior shortening facet joint osteotomies, L3-4, L4-5, L5- Sl;
5. Posterior lumbar interbody fusion, L3-4, L4-5, L5-S1 utilizing leopard cages, L3-4, L4-5, L5-S1;
6. Utilization of bone morphogenic protein implants for anterior body fusion, 4 mg per level;
7. Utilization of bone morphogenic protein implants 4 mg per level posterior;
8. Utilization of local autograft and crushed allograft and grafton demineralized bone matrix putty;
9. Application of a quarter inch expedium segmental spinal instrumentation L3-S1;
10. Posterior spinal fusion L3-S1; (Px.5)

Petitioner was hospitalized at Lutheran General Hospital from the date of surgery through May 22, 2010. (Px. 5,6,7) Post-operatively, Petitioner was fitted with a TLSO brace. Petitioner wore the brace "all day long" for two (2) months. On May 22,

2010, Petitioner was transferred to in-patient rehabilitation at Lutheran General Hospital. (Px.7)

The post-operative diagnosis was discogenic back pain, lumbar spinal stenosis and degenerative and segmental kyphosis L3-L4, L4-L5, L5-S1. (Px.6)

Post-operatively, Petitioner experienced significant residual back pain with some improvement of the radicular left leg pain. (Px.6) Petitioner described his condition as "not good" following surgery and continued to experience sciatic pain down his right leg. Petitioner was prescribed Percocet, Norco and Oxycodone for the pain. Petitioner received physical and occupational therapy while in the rehabilitation program. (Px.7) Petitioner was discharged on June 4, 2010.

Petitioner started out-patient physical therapy at NovaCare on June 8, 2010 and followed up with Dr. Bauer and Dr. Mardjetko post-operatively. Petitioner was prescribed Norco and restricted from all work activity. (Px.2)

During physical therapy, Petitioner experienced increased pain in his back radiating down his legs, right more than left. (Px.2) Dr. Bauer ordered a MRI and CT scan of the lumbar spine and referred petitioner for pain management. Physical therapy was limited to 30-40 pounds lifting. (Px.2)

The August 13, 2010 lumbar CT showed post-surgical changes of multi-level fusion from L3-S1 and disc degeneration and facet arthropathy at L2-L3. (Px.2) The lumbar MRI revealed anterior and posterior spinal fusion from L3-S1 without residual stenosis or intervertebral disc herniation. (Px.2)

Dr. Mardjetko reviewed the CT scan and noted, "the fusion still does not look solid either anteriorly or posteriorly" and recommended that Petitioner decrease the physical therapy. (Px.3)

At Respondent's request, Petitioner was released to return to light-duty work four hours a day starting on September 13, 2010. (Px.2) Petitioner attempted to return to work in the office on September 13, 2010, but could not hold his back up and experienced an onset of neck and back pain. Petitioner left work and went to the emergency room at St. Alexius Medical Center where he was admitted for treatment.

The history at St. Alexius states, Petitioner "returned to work on a part-time basis with work restrictions and after sitting at his desk for (3) hours, he developed neck pain and weakness, followed by low back pain and leg weakness. He left work early and subsequently complained of dizziness." (Px.12) CT scan of the head and MRI of the brain were unremarkable. MRI of the cervical spine revealed C3-C4 mild disc bulge, C4-C5 disc bulge with a small central protrusion, that impresses upon the anterior margin of the thecal sac, C5-C6 disc bulge which impresses upon the anterior margin of the thecal sac, and C6-C7 disc bulge. (Px.12) MRI of the lumbar spine showed post-operative changes with no evidence of spinal stenosis.

Petitioner was diagnosed with:

Cervicalgia;
Cervical disc protrusion;
Cervical degenerative disc disease;
Low back pain, status post lumbar discectomy (Px. 12)

On September 16, 2010, Petitioner was discharged from the hospital and referred to out-patient physical therapy and pain management. (Px.12) Petitioner followed up with Dr. Bauer who restricted him from all work activity and prescribed additional physical therapy and Norco for pain. (Px.2) On September 29, 2010, Dr. Goldberg re-examined Petitioner.

Petitioner saw Dr. Mardjetko and Dr. Bauer on October 25, 2010 at which time he complained of low back and right leg pain. (Px.2) Petitioner experienced pain in his neck radiating up to the back of his head. Physical therapy was prescribed, and Petitioner was restricted from all work. Petitioner completed physical therapy treatment at NovaCare on November 10, 2010. (Px.11)

On November 16, 2010, Petitioner was admitted to Lutheran General Hospital for low back and severe left foot pain with swelling and inflammation. (Px.10) Petitioner "states he was at a pt. appt. last Wednesday where he had his exercises increased. The following morning he noticed swelling and pain in his bilateral feet. The pain and swelling in his right foot decreased, but he noted increased pain to light touch, redness and swelling at the base of his great toe on his left foot. The pain was so bad today, along with the patient's low back pain that he came to the LGH ER today". (Px.10)

Petitioner was diagnosed with acute gout of the left ankle along with residual lumbosacral radiculitis secondary to lumbar degenerative disk disease status post L3-S1 posterior lumbar fusion. (Px.10) Petitioner was hospitalized for four days and prescribed medication for the gout along with Lyrica, Elavil and Percocet for the ongoing low back pain. Petitioner was discharged from Lutheran General Hospital on November 19, 2010.

On December 20, 2010, Petitioner saw Dr. Bauer and reported relief of his back and leg pain. (Px.2) Petitioner's main problem was pain in his neck with stiffness. Petitioner saw his primary care physician, Dr. Dirkes, at Multi Specialty Clinic / Medical Specialists Ltd., on February 7, 2011 complaining of joint pain / spasms in the upper and lower back along with numbness to the hands. (Px.4) Petitioner was prescribed Norco for the pain. On February 23, 2011, Petitioner was again examined by, Dr.

Goldberg. On March 15, 2011, Petitioner was treated at the emergency room at St. Alexius Medical Center for abdominal pain and constipation and received medication. (Px.13)

On March 21, 2011, Petitioner returned to Dr. Mardjetko complaining of low back pain radiating into the right lower extremity. (Px.3) Dr. Mardjetko noted that it was time to do a complete work-up to determine whether Petitioner can return to work and ordered MRI of the cervical, thoracic and lumbar spine and lumbar CT scan. (Px.3) Petitioner was also examined by Dr. Bauer at that time who continued to restrict Petitioner from work.

Subsequent MRI and CT of the lumbar spine demonstrated multi-level lumbosacral fusion L3-S1 and disk degeneration with facet arthropathy L2-L3. (Px.2) On May 18, 2011, Dr. Bauer ordered a cervical MRI for Petitioner's ongoing neck pain. The May 24, 2011 cervical MRI revealed moderate posterior bulge and degeneration of C3-C4, C4-C5, C5-C6 and C6-C7 intervertebral discs with mild to moderate central canal stenosis and mild to moderate bilateral foraminal stenosis. (Px.2)

On June 8, 2011, Dr. Bauer noted Petitioner has "residual back pain, which prevents him from working and sitting for more than 10-15 minutes at a time." (Px.2) A course of physical therapy treatment for the cervical spine was ordered. Petitioner remained restricted from work and was prescribed Hydrocodone. On September 23, 2011, Dr. Bauer recommended a cervical MRI and CT scan and continued to restrict Petitioner from work. (Px.2)

On March 21, 2012, Petitioner completed a functional capacity evaluation that demonstrated his ability to function at the light category of work. (Px.2) Cervical MRI

and CT scan performed on April 7, 2012 revealed a small left paracentral soft tissue disc herniation at C4-C5 with moderate left foraminal stenosis at C3-C4. (Px.2)

Petitioner received pain medication for his neck and back pain from his primary care physician on April 21, 2012. (Px.4) On April 30, 2012, Dr. Bauer reported Petitioner's complaints of right-sided neck pain and continued bilateral low back pain with radiation to his legs. (Px.12) A course of physical therapy treatment for the neck was ordered along with an updated lumbar MRI. (Px.2) Petitioner completed the physical therapy treatment at NovaCare between May 4, 2012 and July 6, 2012. (Px.11)

Petitioner continued to experience neck and low back pain and was referred by his primary care physician for a series of cervical injections. (Px.4) Petitioner received a cervical epidural steroid injection at St. Alexius Medical Center on August 6, 2012. (Px.13) On August 27, 2012, Petitioner received a C7-T1 translaminar epidural steroid injection. (Px.13) Petitioner received a third epidural steroid injection on September 27, 2012. (Px.13)

Petitioner saw his primary care physician, Dr. Griza, following the injections and reported minimal relief. (Px.4) Petitioner continued to experience neck and back pain that radiated to the legs. Dr. Griza continued to prescribe Norco and Ambien and referred Petitioner to a neurologist for chronic pain treatment. (Px.4) Petitioner remained restricted from all work activity. (Px.4)

On November 15, 2012, Petitioner saw Dr. Monica Simionescu, a neurologist at Suburban Neurologists. (Px.14) A MRI of the lumbar spine and EMG of the upper and lower extremities were ordered. Petitioner was started on a trial of Lyrica for pain. (Px. 14)

The lumbar MRI study completed on November 21, 2012 noted the post-surgical changes from the fusion at L3-S1 are stable without residual spinal stenosis. (Px.15) The November 26, 2012 EMG was an abnormal study that revealed moderate to severe bilateral L5 and S1 lumbar radiculopathies without ongoing denervation. (Px.14) There was no evidence of bilateral cervical radiculopathy. (Px.14) On December 12, 2012, Dr. Simionescu referred Petitioner to Dr. Szymon Rosenblatt for neurosurgical evaluation. (Px.14)

A December 28, 2012 cervical MRI revealed:

> C4-C5: Midline disc protrusion on a background of bulging disc. Disc material abuts and slightly indents the anterior margin of the cord causing moderate narrowing of the central canal;
>
> C5-C6: Disc bulging causing mild narrowing of the central canal;
>
> C6-C7: Broad-based posterior disc protrusion present causing minimal narrowing of the central canal. There is moderate left neuroforaminal narrowing. (Px.15)

Petitioner saw Dr. Rosenblatt on January 22, 2013 complaining of low back and bilateral leg pain. (Px.16) Petitioner also reported neck pain, decreased ROM, bilateral arm, hands pain and weakness in both arms since lifting heavy weight during a PT session for his lower back. (Px.16) Examination of Petitioner's cervical spine revealed tenderness and decreased ROM with right and left paraspinal spasm. (Px.16) Dr. Rosenblatt reviewed the most recent cervical MRI study and recommended a C4-C5 anterior cervical discectomy. (Px.16) A trial spinal cord stimulator was recommended for the lumbar spine. (Px.16)

On January 31, 2013, Petitioner was admitted to Alexian Brothers Medical Center and underwent a C4-C5 anterior cervical discectomy followed by fusion. (Px.15) Petitioner remained restricted from work and was discharged on February 1, 2013. (Px. 15) Petitioner was prescribed Norco and Valium for pain.

Post-operatively, Petitioner followed up with Dr. Rosenblatt and Dr. Griza. Petitioner reported improvement in his neck pain. (Px.17) Petitioner continued to receive Norco for ongoing neck and back pain. (Px.4) Petitioner remained restricted from work. (Px.4)

On April 12, 2013, Petitioner complained of shooting pain from neck to head causing headaches. (Px.17) Petitioner reported 50% improvement with the cervical fusion surgery. (Px.17) Petitioner also reported persistent back and right leg pain. (Px.17) Petitioner was referred to pain management.

Petitioner returned to Dr. Bauer on October 30, 2013 for a follow-up evaluation. Petitioner reported burning and numbness on the left side of his lower back with low back pain radiating to his right leg and stabbing pain in his back. (Px.2) Petitioner also reported pain in both of his arms. Petitioner was taking Norco and Gabapentin for pain. Examination demonstrated tenderness over his entire back with cervical and lumbar restrictions in range of motion. (Px.2) Dr. Bauer ordered a cervical and lumbar MRI study.

The November 7, 2013 cervical MRI revealed:

> C3-4: 3 mm diffuse disc/osteophyte complex with hypertrophy of facet joints and bilateral subarticular protrusion, more on the left. There is mild spinal and moderate/severe bilateral neural foraminal stenosis, more on the left, similar to the prior study;

> C4-5: 2.5 mm diffuse disc bulging with broad right-sided protrusion extending laterally and hypertrophy of uncovertebral and facet joints. There is mild/moderate spinal and mild/moderate bilateral neural foraminal stenosis, more in the left;
>
> C5-6: 3.5 mm broad posterior disc bulge abutting the cord and hypertrophy of facet joints. There is mild bilateral neural foraminal stenosis;
>
> C6-7: 1.5 mm diffuse disc/osteophyte complex and hypertrophy of facet joints. There is mild bilateral neural foraminal stenosis. (Px.2)

The November 7, 2013 lumbar MRI revealed:

> Changes consistent with prior fusion L3-S1 with interpedicular screws and fusion rods. The vertebral body heights are maintained. Diffuse disc bulge and hypertrophy of facet joints at L2-L3, causing mild spinal stenosis and minimal neuroforaminal stenosis. (Px.2)

Pursuant to Dr. Goldberg's request, Petitioner was enrolled in the pain management program at the Rehabilitation Institute of Chicago. (Px.2) Petitioner was restricted from working until completion of the program after which his work capacity would be addressed.

An initial evaluation was conducted at the Rehabilitation Institute of Chicago on January 27, 2014. (Px.18) Thereafter, on April 8, 2014, Petitioner started daily treatment which consisted of physical and occupational therapy, psychological evaluation, and biofeedback evaluation. (Px.18) This was a full eight-hour day program. At Petitioner's request, Respondent provided transportation to and from the Rehabilitation Institute of Chicago. Petitioner completed nine sessions.

Petitioner experienced increased neck, low back and right leg pain in the rehabilitation program. (Px.18) Petitioner was unable to sit and could not concentrate. The 2-½ hour car ride each way was "just too much" for Petitioner to take. Respondent's transportation service failed to pick Petitioner up from Rehabilitation Institute of Chicago on April 17, 2014. Petitioner was unable to travel five hours round trip to attend treatment at Rehabilitation Institute of Chicago and stopped attending the program after the transportation service left him stranded and waiting in Chicago.

Dr. Bauer examined Petitioner on June 18, 2014 and opined that, "Given Mr. Grubb's current condition, he is unable to return to either his former employment or to any occupation. He is disabled … he is unable to return to work." (Px.2) Dr. Bauer noted that Petitioner receives Norco from his primary care physician. (Px.2) Petitioner continues to see his primary care physician who prescribes Hydrocodone (Norco), Oxycodone and Zanax for pain.

Respondent's vocational counselor enrolled Petitioner in a computer class. Petitioner attended the classes but was unable to sit for more than 20 minutes without pain. Petitioner completed the eight-week class which met twice a week for two hours. Respondent's vocational counselor did not provide Petitioner with any other training, job leads or other vocational assistance. The vocational counselor only met with Petitioner one time.

Petitioner has not worked since his July 2009 injury at work. Petitioner was terminated by Respondent in 2013. Petitioner's primary care physician continues to prescribe his pain medications.

On April 30, 2013, Petitioner met with Susan Entenberg, a certified vocational counselor and licensed clinical professional counselor. Ms. Entenberg reviewed

Petitioner's medical records, interviewed Petitioner and authored a report. (Px.40, Dep. Ex. 2)

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:

Petitioner injured his lumbar spine on July 14, 2009 lifting a 60-pound box onto a pallet at work. The Arbitrator notes that Respondent does not dispute the causal connection between the July 14, 2009 injury at work and Petitioner's lumbar spine injury. (Ax. 1) In fact, Respondent's Section 12 physician, Dr. Goldberg, causally relates Petitioner's back injury to the July 14, 2009 accident at work. (Rx. 1) Therefore, based on the credible medical evidence presented at trial along with Petitioner's testimony, the Arbitrator finds that the current condition of ill-being of Petitioner's lumbar spine is causally related to the July 14, 2009 accident.

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:

There is no dispute regarding the reasonable and necessary medical treatment Petitioner received for the injuries to his lumbar spine. In fact, Dr. Goldberg agreed with the medical treatment provided by Dr. Bauer, including the three-level fusion surgery. (Rx. 1, p. 10-11) Therefore, based on the medical records admitted into evidence along with the Arbitrator's findings of causal connection between the July 14, 2009, injury at work and Petitioner's lumbar spine, the Arbitrator finds that Respondent shall pay the reasonable and necessary medical expenses (Px. 19, 20, 21, 22, 23, 24, 25,

26, 27, 28, 29, 31, 32, 33 and 36) incurred in the care and treatment of Petitioner's lumbar spine, which totals $67,550.04, pursuant to Section 8(a) and subject to Section 8.2 of the Act. Respondent wrote on Ax.1: "All medical bills for lumbar spine paid." Respondent is entitled to a credit for medical bills paid.

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

Respondent stipulated that Petitioner was temporarily totally disabled from September 1, 2009 through the date of trial. (Ax.1) Respondent claims that they paid $150,021.59 in TTD benefits from September 1, 2009 through September 27, 2015. (Ax.1) This is a period of 316-6/7 weeks. The Rx.5 Payout Query Results total $141,058.59. Respondent is entitled to a credit for all TTD benefits paid.

No benefits were issued between July 11 and August 21, 2011. (Rx. 5)

Petitioner never returned to work for Respondent following the July 14, 2009 injury at work except for September 13, 2010, when he unsuccessfully attempted to return to light-duty work. Petitioner completed a Functional Capacity Evaluation on March 21, 2012, which demonstrated his ability to perform "light" duty work. (Px.2) Petitioner did not meet the physical demands required of a shipping and receiving manager. (Px.2)

On May 21, 2012, Dr. Bauer noted that Petitioner had reached maximum medical improvement with regard to his back. (Px.2) Dr. Bauer prescribed additional physical therapy and continued to restrict Petitioner from all work activity. (Px.2) On December 12, 2013, Dr. Bauer recommended Petitioner participate in a pain management program. (Px.2) Petitioner was unable to complete the program at the Rehabilitation Institute of

Chicago because of ongoing low back and right leg pain; and he returned to Dr. Bauer on June 18, 2014. Dr. Bauer opined that Petitioner is unable to return to either his former employment or to any occupation, and is disabled. (Px.2)

Therefore, based on the medical records admitted into evidence along with Petitioner's undisputed testimony, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits of $469.72/week for the period September 1, 2009 through May 21, 2012. Thereafter, Petitioner is entitled to maintenance benefits of $469.72/week for the period May 22, 2012 through September 23, 2015. Respondent shall receive a credit for all TTD benefits that they have paid.

In support of his decision with regard to issue (L) "What is the nature and extent of the injury?", the Arbitrator finds as follows:

It is undisputed that Petitioner injured his low back lifting a box at work on July 14, 2009. Petitioner underwent a three-level lumbar fusion surgery with cages and segmental spinal instrumentation. (Px.5) Post-operatively, Petitioner completed extensive physical therapy but continued to experience low back and right leg radicular pain. Petitioner testified that his low back pain never went away, that the pain stayed and never went away and is still here to this day. Petitioner remained restricted from all work activity.

On March 21, 2012, Petitioner completed a Functional Capacity Evaluation which demonstrated his ability to work at a "light" duty level. (Px.2) However, Dr. Bauer continued to restrict Petitioner from work activity and prescribed additional physical therapy. At Dr. Edward Goldberg's request, Petitioner was enrolled in the pain management program at the Rehabilitation Institute of Chicago. (Px.18) Petitioner was

unable to complete the program because of the lengthy drive to and from Chicago along with his ongoing low back and right leg pain. (Px.18)

On June 18, 2014, Dr. Bauer examined Petitioner and opined: "Given Mr. Grubb's current condition, he is unable to return to either his former employment or to any occupation. He is disabled . . . he is unable to return to work." (Px.2)

What constitutes disability that renders an employee wholly and permanently disabled pursuant to Section 8(f) of the Act has been determined by the Supreme Court in Ceco Corp. v. Indus. Comm'n, 95 Ill.2d 278, 477 N.E.2d 842, 69 Ill Dec. 407. An employee is totally and permanently disabled when he "is unable to make some contribution to the work force sufficient to justify the payment of wages." Id. at 286. In order to meet his burden of proof he must show that he is, for practical purposes, unemployable. Old Ben Coal v. Indus. Comm'n, 261 Ill.App.3d 812, 814, 634 N.E.2d 285 (1994).

Petitioner was never released to return to work following his July 14, 2009 injury at work. (Px.2) Petitioner was terminated by respondent in 2013. Petitioner testified he did not look for alternative work since "I wasn't able to work."

Petitioner uses a cane to ambulate, but when asked by Susan Entenberg which doctor prescribed a cane for him, he told Ms. Entenberg that he could not recall. Petitioner testified that his current pain medications are Oxycodone, Xanax and Hydrocodone. He testified that these medications affect Petitioner's concentration and vision and prevent him from driving. Petitioner testified at length as to his persistent low back and right leg pain and numbness.

On recross examination, Petitioner testified that he takes Oxycodone three times a day, Xanax every day and Hydrocodone occasionally.

Petitioner testified that he is not able to play sports with his two sons or participate in their Boy Scout activities. Petitioner is no longer able to walk the dog, mow the lawn or trim the bushes. Petitioner is unable to put his shoes and socks on and relies on his sons for assistance. Petitioner can sit 15-20 minutes before experiencing low back pain and stand for 20-30 minutes. Petitioner can only walk two blocks without pain. Lying down is the only way to relieve the low back pain. Petitioner testified at length to the activities of daily living that are currently affected by his low back pain.

On cross-examination, Petitioner testified that he lives in a three-story house and that he takes three steps to get into his house, eight steps down to the family room and ten steps from the main floor to the bedroom.

Susan Entenberg, a certified rehabilitation counselor and licensed clinical professional counselor, met with petitioner on April 30, 2013 and reviewed his pertinent medical records. (Px.40, pp. 5, 6, 8, 11, 29-90) It was her opinion, at that time, that Petitioner was unable to return to work as a shipping and receiving manager. (Px.40, p. 15) Petitioner's job was a heavy physical demand job while his FCE demonstrated the ability to work at a less than sedentary level. (Px.40, p. 15) Ms. Entenberg testified that Petitioner's medical/pain issues needed to be addressed, and that he was not a good candidate for vocational rehabilitation because of the unresolved medical treatment. (Px.40, p. 15)

Thereafter, Ms. Entenberg reviewed Dr. Bauer's June 18, 2014 office note which stated "Given Mr. Grubb's current condition, he is unable to return to either his former

employment or any occupation. He is disabled . . . he is unable to return to work." (Px.41, p. 6) Ms. Entenberg testified that Petitioner was not an appropriate candidate for vocational rehabilitation and that there is no stable labor market for Petitioner since he was not released to any type of work. (Px.41, p. 7)

On the basis of Petitioner's inability to do any type of work and failure to complete the pain management program, Ms. Entenberg opined that Petitioner was unable to return to any employment. (Px.41, p. 8) Ms. Entenberg further opined that the FCE results demonstrate a less than sedentary level. (Px.41, p. 10) The FCE results state:

> No lifting from squatting, power lift occasionally 20#, frequently 10#, occasionally shoulder lift 10#, frequently 10#, occasionally unilateral lifting 15#, occasional bilateral lifting 20#, occasional reaching above shoulder, no bending, squatting or climbing. Occasional standing with an average tolerance of 6 minutes. Occasional sitting with an average of 1 to 9 minutes." (Px. 41, pp. 9-10)

Ms. Entenberg opined that there is no stable labor market for Petitioner at this less than sedentary work level since these physical restrictions impose severe limitations. (Px. 41, p. 11)

The Arbitrator notes that Respondent, in consultation with Petitioner, failed to prepare a written vocational rehabilitation plan for Petitioner, which is required by Section 7110.10 of the Rule Governing Practice Before the Illinois Workers' Compensation Commission.

Respondent's vocational counselor merely enrolled Petitioner in an eight-week, twice-a-week computer class. Petitioner testified that he had to get up every fifteen to twenty minutes.

No direct efforts were made to assist Petitioner in returning to gainful employment.

Dr. Goldberg testified that Petitioner was able to perform some type of gainful employment based upon the March 21, 2012 FCE. (Rx. 1, pp. 36-38) However, the Arbitrator notes that Dr. Goldberg testified he has not seen Petitioner since November 2013 and is not familiar with his current health condition. (Rx. 1, p. 47)

On February 5, 2013, Respondent conducted a Labor Market Survey, wherein David Wolf, a vocational case manager, explored the occupation of a Customer Service Representative for Petitioner and opined that current openings were reported for each position with an average starting salary of $12.06/hour. (Rx.2)

The Arbitrator finds the opinions of Susan Entenberg to be more persuasive than those of Mr. Wolf and Dr. Goldberg.

Therefore, the Arbitrator finds that Petitioner is permanently totally disabled pursuant to Section 8(f) of the Act. Respondent shall pay Petitioner permanent and total disability benefits of $469.72/week for life, commencing September 24, 2015, as provided in Section 8(f) of the Act.

In support of his decision with regard to issue (L) "Should penalties or fees be imposed upon Respondent?", the Arbitrator finds as follows:

The Payout Query Results (Rx.5) indicate that Respondent paid Petitioner TTD weekly checks in the amount of $469.72 for 262 weeks and paid Petitioner TTD benefits in checks for amounts greater than $469.72 on the eleven occasions listed below:

9/14/10 - 9/27/10	2 weeks	$ 939.44
9/28/10 - 10/10/10	3 weeks	$1,409.16
8/22/11 - 9/18/11	4 weeks	$1,878.88
10/10/11 - 11/27/11	7 weeks	$3,288.04
12/26/11 - 1/8/12	2 weeks	$ 939.44
2/6/12 - 3/11/12	5 weeks	$2,348.60
4/9/12 - 4/22/12	2 weeks	$ 939.44
7/2/12 - 7/29/12	4 weeks	$1,878.88
7/30/12 - 8/19/12	3 weeks	$1,409.16
1/14/13 - 1/27/13	2 weeks	$ 939.44
3/25/13 - 4/21/13	4 weeks	$1,878.88
Total:	38 weeks	$17,849.36

Petitioner argues that Respondent cut off Petitioner's benefits on these occasions without written notice to Petitioner as required by the Rules Governing Practice Before the Illinois Workers' Compensation Commission, Section 7110.70(b).

Rx.5 does not indicate any date or dates on which Respondent issued such multi-week checks to Petitioner. Petitioner did not offer any proof of payment or the dates on which such multi-week checks were issued.

Rx.5 is not an exhaustive list of all TTD benefits paid to Petitioner. For example, TTD payments from June 29, 2015 through September 27, 2015 are not included in such document and there is no evidence Petitioner has filed a recent 19(b) petition.

Petitioner testified that the last check paid to him applies to the period through September 27, 2015. Petitioner offered no testimony with regard to Respondent cutting off his TTD benefits or of Respondent making late TTD payments.

Petitioner stated that he filed multiple 19(b) motions and two motions for attorneys' fees. However, Petitioner did not offer copies of these motions into evidence.

Such motions are not in either of the Commission physical files (for case numbers 09 WC 47900 and 11 WC 38035).

Rx.5 indicates that no benefits were issued for the six-week period between July 11, 2011 and August 21, 2011. Therefore, there is no documentary evidence that these six weeks have ever been paid. Respondent did not offer an explanation for non-payment of these six weeks of benefits.

Dr. Goldberg examined Petitioner on February 23, 2011. He issued a report on that date and then an addendum on May 31, 2011. In the last paragraph of that report, Dr. Goldberg states:

> "I recommend a work capacity evaluation at this time. He would then be placed at maximum medical improvement upon completing this with or without appropriate restrictions. In the interim, he is capable of sedentary work." (Rx.1, Dep. Exhibit 2)

However, Petitioner did not participate in an FCE until March 21, 2012.

On June 8, 2011, Dr. Bauer wrote: "His back pain and right leg pain has improved but he has some residual back pain, which prevents him from working and sitting for more than 10-15 minutes at a time." (Rx.2) Dr. Bauer prescribed Hydrocodone.

Notwithstanding the foregoing opinions, as Petitioner did not submit a 19(b) petition or penalties/fees petition into evidence and there is no testimony by Petitioner regarding this issue, the Arbitrator finds that Petitioner failed to prove he is entitled to penalties and fees during this six-week time period.

With regard to medical bills, Petitioner offered into evidence Px.43, which purports to be a document that includes Medical Fee Schedule adjusted amounts for the outstanding charges. Respondent did not object to the document going into evidence but did not necessarily agree with what is contained in the document.

Dr. Goldberg testified that the medical treatment provided by Dr. Bauer was reasonable and necessary. (Rx. 1, pp. 10-11)

Richard Grubb testified that he paid some of the bills, but did not know which ones he paid.

On November 18, 2010, Respondent filed a Response to Petitioner's Petition for Penalties & Fees. Respondent argued that the bills "do not show re-pricing pursuant to the fee schedule" or "do not show the contract amounts the providers agree to accept from the carrier." (Rx.4)

Respondent wrote on Arbitrator's Exhibit #1: "All medical bills for lumbar spine have been paid."

Petitioner's Exhibits 19-37 (Px.19-Px.37) are invoices of unpaid medical bills that Petitioner is claiming. However, only Px.19, Px.28, Px.33 and Px.34 were recently subpoenaed. All other medical bill exhibits have certification dates that are more than one year prior to the trial date.

Px.19, Multi Specialty Clinic, has a Medical Fee Schedule adjusted balance of $3,964.37.

Px.28, Center for Brain & Spine Surgery has a Medical Fee Schedule adjusted balance of $152.49 for the single office visit of April 30, 2012.

Px.33, Alexian Brothers Medical Center, has a Medical Fee Schedule adjusted balance of $7,415.02, of which only $1,985.42 is for the lumbar spine.

Px.34, Alexian Brothers Medical Group, has a Medical Fee Schedule adjusted balance of $10,115.22, all of which is attributable to Petitioner's cervical spine surgery, which is addressed in the decision for case # 11 WC 38035.

Because many of the bills relate to Petitioner's cervical spine, to which Respondent disputes accident (case #11 WC 38035), because the vast majority of medical bill exhibits have certification dates that are more than one year prior to the trial date, and because Petitioner did not offer a 19(b) or penalties/fees petition into evidence, the Arbitrator finds that Petitioner failed to prove entitlement to penalties and fees on medical bills.

Brian Cronin
Arbitrator

7-19-2016
Date

STATE OF ILLINOIS	)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF DUPAGE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Grubb,
Petitioner,
vs.

17IWCC0712
NO: 11 WC 38035

Peacock Colors,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, 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 July 21, 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: NOV 9 - 2017
KWL/vf
O-9/12/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0712

GRUBB, RICHARD
Employee/Petitioner

Case# **11WC038035**

09WC047900

PEACOCK COLORS
Employer/Respondent

On 7/21/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.43% 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:

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

0011 LAW OFFICES OF EDWARD J. KOZEL
MARCY SINGER-RUIZ
333 S WABASH AVE 25TH FL
CHICAGO, IL 60604

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

17IWCC0712

Richard Grubb
Employee/Petitioner

v.

Peacock Colors
Employer/Respondent

Case # 11 WC 38035

Consolidated cases: 09 WC 47900

An *Application for Adjustment 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 **Wheaton**, on 9/24/2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 17IWCC0712

On **1/6/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Petitioner's current condition of ill-being of his cervical spine at C4-C5 *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned an average weekly wage of $**704.58**.

On the date of accident, Petitioner was **46** years of age, *single* with **2** dependent children.

ORDER

Compensation is hereby denied.

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

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

Signature of Arbitrator

7/15/2016
Date

ICArbDec p. 2

JUL 21 2016

STATEMENT OF FACTS

Petitioner has an undisputed lumbar spine claim that is adjudicated in the decision for companion case 09 WC 47900, with a date of accident of July 14, 2009. Petitioner filed this claim, 11 WC 38035, a cervical spine claim, with a date of accident of January 6, 2010.

On November 6, 2009, following the July 14, 2009 accident, Petitioner commenced a course of physical therapy for his lumbar spine at NovaCare Rehabilitation, pursuant to the recommendation of neurosurgeon Jerry Bauer, M.D. On that date, under Plan of Care, his Chief Complaint was the following:

> " • Pain: Constant (B) low back pain, travels down front/back of LEs to ankles. Also exp inc pain into mid/upper back. Pain rate 8/10 at worst, 5/10 currently. Intermittent numbness in (B) toes aggravated with prolonged sitting. Weakness: (B) LEs Loss of Motion/Stiffness: Moderate Degree."

Petitioner testified that he suffered a back injury 10 years prior to his 2009 accident, and that Dr. Jerry Bauer performed surgery to his upper/middle back.

Petitioner claims that on January 6, 2010, he was in physical therapy when he suffered an injury to his cervical spine. Petitioner testified that on that date, he was lifting weights in physical therapy. He testified that he pulled the weights down and felt something in his neck bulge and the weights went flying out of his hands and crashed down. Petitioner further testified that the lady therapist yelled that he cannot do that.

In the NovaCare Rehabilitation Daily Note of January 6, 2010, Tiffany L. Brinkley, P.T., wrote: "Also exp numbness in the L lateral forearm into the thumb and index/middle fingers." (Px.11)

The Daily Note also indicates that one of the exercises Petitioner performed that day was the Lat Pull Down. Such exercise was for the "Spine" and required the use of weights and pulleys. With regard to Lat Pull Downs, she further indicated:

> "Time Elapsed: 4 minutes, Repetitions: 30, Sets: 2, Weight-Kg: 14 plates Kg, Charge As: Therapeutic Exercise" (Px.11)

Ms. Brinkley's Assessment that day is as follows:

> "Tolerance:
> • Added standing hip abd on pulleys, sig mm [muscle] fatigue noted. Pt c/o L LS pain w/prone hip ext exs. Mod c/o LBP w/all the –ex."
>
> (Word in bracket added.) (Px.11)

Ms. Brinkley's Daily Comments that day included the following entry:

> "Called MD regarding inc pain in low back, both legs, and N/T in L arm moved appt up to 1.8." (Px.11)

In the NovaCare Rehabilitation Progress Note and Re-Evaluation of January 7, 2010, Physical Therapist Tiffany L. Brinkley, in Daily Comments, wrote the following:

> "Has been exp inc pain in R > L low back and buttocks that shoots down both legs w/ N/T in lower legs and both feet. Also exp pain in mid to upper back w/L neck mm cramping and numbness in left lateral forearm into thumb and index/middle fingers over past few days. Low back feels best in the mornings then pain inc as pain progresses. Arm/leg mm feel stronger overall, but L leg feels weaker. Cont to exp sig pressure in (B) low back and LE pain w/most daily activities. Cont to use home e-stim unit up to 2x/day, dec pain temporarily. Perceived improvement: 10%." (Px.11)

Petitioner saw Dr. Bauer on January 8, 2010 for his lumbar and cervical spine. In a letter to Ms. Beverly LeBeau at CNA Insurance, Dr. Bauer wrote, in pertinent part, the following:

> "Mr. Grubb has returned to me for follow-up and reevaluation. He called saying that while in physical therapy he was lifting weights and he developed severe neck pain with some radiation down his left arm with numbness and tingling. This lasted for the better part of the morning and has since resolved. He has no residual weakness ... Mr. Grubb's examination reveals that there is no paracervical muscle spasm or tenderness. Range of motion of his neck was mildly limited. There is no Horner's or Adson's sign. He has excellent strength in both his arms and hands. Deep tendon reflexes were symmetric. There is no sensory loss. There is no Tinel's sign. There is no Hoffman's or Trömner's sign ... We discussed the concept of him proceeding with a discogram which would begin at L2-3 and extend down to L5-S1 ... Because of his episode of neck pain and radicular pain in his left arm, despite his normal neurologic examination, I have recommended that he undergo a screening MRI scan of the spine to be followed by his discogram. He will return to see me for follow-up subsequent to this ..." (Px.2)

In the NovaCare Rehabilitation Daily Note of January 15, 2010, Physical Therapist Tiffany L. Brinkley, wrote the identical Daily Comments as those of January 7, 2010, with the following addition:

> "Saw MD on 1.8, prescribed MRI of neck/mid/low back and discogram of low back, then plans to sched surgery. Pt waiting for call-back from MD to schedule discogram and MRI. Disposition: Exp sig inc LBP pain this week, more than usual, from not having therapy sec to waiting for authorization." (Px.11)

The Arbitrator notes that Petitioner's exercise routine on January 15, 2010 did not include Lat Pull Downs. Ms. Brinkley's Assessment was the following: "The patient tolerated today's treatment noting mild increase in pain and difficulty related to activity performance." (Px.11)

In the NovaCare Rehabilitation Daily Note of January 19, 21, 25, 2010, Physical Therapist Tiffany L. Brinkley, wrote the identical Daily Comments as those of January 7, 2010. On January 19, 2010, Ms. Brinkley

reinstated Lat Pull Downs on as part of Petitioner's exercise routine, and on each of these date, Petitioner completed 2 sets of 30 repetitions in 4 minutes with 15 kilogram plates. (Px.11)

On January 20, 2010, Petitioner underwent an MRI of his entire spine. John P. Anastos, D.O., interpreted the films as follows:

> "FINDINGS: There is reversal of the normal cervical lordosis at the level of C4 and C5. Degenerative disc bulging with osteophytic ridges are noted at C3-C4, C4-C5 and to a lesser extent C5-C6. There is slight canal narrowing but no mass effect upon the cervical cord or cord signal changes.
>
> Small central disc herniation is present at T8-T9. There are Schmorl's nodes with irregularity of the inferior endplates of T10 and T11.
>
> In the lumbar region disc herniations with osteophytic ridges are noted at L3-L4, L4-L5 and L5-S1 with slight canal stenosis. There no (sic) vertebral compression or subluxation.
>
> No epidural mass or fluid collection. No cord signal changes.
>
> IMPRESSION: Moderate degenerative changes greatest in the mid cervical and lower lumbar spine without canal compromise or cord signal change."
>
> (Px.2)

In the NovaCare Rehabilitation Daily Note of January 28, 2010, Physical Therapist Tiffany L. Brinkley, in Daily Comments, wrote the following:

> "Cont to exp sig R LBP, pain cont to travel into (B) buttocks and shoots down both legs with N/T in lower legs and both feet. Low back feels best in the mornings then pain inc as pain progresses. Arm/leg mm feel stronger overall, but L leg feels weaker. Cont to exp sig pressure in (B) low back and LE pain w/most daily activities. Cont to use home e-stim unit up to 2x/day, dec pain temporarily. Perceived improvement: 10%. (Px.11)

On this date, in addition to other exercises, Petitioner completed 2 sets of 30 repetitions of Lat Pull Downs in 4 minutes with 15 kilogram plates. (Px.11)

In the NovaCare Rehabilitation Daily Note of February 1, 2010, Physical Therapist Tiffany L. Brinkley, wrote the identical Daily Comments as those of January 28, 2010, with the following addition:

> "Disposition: Low back was sore all weekend. Going in for discogram on 2.3 and follow-up w/MD on 2.8, then hopes will have surgery scheduled."

On this date, in addition to other exercises, Petitioner completed 2 sets of 30 repetitions of Lat Pull Downs in 4 minutes with 15 kilogram plates. (Px.11)

Petitioner saw Dr. Bauer on February 8, 2010. In a letter to Ms. Beverly LeBeau at CNA Insurance, Dr. Bauer wrote, in pertinent part, the following:

> "Mr. Grubb had a discogram which was positive at L3-4, L4-5 and L5-S1 ... Mr. Grubb wishes to proceed with surgery ... he now requires a four level fusion as opposed to a one or two level fusion ... The screening MRI was performed ... There is no evidence of spinal cord compression or significant thoracic disc herniations that would account for his upper back pain." (Px.2)

On March 8, 2010, Dr. Bauer had a telephone conversation with Petitioner. Dr. Bauer recorded the conversation as follows:

> "Mr. Grubb called me to let me know that he has some numbness in his hand and arm. This started a few days ago. He has no weakness in either of his arms. I suggested that he come to see me to have this evaluated further. He promised to do so. He is upset in that he is still waiting for insurance approval."

In the NovaCare Rehabilitation Discharge Summary of April 7, 2010, Physical Therapist Tiffany L. Brinkley, wrote the identical Daily Comments that she did on January 28, 2010. In this Discharge Summary, there are no complaints of any symptoms in Petitioner's neck or upper extremities. (Px.2)

On May 18, 2010, Dr. Jerry Bauer performed surgery on Petitioner's lumbar spine that included a posterior lumbar interbody fusion at L3-4, L4-5 and L5-S1. (Px.2)

Approximately 3 weeks after the surgery, on June 8, 2010, Petitioner began a course of physical therapy at NovaCare Rehabilitation. Petitioner started using a cane two days earlier. In the Initial Evaluation and Plan of Care for this date, Petitioner did not report any neck or upper extremity complaints. In fact, there are no documented complaints of neck or upper extremity symptoms over the course of the numerous NovaCare physical therapy sessions through July 30, 2010. (Px.2, Px.11)

On August 2, 2010, Petitioner completed two pain diagrams for Dr. Bauer. In one pain diagram, in addition to designating symbols for his lumbar symptoms, Petitioner indicated that he had numbness in his posterior neck and right hand, as well as pins and needles in the center of his back and aching in his right scapula. In the other pain diagram, in addition to designated symbols for his lumbar symptoms, he circled the back of his neck and wrote: "numbness back of head and hands." (Px.2)

However, in a letter dated August 2, 2010 and addressed to Ms. Beverly LeBeau of CNA Insurance, Dr. Bauer made no mention of any neck or upper extremity symptoms. Dr. Bauer stated that Petitioner has had a recurrence of his lumbar symptoms, and that the cause of such recurrence was unclear to him. (Px.2)

On August 3, 2010, in her Assessment, Tiffany L. Brinkley, P.T., of NovaCare Rehabilitation wrote that she decreased the weight to 30 pounds for lat pull downs, per M.D. recommendation. (Px.2)

On August 11, 2010, in the NovaCare Rehabilitation Progress Note and Re-Evaluation, Ms. Brinkley wrote: "Also c/o numbness in both hands and back of head w/pain from R neck down to shoulder." (Px.2, Px.11)

On August 18, 2010, in the NovaCare Rehabilitation Daily Note, Ms. Brinkley made no mention of any neck, shoulder or upper extremity complaints by Petitioner. (Px.11)

On August 24, 2010, in the Assessment section of the NovaCare Rehabilitation Daily Note, Tiffany L. Brinkley, MPT, wrote: "Tolerance: Dec wt to 20 lbs w/lat pull downs and straight arm pull downs per MD recommendations. Mod c/o LBP w/all ther-ex. Sig inc LBP noted w/manual (B) hams mm stretching." (Px.11)

On August 23, 2010, Petitioner completed 2 pain diagrams for Dr. Bauer. In one diagram, in addition to her lumbar complaints, she indicated that she felt aching in the back of her neck and numbness in the palms of her hands. In the other diagram, in addition to her lumbar complaints, she indicated that she felt deep aching in the back of her neck and numbness in the back of her right hand. However, in Dr. Bauer's letter to Ms. Beverly LeBeau, he made no mention of any neck, shoulder or upper extremity symptoms. (Px.2)

In a prescription slip dated August 30, 2010, Dr. Bauer wrote the following:

> "Pt. may return to work on 09/13/2010; 4/hrs per day; light-duty computer work with frequent positional changes; no shipping/ rec'g, lifting, bending, twisting, stooping, carrying. Pt. will be re-evaluated in 8-10 weeks." (Px.2)

Petitioner testified that he attempted to return to work in the office on September 13, 2010 but could not hold his back up and after 15 minutes his head "crashed down" onto the desk. Petitioner testified that he left work and went to the emergency room at St. Alexius Medical Center where he was admitted for treatment.

The history at St. Alexius Hospital states that Petitioner "returned to work on a part-time basis with work restrictions and after sitting at his desk for (3) hours, he developed neck pain and weakness, followed by low back pain and leg weakness. He left work early and subsequently complained of dizziness." (Px. 12)

Petitioner underwent a CT scan of the head and MRI of the brain and both sets of images were interpreted as unremarkable.

Petitioner underwent an MRI of the cervical spine on September 13, 2010. Geoffrey Sebastian, M.D., gave the following impression of the images:

> "Mild to moderate degenerative disc changes and disc bulges. A small central disc protrusion at tears (sic) also to be present at C4-C5. There is relatively mild narrowing of the AP diameter of the spinal canal at C4-C5 and C5-6 without any significant spinal stenosis. No significant spinal stenosis. No significant neural foraminal stenosis." (Px.2)

Petitioner saw Dr. Bauer on September 16, 2010. In a letter to Ms. Beverly LeBeau at CNA Insurance, Dr. Bauer wrote the following:

"Mr. Richard Grubb attempted to return to work and apparently had a problem at work. He states that even though he was doing light duty work he had a great deal of pain. He had severe pain in his neck as well and vomited and was taken to Alexian Brother's Hospital and was admitted. He was hospitalized for several days at Alexian Brother's Hospital and states that he had a scan of his neck and had a disc problem in his neck but most of his problem is his back pain. He is still in the early postoperative period.

The purpose of this letter is to indicate that Mr. Grubb is currently unable to work and should resume his physical therapy program. Should you require any further information, please do not hesitate to contact me." (Px.2)

Petitioner saw Dr. Bauer on September 30, 2010. In a letter to Ms. Beverly LeBeau at CNA Insurance, Dr. Bauer wrote that on September 13, 2010, Petitioner was only able to work an hour because he developed severe back pain, that he was filing and his head was flexed, that he developed neck pain and numbness in his right arm, that his symptoms were bad enough to be admitted to Alexian Brothers Hospital after going to the emergency room, that they thought he might have had a stroke, that they thought he might have had a stroke, that he had some numbness in his right face and ear area and his right arm was somewhat numb, and that he was evaluated at Alexian Brothers with MRI scans of the brain, cervical and lumbar spine. (Px.2) Dr. Bauer also wrote:

"Currently, Mr. Grubb has back pain. He has pain in the base of his neck. Mr. Grubb indicates that he originally hurt his neck in therapy prior to his lumbar spine surgery." (Px.2)

Dr. Bauer wrote that he examined Petitioner and reviewed the MRI scans. He found that such scan revealed degenerative changes in the central disc protrusions at C4-5 and degenerative changes at C5-6 less so C6-7. Dr. Bauer concluded that Petitioner has an exacerbation of his neck and back pain, prescribed physical therapy and stated that he is unable to work. (Px.2)

In the Diagnoses section of the October 13, 2010 NovaCare Rehabilitation Progress Note, Ms. Brinkley wrote the following:

"Attempted to RTW on 9.13, desk job, duties included filing and using computer, no lifting and alternated sitting/standing often throughout shift. Low back was good for first hour, was mainly sitting in chair to file paper and use computer, would get up to move around every 20 mins. After 1.5 hours, exp inc LBP from sitting, prog inc and started shooting down R leg, then exp pain in mid back and neck, could barely hold up head and neck mm tightened, R arm went numb. Pt began to feel nausea and was asked to leave work and drove home, could barely get out of car, neighbor drove to ER. Was hospitalized 3 days, MRI of neck, low back, and CAT scan of brain, found C3-C6 disc bulging, discharged once able to walk. Has been waiting for ins approval for further PT over past 3-4 wks, MD does not recommend surgery for neck at this time." (Px.11)

Petitioner saw Dr. Bauer on October 25, 2010. In a letter to Ms. Beverly LeBeau at CNA Insurance, Dr. Bauer wrote, with regard to Petitioner's cervical spine, that Petitioner is troubled by pain in his neck radiating up the back of his head. Dr. Bauer also wrote that there are no neurologic symptoms or findings in his upper extremities. (Px.2)

Petitioner saw Dr. Bauer on December 20, 2010. In a letter to Ms. Beverly LeBeau at CNA Insurance, Dr. Bauer wrote, that Petitioner's major problem now is pain in the base of his neck and stiffness of his neck when he sits for more than one hour at a time. Upon examination, Dr. Bauer found that Petitioner had a limited range of motion of his neck with subjective neck pain and headaches and noted that Petitioner is known to have degenerative changes in his neck. (Px.2)

Petitioner saw Dr. Bauer on May 18, 2011. In a letter to Ms. Beverly LeBeau at CNA Insurance, Dr. Bauer wrote, with regard to Petitioner's cervical spine: "Mr. Grubb complains of significant pain in his neck which he attributes to physical therapy in December 2010, prior to his lumbar spine surgery." Dr. Bauer also wrote that Petitioner has shooting pain down his arms, more so on the right than the left, that he feels he has persistent symptoms in his arms, but that he has no long tract findings. (Px.2)

Petitioner underwent a cervical MRI on May 24, 2011. Glen K. Geremia, M.D., interpreted the images as follows:

> "The craniovertebral junction and cervicomedullary junction are normal. The cervical spinal cord throughout is normal. There is moderate posterior bulge and degeneration of the C3-C4, C4-C5, C5-C6 and C6-C7 intervertebral discs. There is associated mild-to-moderate central stenosis and mild-to-moderate bilateral foraminal stenosis at these levels." (Px.2)

On June 8, 2011, Petitioner completed a pain diagram for Dr. Bauer. In addition to indicating deep aching in his low back and down his posterior right leg, Petitioner indicated deep aching in his neck and right arm. He also wrote that his "ears hurt." (Px.2) When Dr. Bauer examined Petitioner that day, he found no paracervical muscle spasm or tenderness and also found that deep tendon reflexes were symmetric in the upper extremities and the strength was intact. He noted that the cervical spine MRI scan revealed degenerative changes at C3-4, C4-5, C5-6 and C6-7 and that there is no cervical spine compression. Dr. Bauer then offered the following impression:

> "Mr. Grubb has cervical degenerative changes and also mild degenerative changes in the thoracic spine. I have recommended that he begin a physical therapy program. He will consider this. In the interim he will continue to perform a home exercise program. He will return to see me for follow-up in one year." (Px.2)

On September 23, 2011, Petitioner saw Dr. Bauer. At that time, Petitioner asked Dr. Bauer to confirm that he complained of pain in his neck radiating down his right arm when Dr. Bauer saw him on December 20, 2010. Dr. Bauer reviewed his visit on that date and confirmed that Petitioner had pain at the base of his neck and stiffness of his neck as a major limiting factor. At the visit of September 23, 2011, Petitioner complained to Dr. Bauer of pain in the back of his neck that comes and goes. The numbness at times radiates down to the fourth and fifth digits of his right hand. After examining Petitioner, Dr. Bauer ordered an MRI and a CT scan from C3 to T1. (Px.2)

In a prescription slip that is dated March 16, 2012, and bears the name of Richard Grubb, Dr. Bauer wrote: "Unable to work." (Px.2)

In a report in which Barry Rabin, M.D., compares the CT of the cervical spine without contrast dated May 24, 2011 with that of April 7, 2012, Dr. Rabin gave the following impression:

> "1. Small left paracentral soft tissue disc herniation at the C4-C5 level.
>
> 2. Moderate left foraminal stenosis at the C3-C4 level." (Px.2)

In a report in which Barry Rabin, M.D., compares the MRI of the cervical spine without contrast dated May 24, 2011 with that of April 7, 2012, Dr. Rabin gave the following impression:

> "New small left paracentral C4-C5 disc herniation compared to 05/24/2011. There are other levels of degenerative disc disease without significant spinal stenosis. There is left foraminal stenosis at the C3-C4 level." (Px.2)

In a report in which John P. Anastos, D.O., interprets x-rays of the cervical spine with flexion/extension 5-7, Dr. Anastos wrote:

> "Neural, flexion, extension, lobelike, lateral amd swimmer's views of the cervical spine were obtained. There is mild, left foraminal encroachment at C3-C4, C4-C5 and C5-C6. Minimal encroachment on the right also evident. No subluxation. Intervertebral disc spaces are maintained." (Px.2)

Petitioner saw Dr. Bauer on April 30, 2012. In a letter to Ms. Kristen Korkowski, R.N., C.C.M., at CNA Insurance, Dr. Bauer wrote, with regard to Petitioner's cervical spine, *inter alia*, the following: "Trauma occurred due to work injury while at work." (Px.2)

On January 31, 2013, at Alexian Brothers Medical Center, Szymon Rosenblatt, M.D., performed surgery on Petitioner that included the following:

1. C4-5 anterior cervical discectomy using microsurgical technique.
2. C4-5 anterior cervical fusion using allograft.
3. C4-5 anterior cervical instrumentation using anterior cervical plating system (Zimmer).

Dr. Rosenblatt's post-operative diagnosis was "Cervical spondylosis, C4-5 intervertebral disc herniation." (Px.17)

On February 1, 2013, Carmen L. Griza, M.D., took the following History of Present Illness:

> "The patient is a 49-year-old male with history of neck injury injury (sic) in the past. He states he had neck injury while doing physical therapy for back injury he sustained at work. He had a herniated disc that was getting worse and worse to the point he had unbearable pain, and he had bilateral arm pain and numbness. He presented for surgery was planned (sic) to have a C4-C5 anterior diskectomy and fusion. He underwent the

procedure with Dr. Rosenblatt, and he tolerated it well with no complication. This is morning, he is stable. He is awake. He is able to drink. He tolerates clear liquid diet. His pain is controlled with Dilaudid, and he feels very well." (Px.17)

On May 6, 2015, the deposition of orthopedic surgeon Edward J. Goldberg, M.D., Respondent's Section 12 examining physician, was taken by the parties. Dr. Goldberg examined Petitioner on five occasions, which included September 29, 2010. Dr. Goldberg authored examination reports as well as addendums. Dr. Goldberg testified that on September 29, 2010, Petitioner reported to him that on or about September 14, 2010, he returned to work for one hour and developed back pain, numbness in both lower extremities, back pain ascending up to the neck, right arm spasms, "seizures," numbness in the right arm into his fourth and fifth digits and facial numbness. Dr. Goldberg testified that those pain complaints do not follow a normal anatomical pattern. Dr. Goldberg reviewed the actual MRI from September 14, 2010, and felt that there was minimal bulging from C3-4 through C6-7 without any nerve root compression or spinal cord compression. He opined that minimal bulging at C3-4 to C6-7 does not correlate with facial numbness, right arm numbness into his fourth and fifth digits or seizures; there was no nerve root compression. He further opined that Petitioner's cervical spine MRI was within normal limits for a man his age. (Rx.1)

Upon examination, Dr. Goldberg found five-out-of-five strength in the upper extremities bilaterally except for finger flexors, extensors and intrinsics, and the doctor opined that any diminished strength in his finger flexors, extensors and intrinsics was effort dependent since there was nothing compressing at those levels. Dr. Goldberg noted no muscle wasting or long tract findings. He found subjective diminished motion of the cervical spine in all planes to 50 percent. There was diminished sensation C5 to T1 on the right, but intact sensation C5-T1 on the left, which Dr. Goldberg found to be non-anatomic since his MRI clearly did not show it. (Rx.1)

Dr. Goldberg testified that Petitioner had indicated to him that his neck problems started after he returned to work for one hour. Dr. Goldberg testified that the history that Petitioner gave to Dr. Bauer on May 18, 2011 - - a history of some neck pain into the right upper extremity that started in physical therapy in December of 2010 - - was different that what Petitioner told him. (Rx.1)

Dr. Goldberg testified that on December 28, 2012, he reviewed an MRI of the cervical spine, and he felt that this MRI was different than the prior cervical MRIs that he had reviewed. He now felt that there was a small disc herniation at C4-5, a small herniation at C6-7, and some bulging at C5-6. Dr. Goldberg opined that the original MRI showed some bulging, but no herniations and that was a distinction, anatomically. Dr. Goldberg attributed these small herniations to age, but not trauma, because if there was any alleged trauma, he would have expected it to be present on the original MRI. (Rx.1)

Dr. Goldberg testified that, based on the FCE done "prior to the cervical spine," Petitioner can perform some type of gainful employment. The doctor further testified that with regard to Petitioner's ability to return to gainful employment post-cervical spine, he would have to look at an FCE.

On cross-examination, Dr. Goldberg testified that he performs approximately 300 independent medical examinations per year, 90% of which are conducted on behalf of insurance companies. The cost per evaluation, which includes a review of records, examination and assessment, is $1,000.00, and the cost of a deposition is $2,000.00 for up to two hours. Dr. Goldberg testified that the rate of reduction in resolution of symptoms for fusion surgeries increases as the number of levels fused increases. A known sequela with a fusion is that stress

can go to the next level, and the risk increases over time. Problems that can arise, hypothetically, include spinal stenosis, herniation, back pain from some wearing out of the disc, a degenerative disc, or none. (Rx.1)

Dr. Goldberg agreed with Petitioner's Counsel that he prepared a May 21, 2014 addendum to his November 11, 2013 report wherein he stated that Petitioner could return to work with restrictions from the prior FCE despite the fact that he had not examined Petitioner since November 11, 2013. Dr. Goldberg agreed with Petitioner's Counsel that he last examined Petitioner on November 11, 2013. (Rx.1)

Dr. Goldberg testified that he knows of Dr. Bauer and that Dr. Bauer's reputation is good. (Rx.1)

With regard to the September 29, 2010 report that he authored, Dr. Goldberg testified that he was asked to give an opinion on both the lumbar and cervical conditions and that he reviewed the actual films for the lumbar and cervical MRIs. Dr. Goldberg testified that he noted in such report that Petitioner's onset came about after he returned to work sitting for about one hour. Dr. Goldberg did not recall if he reviewed the January 7, 2010 record from NovaCare Physical Therapy. Dr. Goldberg did not believe that he reviewed Dr. Bauer's January 8, 2010 note before the Petitioner came in for his examination. Dr. Goldberg testified that for the history and the development of Petitioner's neck pain, he relies on what Petitioner reports to him, which he documented. Dr. Goldberg did not save any handwritten notes from that visit, and dictates his report just after the patient leaves the room. After reviewing the 1/7/10, 1/15/10, 1/19/10 and 1/25/10 records from NovaCare Rehabilitation, Dr. Goldberg testified that Petitioner had complaints of mid/upper back and indicates left neck causing numbness in the left arm, as well as cramping, numbness into the forearm, thumb and index finger. Dr. Goldberg testified that all of the medical records that have been discussed at the deposition involve the right arm, which is not consistent. Moreover, the thumb and index finger indicates the C5-6 level, not the surgical level of C4-5. After reviewing Dr. Bauer's January 8, 2010 record - -which states that while in therapy he was lifting weights and developed neck pain with left arm - - Dr. Goldberg testified that Petitioner told him about his right arm. Furthermore, Dr. Goldberg testified that Dr. Bauer's notes, which we discussed, discuss the right arm. (Rx.1)

Dr. Goldberg testified that he is not an employment expert and does not have any training in vocational rehabilitation. He further testified that he is capable of looking at parameters and ascertaining whether or not it is safe for Petitioner to return to work, so he is only testifying as to the safety, and not as to whether or not a company would hire him. (Rx.1)

On redirect examination, Dr. Goldberg testified that he is capable, as an orthopedic surgeon, of determining if someone can return to work based upon his physical examination of a patient, the medical records and diagnostic tests that indicate whether or not it is an ongoing problem. Dr. Goldberg testified that his medical opinion does not change based upon who refers a patient to him. Dr. Goldberg did not know that a second FCE was authorized, but Mr. Grubb either chose not to undergo it or was advised not to undergo it. At any time that he saw Petitioner, Dr. Goldberg did not note that Petitioner had adjacent problems with regard to his fusion. When asked if he would anticipate any adjacent problems for Petitioner, Dr. Goldberg testified that that would be purely speculative. (Rx.1)

The medical records indicate that Petitioner has diabetes and gout.

At the request of Petitioner, the deposition of the physical therapist, Tiffany Brinkley, M.P.T, was taken on February 21, 2012. (Px.38) On direct examination, Petitioner's Counsel asked Ms. Brinkley, *inter alia*, the following questions:

Q: Go to your notes for December 2nd of 2009. And by the way, Tiffany, I take it that every time you see Richard, you would generate notes for that visit; fair?

A: Yes.

Q: And would it be your practice to note any important things that occur during the visit?

A: Yes. (Px.38, pp. 7-8)

Ms. Brinkley agreed with Petitioner's Counsel that on January 6, 2010, Petitioner's appointment with Dr. Bauer was moved up to January 8, 2010. (Px.38, pp. 11-12)

On cross-examination, Respondent's Counsel asked Ms. Brinkley the following questions:

Q: And if a patient has some increased pain while you're performing physical therapy, do you have to write it in your notes?

A: Yes.

Q: And what happens if you don't? What are some things that could happen to you? You get your license pulled, potentially?

A: If there is a problem?

Q: Right. If something happens and you're not taking accurate notes.

A: I - - I guess - -

Q: You get fired?

A: I would assume if there was a significant incident.

Q: Okay. And if while you're performing physical therapy on - - for instance, on Mr. Grubb, if they injure themselves, do you have an obligation to put that in your notes?

A: Yes.

*****

Q: Okay. So between that time, between December 22, 2009 - -

A: Uh-huh.

Q: - - and January 7th, you said, 2010 - -

A: Uh-huh.

Q: - - do you ever - - did you record an incident during that time where he was lifting weight and developed severe neck pain?

A: No.

Q: So during that time period he never - - he never - - you don't show that he reported severe neck pain while lifting weights.

A: No.

Q: And if he was lifting weights with you and he developed severe neck pain, you would have recorded it on your notes.

A: I would have had that in my note; definitely.

(Px.38, pp. 19-20, 21-22)

On redirect examination, Petitioner's Counsel asked Ms. Brinkley the following questions:

Q: It is true, however, that you documented symptomatology of neck muscle cramping and numbness in the left lateral forearm down into the thumb and the index fingers, correct? On January 7th?

A: Yes. That was a frequent complaint that he had.

Q: Just doesn't say anything about lifting weights, correct?

A: No.

Q: But it does talk about the symptomatology in the neck; fair?

A: That was a symptom that he was having and that he reported.

(Px.38, pp. 22-23)

On re-cross examination, Respondent's Counsel asked Ms. Brinkley the following questions:

Q: Was that symptomatology on January 7th, 2010, severe pain?

A: He described it as increased pain.

Q: But you didn't record it as severe pain?

A: No, I did not use the word "severe." (Px.38, p. 23)

CONCLUSIONS OF LAW

In support of his decisions on 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 finds as follows:

Petitioner testified that at the physical therapy session on January 6, 2010, he pulled the weights down, felt something in his neck bulge and then the weights went flying out of his hands and crashed down.

The NovaCare Rehabilitation records of January 7, 2010 reflect a complaint of left-sided neck cramping and numbness in his left lateral forearm and into his thumb and index/middle fingers over the past few days.

Dr. Bauer's records of January 8, 2010 reflect that Petitioner told him he was lifting weights and developed severe neck pain with some radiation down his left arm with numbness and tingling. Dr. Bauer noted that this lasted for the better part of the morning and has since resolved. This neurosurgeon further noted that Petitioner has no residual weakness.

However, in the NovaCare Rehabilitation Daily Note of January 6, 2010, there are no documented complaints of a neck bulge or of neck pain on this day. Tiffany Brinkley, M.P.T., testified that if Petitioner were lifting weights with her and he developed severe neck pain, she would have definitely recorded it in her notes. She did not.

The NovaCare Rehabilitation the Daily Note of January 6, 2010, which Tiffany Brinkley authored, does state: "Also exp numbness in the L lateral forearm into the thumb and index/middle fingers." The Daily Note also indicates that Ms. Brinkley called Dr. Bauer with regard to increasing pain in Petitioner's low back and both legs, as well as numbness and tingling in his left arm. She requested that Petitioner's appointment with Dr. Bauer be moved up to January 8, 2010 (from January 27, 2010).

There is no evidence that Ms. Brinkley wrote "Also exp numbness in the L lateral forearm into the thumb and index/middle fingers" at the end of the session on January 6, 2010, rather than at the beginning of the session. After all, the next day, January 7, 2010, Ms. Brinkley wrote that Petitioner is also experiencing pain in the mid to upper back with left neck cramping and numbness in his left lateral forearm and into his thumb and index/middle fingers **over past few days.** (Emphasis added.)

Petitioner's previous NovaCare Rehabilitation Daily Note (January 4, 2010) does not reflect any complaints by Petitioner of left arm numbness or tingling.

There is no documentation on January 6, 2010 that the weights went flying out of Petitioner's hands. Upon reviewing the exercises performed that day, the Arbitrator notes that with regard to "Lat Pull Downs," which appears to be the exercise Petitioner was performing at the time of the alleged accident, Petitioner completed two sets of 30 repetitions with a weight equal to 14 kilograms.

The Arbitrator takes judicial notice that 14 kilograms = 30.86 pounds.

On January 8, 2010, Dr. Bauer wrote that Petitioner's symptoms lasted for the better part of the morning and have since resolved.

Yet, Tiffany Brinkley repeated the January 7, 2010 portion of her Daily Comments - - left neck cramping and numbness in his left lateral forearm and into his thumb and index/middle fingers over past few days - - in her Daily Comments of January 15, 19, 21 and 25, 2010.

The Arbitrator notes that many of the Subjective Examination findings in the NovaCare Rehabilitation Daily Note are repeated in the next session's note. For example, in the Mechanism of Injury section of the September 8, 2010, Daily Note, Ms. Brinkley wrote: "... started using cane two days ago." The Arbitrator points out that Ms. Brinkley first wrote this phrase on June 8, 2010, and wrote it again on June 11, 15, 17, 21, 23, and 25, July 2, 6, 8, 12, 15, 19, 21, 23, 26, 28, 30, August 3, 6, 9, 11, 18, 20, 24, 25, 27, 31, September 1, 3, and 7. Many of the entries contained in the Subjective Examination section are not dated.

Notwithstanding any repetition in the Subjective Examination findings, Tiffany Brinkley testified to the following:

> Q: It is true, however, that you documented symptomatology of neck muscle cramping and numbness in the left lateral forearm down into the thumb and the index fingers, correct? On January 7th?
>
> A: Yes. That was a frequent complaint that he had.

On January 19, 2010, Ms. Brinkley reinstated Lat Pull Downs as part of Petitioner's exercise routine, and Petitioner completed 2 sets of 30 repetitions in 4 minutes with 15-kilogram plates. (Px.11)

Dr. Anastos interpreted the January 20, 2010 MRI of Petitioner's cervical spine as follows:

> "There is reversal of the normal cervical lordosis at the level of C4 and C5. Degenerative disc bulging with osteophytic ridges are noted at C3-C4, C4-C5 and to a lesser extent C5-C6. There is slight canal narrowing but no mass effect upon the cervical cord or cord signal changes."

Petitioner's next documented complaint of neck or upper extremity occurred on March 8, 2010, in a telephone conversation with Dr. Bauer. Dr. Bauer recorded the conversation as follows:

> "Mr. Grubb called me to let me know that he has some numbness in his hand and arm. This started a few days ago. He has no weakness in either of his arms. I suggested that he come to see me to have this evaluated further. He promised to do so. He is upset in that he is still waiting for insurance approval."

The Arbitrator notes that Dr. Bauer did not specify in which arm/hand Petitioner experienced numbness. Moreover, before March 8, 2010, Petitioner last participated in a physical therapy session on February 1, 2010, and was off work during this five-week period.

After March 8, 2010, Petitioner's next documented complaint of neck or upper extremity was on August 2, 2010, when he completed two pain diagrams for Dr. Bauer. On one pain diagram, in addition to designating symbols for his lumbar symptoms, Petitioner indicated that he had numbness in his posterior neck and right

hand, as well as pins and needles in the center of his back and aching in his right scapula. In the other pain diagram, in addition to designated symbols for his lumbar symptoms, he circled the back of his neck and wrote: "numbness back of head and hands."

The Arbitrator finds that these symptoms may be differentiated from his symptoms of January 6-25, 2010.

Petitioner testified that on September 13, 2010, he attempted to return to work in Respondent's office, but could not hold his back up and after 15 minutes his head "crashed down" onto the desk.

There is no history in Dr. Bauer's notes or the St. Alexius Medical Center notes of Petitioner's head crashing down on the desk on September 13, 2010. Such inconsistency leads the Arbitrator to call Petitioner's credibility into question.

The Arbitrator finds the testimony of physical therapist Tiffany Brinkley to be more credible that the testimony of Petitioner.

The cervical spine MRI of September 13, 2010 was interpreted as showing the following:

> "Mild to moderate degenerative disc changes and disc bulges. A small central disc protrusion at tears (sic) also to be present at C4-C5. There is relatively mild narrowing of the AP diameter of the spinal canal at C4-C5 and C5-6 without any significant spinal stenosis. No significant spinal stenosis. No significant neural foraminal stenosis." (Px.2)

On January 31, 2013, Petitioner underwent a C4-5 anterior cervical discectomy and fusion.

Dr. Goldberg testified that when he examined Petitioner on September 29, 2010, he found that Petitioner's pain complaints did not follow a normal anatomical pattern. At that time, Dr. Goldberg testified, Petitioner did not report a physical therapy incident to him. It was Dr. Goldberg's understanding that Petitioner first had cervical complaints on the day he attempted to return to work.

Before he examined Petitioner on September 29, 2010, Dr. Goldberg had not reviewed the NovaCare Rehabilitation records or Dr. Bauer's letter/report regarding Petitioner's visit of January 8, 2010. However, Petitioner's Counsel presented such records to Dr. Goldberg during cross-examination. After reviewing such records, Dr. Goldberg testified that Petitioner's symptoms in January 2010 would relate to the C5-6 level, rather than to the C4-5 level at which Petitioner had surgery. Dr. Goldberg also testified that when Petitioner presented to him on September 29, 2010, he complained of right arm symptoms.

Dr. Bauer, Petitioner's treating neurosurgeon, noted numerous times in his records that Petitioner has degenerative changes in his cervical spine. Dr. Bauer wrote, on May 18, 2011, the following: "Mr. Grubb complains of significant pain in his neck **which he attributes to** physical therapy in December 2010, prior to his lumbar spine surgery." (Emphasis added.)

Petitioner saw Dr. Bauer on April 30, 2012. In a letter to Ms. Kristen Korkowski, R.N., C.C.M., at CNA Insurance, Dr. Bauer wrote, with regard to Petitioner's cervical spine, *inter alia*, the following: "Trauma

occurred due to work injury while at work." The Arbitrator makes the reasonable inference that Dr. Bauer is referring to the onset of pain Petitioner experienced when he returned to work on September 13, 2010, for a short period of time, and was sitting at a desk and filing. There is no evidence that Petitioner violated his work restrictions on that date.

Dr. Griza took a history from Petitioner two days after he underwent the cervical fusion wherein Petitioner reported sustaining a neck injury while doing physical therapy for a back injury he sustained at work. Petitioner further reported that he had a herniated disc that was getting worse and worse to the point that had unbearable pain and bilateral arm pain and numbness and presented for the C4-C5 anterior diskectomy and fusion.

On January 20, 2010, Dr. Anastos made the following findings with regard the cervical MRI of that date:

> There is reversal of the normal cervical lordosis at the level of C4 and C5. Degenerative disc bulging with osteophytic ridges are noted at C3-C4, C4-C5 and to a lesser extent C5-C6. There is slight canal narrowing but no mass effect upon the cervical cord or cord signal changes.

Dr. Goldberg suggested that if there had been trauma, it would have been reflected as a herniation or herniations in this, the original, cervical MRI. Dr. Bauer noted no evidence of spinal cord compression on the above MRI.

The September 13, 2010 cervical MRI was the first MRI that was interpreted as showing a small central disc protrusion at C4-C5.

There is no medical opinion in evidence that causally links the need for the C4-C5 fusion surgery with any incident in physical therapy on January 6, 2010.

The burden is on the party seeking an award to prove by a preponderance of credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. Hannibal, Inc. v. Indus. Comm'n, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967); Illinois Institute of Technology v. Indus. Comm'n, 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill. Dec. 146 (1977)

Therefore, based on the foregoing, the Arbitrator finds that Petitioner failed to prove accident and failed to prove that his current condition of ill-being of his cervical spine is causally related to any incident in physical therapy on January 6, 2010. Compensation is hereby denied. All other issues are rendered moot.

Brian Cronin
Arbitrator

7-15-2016
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David M. Perales,

Petitioner,

17IWCC0713

vs.

NO: 13 WC 12981

Barton Staffing,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 3, 2016 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,200.00. 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: NOV 9 - 2017
KWL/vf
O-11/17/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

17IWCC0713

PERALES, DAVID
Employee/Petitioner

Case# **13WC012981**

BARTON STAFFING
Employer/Respondent

On 5/3/2016, 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 0.39% 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:

0924 BLOCK, KLUKAS & MANZELLA PC
BRYAN L SHELL
19 W JEFFERSON ST
JOLIET, IL 60432

1120 BRADY CONNOLLY & MASUDA PC
DANIEL J CODY
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

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
19(b)

17IWCC0713

DAVID PERALES
Employee/Petitioner

v.

BARTON STAFFING
Employer/Respondent

Case # **13** WC **12981**

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 **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **April 15, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0713

FINDINGS

On the date of accident, **April 2, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$12,446.90**; the average weekly wage was **$541.17**.

On the date of accident, Petitioner was **25** 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 **$11,570.81** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,570.81**.

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

ORDER

Petitioner's current condition of ill-being is causally related to the accident of April 2, 2013 and as a result prospective medical care consisting of diagnostic arthroscopy is awarded.

Respondent shall pay reasonable and necessary medical services of $4,490.62, as provided in Sections 8(a) and 8.2 of the Act and reimburse the State of Illinois Medicaid for reasonable and related payments made.

Respondent shall pay Petitioner temporary total disability benefits of $360.78/week for 158 3/7 weeks, commencing April 3, 2013 through April 15, 2016 continuing until the Petitioner's condition stabilizes, as provided in Section 8(b) of the Act, which is a total of $57,157.86.

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

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

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

Robert E. Johnson

Signature of Arbitrator

April 29, 2016

Date

MAY 3 - 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID PERALES, Petitioner, v. BARTON STAFFING Respondent.	)	17IWCC0713 No.: 13 WC 12981 Arbitrator: Robert Falcioni

RIDER TO ABITRATOR'S DECISION

IN SUPPORT of the Arbitrator's Decision regarding C (Arise Out/In the Course of Employment); F (Causal Connection); G (AWW); J (Medical); K (TTD) and O (Prospective Medical), the Arbitrator makes the following findings and conclusions:

FACTS

At the time of trial the Petitioner was 28 years old. The Petitioner's highest level of education was up to his senior year of high school. The Petitioner has worked as a welder and machinist since his last year of high school. The Petitioner has worked for Respondent on two separate occasions. The first time period began in November 2010 and he worked until an unrelated motor vehicle collision that occurred in January 2011. The second time period began October 2012 until the injury in question, which occurred April 2, 2013. The Petitioner testified that he earned approximately $13.00 (thirteen dollars) per hour and would work eight (8) to twelve (12) hours per day, five (5) to six (6) days per week. The Petitioner testified that overtime was mandatory, that he would be disciplined if he called off.

Dan Doe, an employee of Mondi was called as a witness by Respondent, who testified that if he called off overtime once the schedule was posted, he

would be disciplined by receiving one-half point. Leticia Felicia, the Human Resources representative for Mondi called as a witness by Respondent and testified that any overtime is considered voluntary and that an employee could request to be taken off the schedule for overtime without discipline. Franco Messer, the operations manager for Mondi called as a witness by Respondent and testified that as long as an employee approached him for pre-approval, they could take themselves "off" overtime, but must provide documentation for the reason(s), such as a doctor's note.

During the November 2010 through January 2011 employment, the Petitioner was staffed at Mondi and worked as a maintenance mechanic. The Petitioner was involved in a motor vehicle collision January 14, 2011. The Petitioner suffered a fractured patella in his right knee and several other injuries, which required medical treatment. The Petitioner underwent right patellectomy with patellar tendon insertion repair and reinforcement on January 16, 2011. (Resp. Ex. 7 at 58). After surgery the Petitioner continued to follow up with Dr. Paul Sauer of Rezin Orthopedics, who released Petitioner from care on January 31, 2012. (*Id.* at 9-10). After a physical examination, Dr. Sauer noted that Petitioner was walking very well without any limp and opined:

> I think he will have some limitations on any running or jumping activities, the amount of time he can spend on his feet and he could develop arthritis, which may become more disabling for him in the right knee and ankle. The rate of progression is impossible to determine. (*Id.*)

Dr. Sauer filled out an impairment questionnaire June 12, 2012, where he opined that the Petitioner was able to sit eight (8) hours per day, stand/walk six to eight hours per day, with the ability to lift twenty (20) to fifty (50) pounds occasionally and ten (10) to twenty (20) pounds frequently, carry twenty (20) to fifty (50) pounds occasionally and ten (10) to twenty (20) pounds frequently and no significant limitations in repetitive reaching, handling, fingering or lifting. Petitioner was capable of performing a full time competitive job that requires

activity on a sustained basis and that Petitioner will have good days and bad days. (Resp. Ex. 7 at 104-111).

On June 17, 2012, the Petitioner sought medical treatment with Provena St. Joseph's Medical Center, where he reported an issue with rectal bleeding. The Petitioner did not have complaints of knee pain. (Resp. Ex. 6).

On August 22, 2012, the Petitioner sought medical treatment at Edward Hospital where he reported a slip and fall on stairs. The Petitioner was diagnosed with a right knee sprain and had no follow up treatment. (Resp. Ex. 3). This was the last medical treatment before the April 2, 2013 work injury.

Respondent rehired Petitioner in October 2012. The Petitioner was again staffed at Mondi as a bottomer. The Petitioner testified he was hired to work full duty for five to six days per week and would work eight to twelve hours per day. The Petitioner worked full duty as a bottomer for approximately one to two months. As a bottomer, the Petitioner would run a machine that seals and folds the bags. This involved a lot of walking around the machine, which was approximately one-quarter of a city block long and the Petitioner would lift product to load the machine. This was a very repetitive job, working 8-12 hours per day and Petitioner was able to perform without complaints of pain to his right knee. In approximately December 2012 or January 2013, the Petitioner was moved to the print press machine to work as a print press operator. As a print press operator both Petitioner and Respondent's witness Dan Doe testified that the duties were to set the machine up with ink, load the proper dies (a cylinder made of silicone and plastic), as well as load very large rolls of paper that weigh approximately 1000-2000 pounds per roll. To load the paper the Petitioner was provided with a manual pallet jack that required significant force to move the roll of paper into position. The Petitioner testified that the roll of paper would be taken from the back of the print press machine, which is approximately 50-60 feet away and rolled up an aisle on a smooth concrete floor. The roll is then pulled on to metal diamond plate floor material in front of the machine. The machine is lowered hydraulically and the Petitioner would install

the steel rod through the paper roll and then the machine lifts the roll of paper into place to print. Both Dan Doe and the Petitioner testified that it is difficult to roll the paper once the pallet jack leaves the smooth concrete surface and moves onto the diamond plate floor. The pallet jack can become lodged, stop abruptly and is harder to pull with the raised metal on the diamond plate material. (Resp. Ex. 11, photo of the area in question). The Petitioner would have to load/unload rolls at least 1-2 times per hour, meaning he would pull the pallet jack back and forth loaded with 1000-2000 pounds at least 2-4 times per hour. Over the period of an eight hour shift that would be 16-32 times that he would pull the large roll of paper back and forth, 24-48 times if he worked up to 12 hours. The Petitioner was able to work this position for at least three months without incident or pain complaints to his right knee.

During his return to work for Mondi from October 2012 through April 2, 2013, the Petitioner sought medical treatment on several different occasions. On November 4, 2012, the Petitioner sought medical treatment at Edward Hospital, where he gave the medical history that he slipped and fell in his garage one week ago on antifreeze. The Petitioner reported no right knee injury or right knee pain, but chronic right ankle pain. He was discharged from the emergency room with an ankle sprain and rib contusion.

On January 5, 2013, the Petitioner was seen at Adventist Bolingbrook Hospital for right ankle and foot pain with no new injury, but had started a job that requires a lot of walking. (Resp. Ex. 8 at 134). The January 5, 2013 medical visit does not contain any complaints of pain or injury to the right knee.

The Petitioner was seen again on January 14, 2013 at Adventist Bolingbrook Hospital, where he complained of sharp cramping pain in the mid epigastric area. He was diagnosed with epigastric pain, acute gastritis and discharged. (Resp. Ex. 8 at 92).

On February 8, 2013, the Petitioner presented to Adventist Bolingbrook Hospital where he had an irregular heartbeat. The hospital notes that Petitioner

works out regularly without problems. The Petitioner was diagnosed with anxiety. (Resp. Ex. 8 at 48).

At issue in this case is the April 2, 2013 work injury. The Petitioner testified that he was operating the print press, which was low on paper. He went to the back of the machine approximately fifty to sixty feet away to get a new roll with the manual pallet jack. He testified that he was pulling the manual pallet jack loaded with approximately 2000 pounds backwards, transitioning from the concrete to the diamond plate area in front of the print machine. The Petitioner was pulling as hard as he could from the transition off of the concrete surface onto the diamond plate, and as he pulled backwards he felt and heard a "snap" in his right knee. Both Petitioner and Mr. Doe testified that once the manual pallet jack loaded with 1000-2000 pound rolls of paper rolled onto the diamond plate material it became difficult to move and could get stuck on the raised metal material.

The Petitioner was in severe pain, but tried to compose himself before reporting any injury. After a few minutes, the Petitioner was still in excruciating pain and reported the injury to Ed Vargas. The injury was noted for the first shift manager, Franco (who Respondent called as a witness who did not refute Petitioner's testimony regarding the accident or accident report/notice) and the Petitioner was sent for treatment at Adventist Bolingbrook Hospital.

The Petitioner was seen in the emergency room on April 2, 2013 where he reported right knee pain after moving a heavy object at work. An X-ray was performed and the Petitioner was given crutches with the recommendation to bear minimal to no weight, follow up with an orthopedic specialist and take pain medication as directed. (Pet. Ex. 3 pg. 2-3 of 44). The Petitioner was referred to a number of orthopedic specialists, but chose Dr. Ryan Pizinger. (Pet. Ex. 3 at 6 of 44).

The Petitioner scheduled an appointment with MK Orthopedics for April 10, 2013. On that visit the Petitioner filled out an intake form indicating that he

had a right knee injury, where he twisted his right knee while moving a 2100 pound roll of paper on April 2, 2013. (Pet. Ex. 5 at 7).

The Petitioner was first examined by a physicians' assistant, Gina Herlihy, who noted a history of a 25 year old who is a print press operator at Barton Staffing, on April 2, 2013, while working, he was moving a 2100 pound roll of paper with a dolly. Pulling it backwards and was stepping from concrete to diamond plate surface when he heard a pop and snap in his right knee. On physical exam it is noted that he has some swelling in the right knee compared to the left. There was diffuse pain with palpation, pain with range of motion and quite a bit of crepitus in his knee. It was suspected that there might be meniscal pathology, so an MRI was ordered. The Petitioner was taken off of work. (Pet. Ex. 5 at 72-74).

The Petitioner had an MRI April 15, 2013 (Pet. Ex. 6) and followed up with P.A. Herlihy, who diagnosed post femoral instability, tendonitis and surgical changes in the right knee. P.A. Herlihy recommended conservative treatment, which would include physical therapy and a cortisone injection in the right knee to help with burning and inflammation. A cortisone injection was done at this visit. The Petitioner was advised to follow up in one month and to stay off work. (Pet. Ex. 5 at 69-71).

The Petitioner saw Dr. Ryan Pizinger of MK Orthopedics on May 9, 2013. Dr. Pizinger is a board certified orthopedic surgeon who specializes in sports medicine and traumatic injuries. (Pet. Ex. 19 at 4-5). Dr. Pizinger noted that the cortisone injection did not help and the Petitioner had an allergic reaction from the injection. After a review of the diagnostic studies, Dr. Pizinger recommended different options for the treatment plan. The Petitioner could undergo a diagnostic arthroscopy to smooth out any cartilage in the knee, or he could try Orthovisc injections. The Petitioner chose to undergo diagnostic arthroscopy and the physician's office sought approval from Workers' Compensation.

Respondent sent the Petitioner for an examination with Dr. David Raab from Illinois Bone and Joint Institute pursuant to Section 12 of the Act, which

was done on June 17, 2013. Dr. Raab noted a history related to him by Petitioner that he was injured at work on April 2, 2013 while he was pulling a roll of paper weighing approximately 2100 pounds with a dolly. He was pulling backwards and he believes he twisted the right knee with subsequent onset of pain. Dr. Raab reviewed pre-existing records from the motor vehicle collision and the treatment with MK Orthopedics. Dr. Raab performed a physical examination revealing severe/audible crepitus to the right knee, positive patellofemoral grind and range of motion from zero to 135 degrees. Dr. Raab opined that the Petitioner has severe posttraumatic degenerative arthritis of the patellofemoral joint and had a poor prognosis. Dr. Raab stated that it is possible the work-related injury may have aggravated his preexisting posttraumatic degenerative arthritis of the patellofemoral joint based on the Petitioner's history. Dr. Raab opined that he would recommend viscosupplementation and physical therapy prior to a knee arthroscopy and wrote that "hopefully this was a temporary aggravation". (Resp. Ex. 1, Dep. Ex. 2).

Petitioner returned to MK Orthopedics on August 8, 2013, where Dr. Pizinger reviewed the Section 12 report and recommended a series of three Orthovisc injections versus one Synvisc One injection. The Petitioner was kept off work. (Pet. Ex. 5 at 62).

The Petitioner was seen again by Dr. Pizinger 5 days later where he felt a pop in his knee going upstairs. Dr. Pizinger did not think anything had changed in the knee and awaited approval from Workers' Compensation for the Orthovisc injections to the knee. (Pet. Ex. 5 at 58).

A physical therapy evaluation was performed August 14, 2013. A consistent history was given to the therapist, where the Petitioner stated on April 2, 2013 he was moving a very heavy coil of paper while at work. The therapist also noted the August 13, 2013 knee pain where the Petitioner was climbing stairs and felt a pop. (Pet. Ex. 5 at 51).

The Petitioner followed up with Dr. Pizinger on August 20, 2013, where a Synvisc One injection, not a series of Orthovisc injections, was approved and

administered. A follow-up visit was planned for six (6) weeks. Physical therapy was continued and the Petitioner was to remain off work. (Pet. Ex. 5 at 46-48 and 130).

The Petitioner next saw Dr. Pizinger October 1, 2013, where he reported that the Synvisc One injection and physical therapy visits did not improve his symptoms. The Petitioner had anteromedial and anterolateral knee pain, which was bothersome with all activities. A diagnostic arthroscopy and debridement was recommended again and approval was sought for the same. (Pet. Ex. 5 at 27).

Petitioner's final visit with Dr. Pizinger was on November 4, 2013, where he continued to seek approval for the diagnostic arthroscopy and debridement of the right knee and he recommended Petitioner see a pain specialist. Dr. Pizinger continued to keep Petitioner off work. (Pet. Ex. 5 at 22).

The Petitioner was paid temporary total disability by Respondent while he was off work.

Authorization for the surgery was sought by Petitioner and Dr. Pizinger's office until November 25, 2013, where Respondent had again sent Petitioner to a second evaluation pursuant to Section 12 of the Act with Dr. Raab. Dr. Raab changed his opinions now opined that Petitioner was at MMI for the work-related injury as the injury sustained was a temporary aggravation of his pre-existing degenerative arthritis of his patellofemoral joint. (Resp. Ex. 1, Dep. Ex. 3).

At depositions, Dr. Ryan Pizinger testified that given the history of pulling the roll of paper backwards, it's likely that the knee is bent during those kinds of activities which would cause – put upwards of three to five times pressure across the kneecap. (Pet. Ex. 19 at 7 Dr. Pizinger further opined that the Petitioner had an acute exacerbation upon the work-related injury he described, that the work-related injury exacerbated his underlying condition. (Pet. Ex. 19 at 11 and 17-18). Dr. Pizinger discussed the surgery and why he diagnosed a diagnostic arthroscopy, so that he could see what is going on in the knee and be able to perform further procedures at that time, that a CT or MRI only shows

somewhere in the low to mid 90 percentage range of what pathology might exist and that the arthroscopy would be the gold standard and that surgery was appropriate as the Synvisc One injection and physical therapy did not help, so the Petitioner failed all conservative treatment for his diagnosis and the last option was to perform the diagnostic arthroscopy. (Pet. Ex. 19 at 13-15).

Dr. David Raab authored two reports pursuant to Section 12 of the Act at Respondent's request. In the first report, dated June 17, 2013, Dr. Raab opined that the Petitioner has severe posttraumatic degenerative arthritis of the patellofemoral joint, with a poor prognosis. Dr. Raab stated that it is possible the work-related injury may have aggravated his preexisting posttraumatic degenerative arthritis of the patellofemoral joint based on the history given that he was pulling a roll of paper that weighed approximately 2100 pounds with a dolly but that the aggravation was only temporary. Dr. Raab admitted that some type of injury occurred according to the patient's history. (Resp. Ex. 1 at 51). Dr. Raab recommended viscosupplementation and physical therapy, which had been previously requested by Dr. Pizinger and denied. (Resp. Ex. 1 at Dep. Ex. 2).

Dr. Raab authored a second report pursuant to Section 12 of the Act, where he reviewed treatment records including the Synvisc One injection and physical therapy. Dr. Raab notes that the Petitioner had no improvement after this treatment. Dr. Raab was also provided with Respondent's Exhibit 10, surveillance of the Petitioner, which did not affect his opinion in this case. Dr. Raab then changed his opinion that the Petitioner was at MMI and Petitioner's injury was a temporary aggravation of his preexisting degenerative arthritis of his patellofemoral joint. Dr. Raab testified that his definition of a temporary aggravation is something that is short-term. (Resp. Ex. 1 at 18 On cross-examination he did concede that he gave the Petitioner the "benefit of the doubt" that whatever occurred aggravated his arthritis. Dr. Raab agrees that according to the Petitioner's history there was something that aggravated his knee and that viscosupplementation and physical therapy he received was

appropriate treatment for that aggravation, but any treatment after that goes beyond the injury of April 2, 2013 and would relate to the arthritis in his knee. (Resp. Ex. 1 at 52-53). Dr. Raab testified that despite causation and if the Petitioner is symptomatic, he would restrict work to limit bending, stooping and squatting because those activities are going to bother his knee. The Arbitrator notes that the Petitioner was performing these exact activities without issue for Respondent from October 2012 through April 2, 2013.

Since the surgical recommendation, it appears that the Petitioner's knee has grown increasingly weaker, which is documented on two occasions where his knee gavecout. On October 28, 2014, the Petitioner's right knee gave out while coming down stairs and he was discharged from the hospital with minimal care. (Pet. Ex 8 at 45). Again on January 4, 2015 his right knee gave out and the Petitioner landed on his back on wood stairs. The Petitioner was discharged with no further follow-up care. (Pet. Ex. 7 at 84-85).

Leticia Felicia was called as a witness by Respondent. Ms. Felicia works in the human resources department at Mondi. She is in charge of writing any disciplinary/reprimand reports and co-ordinates with Barton Staffing to place employees at Mondi. Ms. Felicia testified that the Petitioner was hired as temporary to permanent status, which meant after working approximately four hundred and eighty hours, the temporary employee would be considered for a permanent position. Ms. Felicia testified that from October 2012 up until his first absence due to illness February 6, 2013, the Petitioner had not been disciplined/reprimanded and was a good employee; he did a good job and was a fast learner. Sometime after he was available for a permanent position Ms. Felicia wrote three reprimands. (Resp Ex. 12, 13, 14). The first, the Petitioner was reprimanded for being absent for three days due to illness; the second, the Petitioner left his shift early after claiming to have clocked in early; and the third, the Petitioner left the premises during break. After the third reprimand, Ms. Felicia testified that she terminated the employment of the Petitioner. While finalizing the paperwork and prior to informing Barton Staffing, Ms. Felicia

testified that she was told by Franco Messer not to fire the Petitioner as he was a good worker and deserved one more chance. Ms. Felicia testified that the Petitioner had thirty (30 days) to "shape up" to be hired on a permanent basis with Mondi. Ms. Felicia testified that approximately April 2, 2013 she met with another temporary to permanent employee, Floyd Senca, to discuss his permanent hire to Mondi. Ms. Felicia testified that at this exact moment the Petitioner entered her office and became upset his position was filled. However, Ms. Felicia testified that a permanent position was still available to the Petitioner even after the hire of Floyd Senca.

Franco Messer was called as a witness by Respondent. Mr. Messer is the Operations Manager in charge of the entire floor and he is in charge of the schedules for the employees. Mr. Messer testified that the Petitioner was a good employee and fast learner, but had attendance issues with the company. Mr. Messer also testified that he was the person to stop the termination of the Petitioner as he was a good employee and deserved a second chance to be hired with Mondi. Mr. Messer stated that there was still a permanent position available despite the hiring of Floyd Senca. Mr. Messer testified that the Petitioner came to him to discuss the insurance benefits of Mondi at some point during his employment, but Mr. Messer could not remember being involved in the interview of the Petitioner just a few months prior to the time of Petitioner's placement with Mondi. Mr. Messer testified that overtime is not mandatory, but also stated that once he puts out the schedule the employees have to approach him to request the overtime hours be removed for an approved reason, such as a doctor's visit, which must be documented. Mr. Messer knew that Petitioner was involved in a motor vehicle collision prior to his hire, but he knew of no restrictions placed on the Petitioner and assumed he could work full duty with Mondi because he would not be hired if he was not able to perform the job.

Dan Doe was called as a witness by Respondent. Dan Doe is an employee at Mondi operating a print press. Dan Doe trained Petitioner to operate the print press machine. As they worked together, the witness and Petitioner would have

conversations. They were not "go to the bar together" friends, but they would converse during work hours. Respondent asked what important information Mr. Doe would like to share and he said that Petitioner would complain of right knee pain. However, Mr. Doe could not remember Petitioner complaining of pain to his right ankle, especially around the time Petitioner went to the emergency room for ankle pain on January 5, 2013, a time when Petitioner was being trained by the witness. (Resp. Ex. 8 at 134). The witness could not recall any other specific conversations he had with Petitioner or anyone else that occurred during that time period over three years ago. Dan Doe did testify to the policies and procedures at Mondi, including the job duties as a print press operator, which were nearly identical to Petitioner's description. However, the only difference was how far the 1000-2000 pound rolls of paper would have to be moved by manual pallet jack. Mr. Doe testified that emploeeys are rolling the paper from the concrete to the diamond plate and that the rolls are placed near the machine by other employees, approximately ten (10) feet away and would be rolled from the smooth concrete surface onto the metal diamond plate surface. Petitioner testified that he would have to walk to the end of the machine or about sixty (60) feet to get the paper with the manual pallet jack and roll it to the area near the machine. Both Petitioner and Mr. Doe testified that once the pallet jack rolled onto the diamond plate material it became difficult to move and could get stuck on the raised metal material.

In support of the Arbitrator's Decision regarding "C" (Arise out of / In the Scope of Employment), the Arbitrator finds as follows:

In the case at Bar, the Petitioner was clocked in and working as a print press operator. As part of the print press operator duties the Petitioner has to refill/replace the rolls of paper as they near printing completion. To replace the rolls the Petitioner has to get a new roll weighing approximately 1000-2000 pounds with a manual pallet jack, pull the new roll into place, pull out the steel tube from the old roll and place the steel tube into the new roll so that the

machine then lifts the roll into place. The Petitioner was clearly in the scope of his employment on April 2, 2013, while he was performing this task.

As the Petitioner and Respondent's witness Dan Doe testified, they are required to pull the 1000-2000 pound roll into place so they can load the machine. The Petitioner testified on April 2, 2013 he was pulling the roll from the concrete surface to the diamond plate surface and felt the "snap" in his knee. The Petitioner testified that he is required to perform this task as many as 48 times per shift. This task of rolling a 1000-2000 pound roll of paper with a pallet jack is clearly one that is a risk peculiar to a print press operator, which was the position Petitioner was working at the time of injury. The Petitioner testified that he was planting his leg while trying to pull a pallet jack that was loaded with a 1000-2000 pound roll of paper. As. Dr. Pizinger testified this put force on the knee and it was in this pulling motion that the Petitioner felt and heard the "pop" in his knee.

Dan Doe also testified that he and the Petitioner used to work together, they were not close friends, but would have conversations while working the print press machine. Mr. Doe testified that he specifically remembers the Petitioner telling him that the Petitioner had right knee pain while at work. On cross-examination, Mr. Doe could not remember any other specific conversations he had with any other individuals from January 2013 through April 2013. Mr. Doe did not recall the Petitioner telling him anything about going to the hospital for any pain he was having even though the Petitioner had sought treatment on several occasions prior to April 2, 2013 for right ankle pain, anxiety and gastritis. Dan Doe had no recollection of the Petitioner telling him about those hospital visits, which were during the time period he remembers the Petitioner telling him about his right knee pain.

Franco Messer testified that the Petitioner approached him and asked about only insurance benefits once hired on as a permanent employee at Mondi.

Yet, Mr. Messer could not recall being involved in the interview when Petitioner was hired with Respondent. The Petitioner testified that at one point he asked about all benefits, including 401(k) and any pay increase once he was a permanent employee.

The Arbitrator does not find the testimony of Respondent's witnesses to be persuasive to prove that the Petitioner did not sustain an accident under the Act. All witnesses testified that the Petitioner was a good worker. Leticia Felicia and Franco Messer both testified that despite the hire of Floyd Sensial, the Petitioner still had a job available after he "proved himself" for thirty days, proving further that his position with Mondi was not in jeopardy as long as there were no further violations.

There was testimony regarding the surveillance/security footage cameras located near the area near the print machine in question. The Petitioner testified that he thought the accident would have been shown on surveillance. Respondent did not offer the surveillance/security footage of the area in question as an Exhibit, as Respondent's witnesses testified that the security camera view of the area where Petitioner was injured would have been blocked by the presence of certain large machines.

The Arbitrator finds that the Petitioner was a credible witness. The fact that he believed his station was under surveillance only lends to his truthfulness at trial as he would testify consistent to what he thought would have been shown if the video was available. The Petitioner testified that he knew of the cameras, had seen the monitors in the manager's office, signs were posted in the work area stating that it is under surveillance and he believed that his accident would have been shown on film. Moreover, the contemporaneous medical records from the April 2, 2013 injury show a consistent history of the injury as described by the Petitioner, which was consistent with his testimony at the hearing April 15, 2016. Further, Petitioner has been injured at work on prior

occasions, but has never filed a Workers' Compensation case, other than the April 2, 2013 work injury. (Resp. Ex. 3, October 15, 2007 work injury), (Resp. Ex. 6 at 43, Spetember 10, 2009 work injury), (Resp. Ex. 6 at 28, July 1, 2008 work injury), (Resp. Ex. 6 at 12, June 20, 2006 work injury), (Resp. Ex. 8 at 134, January 5, 2013, ankle pain while at work), (Resp. Ex. 8 at 164, December 14, 2012 work injury).

The Arbitrator finds that the Petitioner had an accident on April 2, 2013 which was arose out of and the course of his employment with Respondent, which is consistently documented in the records. Further, Respondent's Section 12 physician Dr. Raab agrees that if the Petitioner had been moving the roll the way he stated in his history, that it could aggravate his underlying preexisting condition. (Resp. Ex. 1 at 33, 45, 46, 50, 51). The Petitioner did have an underlying preexisting condition, but was working full duty on April 2, 2013 and had a specific accident while he was pulling a dolly loaded with 1000-2000 pounds from a smooth concrete surface to diamond plate.

In support of the Arbitrator's Decision regarding "F" (Causal Connection), the Arbitrator finds as follows:

Both Parties agree that Petitioner had a preexisting condition in his right knee. Both Dr. Pizinger and Dr. Raab agree that there was patellofemoral arthritis in the right knee. Both Dr. Pizinger and Dr. Raab agree that the arthritis is attributable to the January 2011 motor vehicle collision. (Pet. Ex. 19 at 45 and Resp. Ex. 1 at 16). The Petitioner was released from care by the prior physician with no work restrictions and a comment that the damage to his knee "will have limitations running, jumping, the amount of time he can spend on his feet and he could develop arthritis, the rate of the progression of arthritis was impossible to determine". (Resp. Ex. 7 at 9). Despite these limitations, Dr. Sauer released Petitioner and stated he was capable of performing a full time competitive job that requires activity on a sustained basis and that Petitioner will have good days

and bad days. (Resp. Ex. 7 at 104-111). It is irrelevant to consider that the Petitioner had applied for disability in the past, which disability was never approved.

Petitioner had been working full duty for Respondent from October 2012 up until the April 2, 2013 work accident. Respondent had full knowledge of the prior injury as it occurred while he was an employee. Respondent hired Petitioner back to full duty work. Dr. Pizinger and Dr. Raab agree that the work injury as described aggravated or exacerbated the underlying degenerative condition. (Pet. Ex. 19 at 17-18 and Resp. Ex. 1 at 33). Dr. Pizinger testified that there were signs of increased swelling after the April 2, 2013 work injury and that the MRI revealed bone marrow edema within the patella, which could indicate an acute injury. (Pet. Ex. 19 at 39-40). Dr. Raab stated in his June 17, 2013 report that it is possible that his work-related injury may have aggravated his pre-existing posttraumatic degenerative arthritis of the patellofemoral joint based on the Petitioner's history and that the event on April 2, 2013, was an aggravation of this preexisting arthritis and he would attempt to get Petitioner back to his baseline. (Resp. Ex. 1, Dep. Ex. 2 opinion 5 & 6). Dr. Raab later writes in the report that this was hopefully a temporary aggravation, but never stated that it was. (*Id.* at Dep. Ex. 2 opinion 10). Dr. Raab then testified inconsistent with his June 17, 2013 report on direct-examination that it was his opinion at the time of that report the Petitioner suffered a temporary aggravation of his knee issue, his knee problem. (Resp. Ex. 1 at 16-17). When asked on cross-examination whether the work injury could have aggravated his underlying condition Dr. Raab states that "I'm giving the benefit of the doubt that whatever occurred aggravated his arthritis. (Resp. Ex. 1 at 33). Dr. Raab then changed his opinion that the Petitioner suffered only a temporary aggravation of his underlying condition in the November 25, 2013 report. (Resp. Ex. 1, Dep. Ex. 3). However, Dr. Raab in the June 17, 2013 report hoped that Petitioner sustained only a temporary aggravation and that he would return to a baseline, recommending viscosupplementation and physical therapy. After that treatment

was complete and the Petitioner still continued to complain of pain, Dr. Raab changed his expert opinion in that the aggravation was temporary and the Petitioner is now at MMI, the basis or bases of his opinion are concerning as Petitioner's complaints of pain remained constant at that point, conservative measures had not helped and the Petitioner had clearly not returned to a baseline. Despite Dr. Raab's hope that the knee would return to a baseline, it had not and remained symptomatic. The baseline established prior to April 2, 2013 was that the Petitioner could work full duty in a heavy capacity pushing and pulling 1000-2000 pound rolls of paper. According to Dr. Raab, despite not being causally connected, the Petitioner, after the April 2, 2013 injury, should be limited, if his pain is not tolerable, in his activity to include no bending, stooping and squatting because those are the activities that are going to bother the knee. (Resp. Ex. 1 at 54).

The Arbitrator finds that the work injury of April 2, 2013 caused an injury to Petitioner's knee that is at this point still undiagnosed and unresolved. Dr. Pizinger, the treating orthopedic surgeon, testified credibly that in order to correctly diagnose Petitioner's condition, he would need to perform a diagnostic arthroscopy. Based on the record as a whole, the Arbitrator finds that Petitioner's current condition of ill-being, including the need for the diagnostic arthroscopy, is causally related to the April 2, 2013 work injury.

In support of the Arbitrator's Decision regarding "G" (AWW), the Arbitrator finds as follows:

Section 10 of the Illinois Workers' Compensation Act, 820 Ill. Comp. Stat. Ann. 305/10 (2011), states that overtime is to be excluded in calculating a claimant's average weekly wage. Overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week. In Tower Automotive v. Illinois Workers' Compensation Commission, 407 Ill.App.3d, 943 N.E.2d 153 (1st Dist. 2011), the Appellate Court reiterated their holding that the hours that an

employee works in excess of his regular weekly hours of employment are not considered overtime within the meaning of Section 10 of the Act and are to be included in an average-weekly-wage calculation if the excess number of hours worked is consistent or if the employee is required to work the excess hours as a condition of his employment.

The Petitioner testified that as part of his employment schedule he would have days which were considered overtime scheduled. Franco Messer testified that the schedule is posted in the break room on Thursdays and that if the employees would like to remove themselves from the schedule on overtime days they would have to put in a request and provide documentation to verify their reason/excuse. Leticia Felicia testified that overtime is completely voluntary and employees can call off whenever they want. Dan Doe testified that he would be disciplined and given one-half point for calling off on a scheduled overtime day.

The Arbitrator finds by a preponderance of the evidence that overtime was mandatory. Essentially, overtime was mandatory unless an employee could provide a doctor's note. Once the schedule was posted, the employees could only remove themselves from overtime hours if it was approved by the operations manager. Further, they must provide documentation of the reason/excuse for calling off of work. Dan Doe testified that if he were to call off on an overtime day he would be disciplined. The Petitioner testified that the temporary employees would be disciplined if they called off on a scheduled overtime day even with an excuse. The overtime is a condition of the employment and therefore considered when calculating the average weekly wage.

In review of Petitioner's Exhibit 21, the Barton Staffing Solutions, Inc. payroll register, the Petitioner earned a total of $15,288.10. The earnings prior to April 2, 2012 are excluded from calculation of the AWW. The Petitioner earned a total of $12,446.90 (paid at the straight rates of $13.00 and $13.30) from October 28, 2012 through March 31, 2013, a period of 23 weeks. The Arbitrator finds that the average weekly wage is therefore $541.17.

In support of the Arbitrator's Decision regarding "J" (Medical), the Arbitrator finds as follows:

Having found that an accident occurred and the injury was causally connected, Petitioner's medical bills were admitted as Petitioner's exhibits 10-20 in the sum of $$17,611.13 of which $4,490.62 remains unpaid as well as bills paid by the State of Illinois Medicaid program. After review of the medical records, the Arbitrator finds that Petitioner's treatment was standard medical care, which was reasonable and necessary as opined by both Dr. Pizinger and Dr. Raab. (Pet. Ex. 15 at18 and Resp. Ex. 1 at 52). Dr. Pizinger recommended physical therapy and viscosupplementation, which was initially denied by Respondent until the June 17, 2013 report wherein Dr. Raab concurred the treatment was reasonable and necessary. The Arbitrator awards payment of the outstanding medical bills subject to the fee schedule as well as reimbursement to the State of Illinois for bills paid pursuant to the State Medicaid program all to be paid pursuant to the medical fee schedule and Respondent to be given credit for all sums previously paid hereunder.

In support of the Arbitrator's Decision regarding "K" (TTD), the Arbitrator finds as follows:

The Petitioner was restricted from work April 2, 2013 to the present. It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.,* whether the claimant has reached maximum medical improvement. Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 271 (2010). It is clear from review of the records that Petitioner's condition had not stabilized after the injury. Further, Respondent has denied any further treatment after the November 25, 2013 Section 12 report of Dr. Raab. The Petitioner testified he has sought medical care for his right knee, but is unable to locate a surgeon who will accept his insurance issued through the State of Illinois for treatment related to his right knee, especially when they are informed there is an aspect of litigation involved with Workers' Compensation. The Petitioner

did not choose to stop treatment or abandon treatment. Treatment was denied further treatment by Respondent and the Petitioner has made efforts since that denial to actively treat for his right knee condition, but has been unsuccessful in finding a physician to accept his insurance and take over care.

Therefore, the Arbitrator awards TTD from April 3, 2013 through April 15, 2016 and continuing until the Petitioner's condition stabilizes, or 158 3/7 weeks pursuant to Section 8(b) of the Act.

In Support of the Arbitrator's Decision regarding "K" (Prospective Medical), the Arbitrator finds as follows:

The Arbitrator finds the surgery recommended by Dr. Pizinger is reasonable, necessary, and customary medical treatment. Dr. Pizinger has testified that this is one of the last options and could lead to other forms of treatment as all other conservative treatment has failed to reduce/improve the Petitioner's symptoms. Dr. Raab disagrees with the need for surgery, but offers no other alternatives after the viscosupplementation and physical therapy. The Arbitrator therefore awards the surgery as prescribed by Dr. Pizinger and orders Respondent to pay for same pursuant to the medical fee schedule.

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

Chester Latham,
Petitioner,
vs.

17IWCC0714

NO: 09 WC 30612

A to Z Messenger Service & Illinois State Treasurer
as ex-officio Custodian of the Injury 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 medical expenses, permanent partial disability, statute of limitations 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 8, 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 $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 9 - 2017
KWL/vf
O-11/7/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0714

LATHAM, CHESTER
Employee/Petitioner

Case# **09WC030612**

A TO Z MESSENGER SERVICE & ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 3/8/2016, 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 0.47% 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.

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

0000 A TO Z MESSENGER SERVICE
1006 W RANDOLPH ST
CHICAGO, IL 60617

5204 ASSISTANT ATTORNEY GENERAL
CHRISTOPHER FLETCHER
100 W RANDOLPH ST 13TH 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

17IWCC0714

Chester Latham
Employee/Petitioner

v.

A to Z Messenger Service & Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund

Employer/Respondent

Case # **09** WC **30612**

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 **01-08-16**. 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 _____

17IWCC0714

FINDINGS

On **06-27-07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 **41** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $200.00/week for 4 6/7s weeks, commencing 6/27/07 through 7/31/07, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $349.00 for City of Ambulance, $256.00 for Rush University Medical Group, $577.51 for Rush Emergency Center; $675.00 for Beverly Park Medical; and $2625.00 for Dr. Kalagaraju as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $180.00/week for 10 weeks, because the injuries sustained caused the 2% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

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

Signature of Arbitrator

03-07-16
Date

MAR 8 - 2016

17IWCC0714

Chester Latham,
Employee/Petitioner

v.

Case # **09** WC **30612**

Chicago, IL

A to Z Messenger Service
& Michael Frerichs, Illinois State Treasurer,
as *ex-officio* custodian of the Injured Workers' Benefit Fund,
Employers/Respondents

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

This action was pursued under the Illinois Workers Compensation Act ("the Act") by the Petitioner and sought relief from Respondent-Employer A to Z Messenger Service ("A to Z") and the Injured Workers Benefit Fund regarding Petitioner's work-related accident on June 26, 2007. Petitioner notified A to Z via certified mail at its last known address but no one appeared on behalf of A to Z. On January 8, 2016, a hearing was held before Arbitrator Kurt Carlson in Chicago, Illinois. The Illinois Attorney General filed an appearance on behalf of the Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund. Petitioner's Exhibits 1 - 8 were admitted into evidence.

Petitioner testified he was born on November 21, 1965 and he currently lives in Waterloo, Iowa. On June 26, 2007, Petitioner was married with no dependent children. On that date, the date of the work injury, Petitioner was employed as a bicycle messenger for A to Z in Chicago, Illinois.

As a bicycle messenger, Petitioner picked up packages from different companies and rode his bike on the streets of Chicago. Petitioner was hired by Mr. Colonel Bradford, the owner of A to Z, and was to deliver packages for $300.00 per week. Petitioner was paid by check.

Petitioner's Exhibit 3 is a check from A to Z to Petitioner. That check was returned for non-sufficient funds.

Petitioner testified he was riding down Michigan Avenue on June 26, 2007 and was hit by a car on his rear tire when he was bicycling. When this happened, Petitioner tried to pull out of the way and was looking at a different accident that occurred in the street. Petitioner's middle buttocks hit the ground first. Petitioners left thigh was also hurt.

Petitioner spoke with the owner of A to Z, Mr. Bradford, after the accident and said he would be delayed due to the accident and asked someone to pick up the packages he still had in his possession.

Petitioner testified he went to the emergency room at Rush on the day of the accident. Petitioner also had x-rays done at Beverly Park Medical Center. Petitioner treated with Dr. Kanagaraju.

Petitioner testified he tried to go back to work at A to Z, but then he was terminated. Petitioner had no injuries to his back or thigh before the accident on June 26, 2007. Petitioner had no injuries to his back or thigh since the accident date. Petitioner testified he was able to ride a bicycle at least 30 miles a day before his accident. The Petitioner testified that at the present time he cannot ride a bike and still has numbness in his back and left calf

On cross-examination, Petitioner testified he would know where to go for deliveries from the A to Z dispatcher. Petitioner did not have control over where to go for his deliveries. Petitioner had a work ID while working for A to Z. Petitioner also had a purple uniform while he delivered for A to Z. That uniform had a logo for the company and his hat also had an A to Z logo.

Petitioner explained his start time at A to Z was 7:00 a.m. and if he did not show up for work his boss would not be happy and he would have to answer for it. Petitioner explained that A to Z Messenger was located at 1007 West Randolph and he found the job as a bicycle messenger through a friend. Petitioner testified Colonel Bradford lived above this address. Petitioner further testified he was terminated in August 2007. Petitioner testified he was off work for 3 to 4 weeks.

Petitioner admitted in cross-examination he has not treated for his work injury in 8 years and he has no doctor's appointment set up in the future connected to his work injury.

On redirect examination, Petitioner testified he was paid a specific amount every week. Petitioner happened to have the check from A to Z because that check bounced. *See* Petitioner's Exhibit 3.

Petitioner testified he works currently as a customer service representative. For this current job, he works from 9:00 a.m. to 5:00 p.m.

After Petitioner rested his case-in-chief, Respondent-IWBF made an oral motion to dismiss the IWBF because Petitioner amended his Application for Adjustment of Claim outside the three-year statute of limitations allowed. This Arbitrator takes up this issue in the Conclusions of Law.

Petitioner's Medical Records

Petitioner's emergency room medical records reveal he was a "bicyclist hit by car knocked to ground." Petitioner complained of pain in his buttocks with moderate symptoms. Petitioner's primary diagnosis at this time was: contusion. (Petitioner's Exhibit 5).

Petitioner underwent x-rays of the thoracic spine, right hip, and bilateral femur. Those x-rays revealed a normal thoracic spine examination, a normal right hip examination, and examination of the bilateral femur showed the right hip was not seen, but otherwise was a normal study.. These films were interpreted by Dr. Perry Rudich.(Petitioner's Exhibit 7)

Petitioner underwent physical therapy with Dr. Kanagaraju beginning June 29, 2007. *See* Petitioner's Exhibit 8, Records of Kanagaraju. That physical therapy treatment ended on July 31, 2007 when Petitioner was discharged. When Petitioner saw Dr. Kanagaraju, he complained of pain over the lower back, right hip, both right and left thighs, and right gluteal area since the accident. Petitioner was given a diagnosis of sprain - lower back; sprain - Rt. hip, When Petitioner was released from Dr. Kanagaraju on July 31, 2007, he was told to continue with home exercises and come back to the clinic as needed.(Petitioner's Exhibit 8) This Arbitrator notes the last time Petitioner had any kind of treatments for this 2007 work accident was on July 31, 2007, over 8 years ago.

II. CONCLUSIONS OF LAW

a. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Disease Act?

Petitioner testified he worked for Respondent-Employer A to Z on June 26th, 2007. Petitioner was working as a bicycle messenger that day and his job was to deliver a multiple packages throughout the day. Respondent-Employer was engaged in the business of carriage by land under 820 ILCS 305/3(3) and, therefore, was operating under and subject to the mandatory insurance coverage provisions of section 3 of the Act.

b. Was there an employee-employer relationship?

Petitioner testified he worked for A to Z Messenger as a bicycle messenger. Petitioner had no control over his deliveries and was told where to go by the A to Z dispatcher. The Petitioner wore an A to Z uniform and was hired by Colonel Bradford, the owner of A to Z. The Arbitrator finds by a preponderance of the evidence Petitioner worked for A to Z as an employee under the Act.

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

Petitioner testified he was riding his bicycle performing deliveries when he was hit by a car and fell to the ground. The Arbitrator finds Petitioner proved by a preponderance of the evidence that an accident arose out of and in the course of Petitioner's employment.

d. What was the date of accident?

Petitioner's testimony established a date of accident of June 26, 2007.

e. Was timely notice of the accident given to Respondent?

Petitioner testified he called the owner of A to Z, Colonel Bradford, and notified him of the accident on June 26th, 2007. Petitioner has proven timely notice of the accident to the Respondent-Employer.

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

In answering the question of whether Petitioner's current condition of ill-being is related to what happened to him on June 26, 2007, this Arbitrator has considered the testimony and all of the Petitioner's medical evidence. The Arbitrator finds that there were no prior or subsequent injuries to the Petitioner to account for his current complaints.

g. What were Petitioner's earnings?

Petitioner testified he earned $300.00 per week riding a bike as a messenger for A to Z. This Arbitrator finds, after considering Petitioner's testimony and Petitioner's Exhibit 3, his average weekly wage is $300.00 per week.

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

Based on the evidence presented, this Arbitrator determines that at the time of the accident Petitioner was 41 years old.

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

Based upon the evidence presented, this Arbitrator determines that at the time of the accident Petitioner was married with no dependent children.

j. Were the medical services provided to the Petitioner reasonable and necessary, and has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent-employer has failed to pay any of Petitioner's requested medical bills. The Arbitrator finds, after considering the testimony and the medical evidence, Respondent is liable for the reasonable and medically necessary medical services provided by City of Chicago Ambulance in the amount of $349.00 (Petitioner's exhibit 4), Rush University Medical Group in the amount of $256.00 (Petitioner's Exhibit 5), Rush Emergency Center in the amount of $577.51 (Petitioner's Exhibit 6), Beverly Park Medical in the amount of $675.00 (Petitioner's Exhibit 7) , and Dr. Kanagaraju in the amount of $2625.00 (Petitioner's Exhibit 8).

k. TTD benefits in dispute.

The Arbitrator finds, based on the medical evidence, Petitioner has proven by a preponderance of the evidence entitlement to temporary total disability benefits for 4 and 6/7 weeks covering the period of June 27, 2007 through July 31, 2007. Petitioner is to be paid at a

rate of $200.00 per week for this period of temporary total disability under 820 ILCS 305/8(b) of the Act.

l. What is the Nature and Extent of the Petitioner's Injury?

The Petitioner testified that he had no issues before this accident, no subsequent injuries to his back or leg and at the present time he notices that he still has numbness in his back and left calf and cannot ride a bicycle. The Arbitrator finds that the Petitioner has sustained a permanent partial disability to a person as a whole to the extent of 2%.

m. Other Issues: Respondent-IWBF's Motion to Dismiss for Failure to Name the Injured Workers' Benefit Fund within the Statue of Limitations Mandated by 820 ILCS 305/6

The Act specifically states: "In any case, other than one where the injury caused by exposure to radiological materials or equipment or asbestos unless the application for compensation is filed with the Commission within 3 years after the date of the accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred." 820 ILCS 305/6(d).

The Act further states: "The custodian of the Injured Workers' Benefit Fund shall be joined with the employer as a party respondent in the application for adjustment of claim." 820 ILCS 305/4(d).

The Arbitrator notes that the Act does not specify when the joinder must occur and it is apparent from the record that an Application for Adjustment of Claim was filed against the Petitioner's employer within the applicable filing period. The Act does not require a separate Application to be filed against the Injured Workers' Benefit Fund but only that it be joined as a party respondent in the already timely filed Application for Adjustment of claim.

This Arbitrator took judicial notice that Petitioner's original Application was filed on July 23, 2009 (within the statute of limitations) and his Amended Application was filed on July 2, 2010, which is after the 3 year statute of limitations. *See also* Resp. Ex 1.

The Commission Rules Section 7020.20 state that "Applications for Adjustment of Claim may be amended prior to a hearing on the merits by filing an Amended Application for Adjustment of Claim under the letter and number given the original Application for Adjustment of Claim. "When the Act or the Commission's rules regulate a procedural area or topic, the Act or the Commission's rules apply, not the Code." *Preston v Industrial Comm'n, 332 Ill. App. 3d 708, 712, 773 N.E. 2d 1183, 1188 (2002).*

The Arbitrator therefor denies Respondent-IBWF's Motion to dismiss for Failure to Name the Injured Workers' Benefit Fund with three years.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sandra Taormina,

Petitioner,

vs. NO: 15 WC 5782

Aldi, Inc.,

17IWCC0715

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 all of the issues, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the below modifications. 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).

1. The second paragraph on Page 1 is corrected to read as follows: "The issues in the above-referenced cases relate to Petitioner's claimed accident of November 18, 2013. Petitioner's claims with regard to her injury at work on July 11, 2014, are addressed in the concurrent decision issued in Case No. 14 WC 42032."
2. The last full paragraph on Page 2 is corrected to read as follows: "Petitioner reported the incident to Anna or Matt and a report was made. Petitioner testified that she had no prior medical treatment or diagnosis regarding her left shoulder before November 18, 2013."

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 5/13/16 is modified and the case remanded as stated herein.

17IWCC0715

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

Bond for the removal of this cause to the Circuit Court 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.

NOV 9 - 2017

DATED:
o:9/25/2017
TJT/knc
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

TAORMINA, SANDRA
Employee/Petitioner

Case# **15WC005782**

14WC042032

ALDI INC
Employer/Respondent

17IWCC0715

On 5/13/2016, 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 0.38% 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:

0657 TURNER KAW OFFICES
RICHARD L TURNER JR
107 W EXCHANGE ST
SYCAMORE, IL 60178

0481 MACIOROWSKI SACKMAN & ULRICH
ROBERT T NEWMAN
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

17IWCC0715

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

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

Sandra Taormina
Employee/Petitioner

v.

Aldi, Inc.
Employer/Respondent

Case # **15** WC **5782**

Consolidated cases: **14** WC **42032**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Geneva**, on **March 11, 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. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

17IWCC0715

FINDINGS

On the date of accident, November 18, 2013, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding these injuries, Petitioner earned $32,306.56; the average weekly wage was $621.28.

On this date of accident, Petitioner was 38 years of age, *married* with 3 dependent children.

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

Respondent shall be given a credit 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 shoulder on November 18, 2013 as well as a continued causal connection between this accident at work and an ongoing left shoulder condition. The Arbitrator also notes the concurrently issued decision in Case No. 14 WC 42032 in which Petitioner receives certain benefits related to temporary total disability, temporary partial disability, medical bills and prospective medical care in relation to her claims. Penalties and attorney's fees are denied in relation to both cases. No duplicate benefits or credits are awarded to either party in relation to Petitioner's claims.

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 13, 2016
Date

ICArbDec19(b) p. 2

MAY 13 2016

17IWCC0715

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

Sandra Taormina
Employee/Petitioner

v.

Aldi, Inc.
Employer/Respondent

Case # **15** WC **5782**

Consolidated cases: **14** WC **42032**

FINDINGS OF FACT

The issues in dispute include whether Petitioner sustained compensable accidents on November 18, 2013 and July 11, 2014, causal connection between Petitioner's condition of ill being and her alleged accidents, Respondent's liability for payment of certain medical bills, Petitioner's entitlement to temporary total disability benefits commencing on August 21, 2014 through March 21, 2015, Petitioner's entitlement to temporary partial disability benefits commencing on July 11, 2014 through August 22, 2014 and from March 22, 2015 through March 11, 2016, Petitioner's entitlement to prospective medical treatment in the form of a right shoulder surgery as prescribed by Dr. Glasgow, and Respondent's liability for penalties and fees pursuant to Sections 19(k), 19(l) and 16 of the Illinois Workers' Compensation Act ("Act"). Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

The issues in the above-referenced case relate to Petitioner's claimed accident of July 11, 2014. Petitioner's claims with regard to her injury at work on November 18, 2013 are addressed in the concurrent decision issued in Case No. 14 WC 42032.

Background

Sandra Taormina (Petitioner) testified that she was employed by Aldi, Inc. (Respondent) on November 18, 2013 and had been so employed since April of 2008. She explained that she was an Order Selector working in a warehouse in Batavia operated by Aldi in the cooler/freezer on November 18, 2013. Petitioner explained that she would receive orders through a headset and then "pick" products from either the cooler sections or the freezer, depending on her assignment that day, to fill the stores' orders.

Products in the cooler include cartons of yogurt, closed cases of hot dogs and cases of lunch meat, juices, cheeses and dairy products. Petitioner estimated that these products weighed anywhere from 5-50 pounds. She also explained that these items are stacked on pallets at levels requiring her to kneel down, at waist level or above her head. Petitioner explained that a lot of times these items are coming directly from the suppliers on stacked pallets at heights above her head, even though the items have been "down-stacked" after arrival at the warehouse. Petitioner also testified that some products are located at heights requiring her to kneel down.

Freezer products include pizzas, vegetables, ice cream and meats including chicken, ground beef and five pounds rolls of beef. The ice cream came in five gallon tubs or little cartons that sat in cardboard boxes with

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

approximately two inches of space along the sides. Chicken came in long rectangular boxes with a removable top, which Petitioner explained required her to maintain a good grip so that the top did not come off of the box. Other items in the freezer were in boxes, some of which were sealed and some of which were not. Petitioner estimated that freezer items were heavier than cooler items, which explained why her picking rate was lower than required in the cooler, but estimated that freezer products also weighed anywhere from 5-50 pounds.

To pick products, Petitioner used one of several different "tuggers" that have two forks in the back. To operate a tugger, Petitioner would grip its handles, which are like bicycle handles, with her palms facing downward. Petitioner explained that she would be told through the headset how many items to pick from a particular slot. Depending on whether the items were closer to the ground, at waist height or sometimes located above her height, she would step down from the tugger and physically pick up the item. She explained that there were also other employees picking items such that, depending on the location of the item, she might have to walk a little bit with the items to place them on the pallets behind the tugger.

Petitioner explained that she was required to pick products at a certain "rate" in order for her to be productive. The particular rate that she was required to meet by Respondent was different in all of the sections. Petitioner explained that the rate for the cooler was 256 pieces per hour and 229 pieces in the freezer. Respondent monitored how many pieces she picked per hour by averaging the time that she was logged into her headset and picking items subtracting break times and such. The averages were calculated over the period of a week or month so that, if an employee had a bad day, she could compensate with a good day picking over rate. Petitioner testified that if an employee did not pick at the required rate, Matt or Anna would talk to the employee. After so many occasions of counseling by Matt or Anna, the employee would then be referred to John Krahulik (Mr. Krahulik).

Petitioner testified that she had to meet with Mr. Krahulik previously. She explained that Mr. Krahulik talked to her about her rate and wanted to know what he could do to help her get up to her rate in order to stay productive. Petitioner also testified that they discussed the consequences of not meeting her rate, including termination. She could not recall whether she ever suffered any discipline as a result of failing to meet her rate.

November 18, 2013

On November 18, 2013, Petitioner testified that she was in the produce section by the apples. She picked up two cases together and felt numbness and tingling going down her left arm. Petitioner dropped the cases and said she could not take the pain. Previously, Petitioner testified that she did experience daily pain over a couple of months prior to this incident at work when she was lifting a lot at work. Petitioner explained that the pain was located in the front part of her shoulder and specifically localized the pain to the glenohumeral joint capsule[2].

Petitioner reported the incident to Anna or Matt and a report was made. Petitioner testified that she had no prior medical treatment or diagnosis regarding her left shoulder before November 28, 2013.

Medical Treatment

On November 18, 2013, Petitioner was transported by taxi to the Dreyer Medical Clinic for a drug test. The

[2] Petitioner testified that she is a licensed massage therapist as of April of 2013 with an Associate's degree in Applied Science as of 2012 that included studies in kinesiology, anatomy and physiology.

Dreyer medical records reflect that Petitioner saw a certified physician's assistant, Ms. Hillby, under the supervision of Dr. William Johnston. PX1 at 2-5. Petitioner provided the following history:

> Sandra Taormina is a 37 year old female who presents to the clinic today for a shoulder injury that occurred while at work. Patient is a warehouse employee at Aldi. Patient states that she lifts heavy items quite repetitively at work. She states that quite a few months ago she noticed some deep left shoulder pain after a long day of lifting. She thought that the pain would go away, but it has not improved. Patient states that the pain is located deep in the left shoulder joint. She does get some neck pain on the left side as well. Patient is not able to move the affected arm overhead without pain. Patient has tried ice, a chiropractor and a massage to help with the pain. She is complaining of some left arm/hand numbness and tingling that is positionally related. Patient does not have a history of any significant shoulder or neck injury. Patient is otherwise well.

Id. After an examination, Petitioner was diagnosed with a left shoulder strain, a neck strain and hand numbness. *Id.* She was instructed to ice the shoulder several times a day for several days and given Prednisone and Soma. *Id.* Petitioner was also placed on work restrictions including no lifting over 10 pounds with the left hand, limited repetitive lifting and no overhead lifting. *Id.*

On November 25, 2013, Petitioner reported that she was doing slightly better, but experienced continued pain and tenderness located in the posterior left shoulder. PX1 at 6-8. She reported that she was able to move the affected shoulder overhead, but continued to experience tingling in the left arm above shoulder height. *Id.* Petitioner was diagnosed with a left shoulder strain, probable tendonitis as well as a cervical strain and arm numbness. *Id.* Petitioner remained on work restrictions. *Id.*

Petitioner returned to Dreyer on December 2, 2013 with similar complaints, referred for physical therapy and kept on light duty work restrictions. PX1 at 9-11. She began physical therapy at Dreyer the following day, on December 3, 2013, which continued through January 8, 2014. PX1 at 12-42.

On January 10, 2014, Petitioner reported minimal discomfort in the posterior left shoulder and left neck area, no tingling in the left arm with lifting above shoulder height and she had discontinued pain medication usage. PX1 at 43-46. Ms. Hillby diagnosed Petitioner with a shoulder strain and cervical strain and recommended use of over-the-counter medications for mild residual discomfort. *Id.* Petitioner was returned to modified work with no lifting over 20 pounds and no overhead lifting through January 12, 2014 followed by a full duty release to work effective January 13, 2014. *Id.*

July 11, 2014

Petitioner testified that after she was discharged from care at the Dreyer clinic on January 10, 2014, she went back to work performing the same job, but explained that her hours were longer. Petitioner testified that as she continued working her condition worsened to the point of "square one" and the same type of injury occurred.

The medical records reflect that Petitioner returned to Dreyer Medical Clinic on July 11, 2014. PX1 at 47-49. Petitioner provided the following history:

> Initial Occupational Health visit for a 38-year-old female who has been having problems with her left shoulder for some time. Back in April of 2013, she noticed a gradual onset of pain in the left shoulder. She subsequently was seen where she went through physical therapy for approximately 2 months. Was thought to have overuse tendinitis in her left shoulder. She required medication and therapy. She states

that the shoulder pain became waxing and waning after that to the point that when she increased her level of activity she would have more pain, but when she decreased her lifting she would have less pain. She describes no particular lifting incident that caused the onset of the pain over a year ago. She did not sustain any fall. She did not sustain any direct-blow trauma to the shoulder. She had x-rays last year which showed a mild widening of her AC joint on the left but no degenerative changes. She denied any prior problems with shoulder injury or separation in the past.

She takes no medications. SHE HAS NO DRUG ALLERGIES. She is in here today. She states that she has been increasing her level of activity at work. They have had particularly heavy days and she has noticed over the past few days that her left shoulder pain has worsened to the point that she is having trouble with her lifting activities and trouble with her work activities. She again does not report any specific single event that precipitated the pain. She states the pain is primarily posterolateral. She states it does not go into the neck or upper back. She denies any radicular component of pain into the left upper extremity at this point in time. She denies any upper or lower back complaint.

Id. On physical examination, Petitioner had pain associated with various maneuvers and mild tenderness over the posterolateral aspect of the shoulder. *Id.* Dr. Johnston diagnosed Petitioner with chronic recurrent left shoulder pain, suspected rotator cuff tendinosis with acute tendinitis and suspected inflammatory rotator cuff disease with a differential diagnosis to rule out a tear. *Id.* Dr. Johnston also noted that "Today patient was counseled that as she has had waxing and waning shoulder pain that seems to worsen every time she increases her lifting level that MRI of her left shoulder is warranted to anatomically define the pathology. She was counseled that most likely she has tendinosis which places her at risk for overuse-type tendinitis. The MRI will be primarily to rule out any significant rotator cuff tear that may need surgical repair." *Id.* He imposed work restrictions, ordered a left shoulder MRI and prescribed a short course of prednisone. *Id.*

On July 23, 2014, Petitioner underwent the recommended left shoulder MRI. PX2. The interpreting radiologist noted collection in the subacromiodeltoid bursa, mild acromioclavicular joint arthropathy, a normal rotator cuff with no evidence of impingement and no obvious tear or cyst formation of the glenoid labrum. *Id.*

On July 29, 2014, Petitioner saw Dr. Michele Glasgow at Midwest Orthopaedic Institute. PX3 at 4-6, 68, 79. The following history was noted:

Sandra is a 38-year-old right-hand-dominant female that presents to the office with a chief complaint of left shoulder pain. The patient describes first noticing left shoulder pain in November 2012. She initially attributed this to working long days at work. The patient does not report any discrete injury. In November 2013, she states that she picked up 2 cases of apples collectively weight 30 pounds. Since then, she reports progressively worsening anterior and superior left shoulder pain. The patient was seen by a doctor in November 2013. She states she was given muscle relaxers and prednisone for approximately 1-2 weeks. She did not feel the medication was helpful. She was then placed on anti-inflammatories, participated in approximately 6 sessions of physical therapy and massage which did help.

Sice [sic] November, she reports numbness and tingling starting at the anterior left shoulder and radiating down the biceps, volar forearm and throughout all of her fingers, except her thumb. The numbness and tingling was noted to be worse with overhead activity and driving. She states that this also awakens her up at night. The numbness and tingling did subside when she returned to work full duty in January. Since then, the numbness and tingling has occurred intermittently and "once in a while." Her pain, however, was not 100% better when returning to work full duty in January. She states subjectively that she was only 70% better.

Since January, her left shoulder pain has progressively worsened. She has not had any physical therapy

> since January. She denies any remote trauma or injury. She denies any prior injections. I have reviewed recent medical notes where the patient was again given 2 days of prednisone and sent for an MRI scan. Patient was referred to orthopedics.
>
> On the left, this patient subjectively reports significant difficulty sleeping on the left side, wading up her back, reaching a high shelf and lifting 10 pounds over her shoulder. Incidentally, she does report some mild right shoulder discomfort that she attributes to compensating for the left.

Id. On physical examination, Petitioner had significant tenderness at the AC joint to palpation, mild tenderness at the greater tuberosity and some tenderness at the posterior acromion. *Id.* Dr. Glasgow diagnosed Petitioner with left shoulder acromioclavicular joint pain, provided muscle relaxers, anti-inflammatories and prescribed a course of physical therapy. *Id.* She also administered Lidocaine injections in the acromioclavicular joint. *Id.* Petitioner began physical therapy on August 6, 2014. *Id.*, at 48-49.

On September 5, 2014, Petitioner reported that she went back to work full duty in January after feeling subjectively about 75% improved, but was unable to sustain this and had increasing left shoulder pain. PX3 at 7-8, 69, 80. She also reported that she was off work as Respondent did not have long-term light-duty options. *Id.* Petitioner explained that she worked light duty for six weeks and was then sent home understanding that she would be accepted back when she was 100%. *Id.* Dr. Glasgow diagnosed Petitioner with shoulder dysfunction mostly associated with trapezial droop and mechanical deviation. *Id.* She ordered physical therapy twice per week. *Id.*

Petitioner returned to Dr. Glasgow on October 10, 2014 reporting improvement with the numbness and tingling, but continued pain. PX3 at 20-22, 70. Dr. Glasgow ordered continued physical therapy for one month noting that she would consider a lidocaine injection at the next visit if Petitioner's condition did not improve. *Id.* Petitioner continued in physical therapy as of October 20, 2014. PX4 at 3-4.

Petitioner received a cortisone injection on November 14, 2014 and her physical therapy was put on hold for one week. *Id.*, at 82. Petitioner was discharged from physical therapy on December 18, 2014. *Id.*, at 67.

The following day on December 19, 2014, Dr. Glasgow recommended left shoulder arthroscopy with acromioclavicular joint excision. PX3 at 32-33, 72. She noted that Petitioner's MRI showed mild changes at the acromioclavicular joint and noted that the surgery might not alleviate all of Petitioner's pain. *Id.* Petitioner was discharged from physical therapy on December 26, 2014. PX4 at 20-21.

First Section 12 Examination – Dr. Atluri

On December 30, 2014, Petitioner submitted to a medical examination with Dr. Prasant Atluri at Respondent's request. RX1 (Dep. Ex. 2). Dr. Atluri examined Petitioner, reviewed various treating medical records and rendered opinions about Petitioner's condition and its relatedness, if any, to an accident at work. *Id.*

In his report dated January 2, 2015, Dr. Atluri noted the following history in pertinent part:

> The patient reports an injury from July, 2014. She states that she was picking up two cases of applies (sic) weighing approximately 20 pounds each. She states she felt numbness and tingling in her left hand involving the small and ring fingers as well as partially involving her middle finger and thumb. This was accompanied by pain at the superior aspect of her left shoulder. She indicates that she was lifting the cases from a pallet approximately waist high and was placing them onto her pallet. She demonstrates a

maneuver with her arms slightly flexed at her side and her elbows flexed as she was lifting.

She states she reported the injury and was referred to a doctor at Dreyer Medical Clinic. X-rays were taken, and prednisone was prescribed which did not help. She was then referred to obtain an MRI after a few weeks.

...

The patient does report a history of a left shoulder injury in November, 2013. She states the condition was "the same as what I have now", although she states the numbness and tingling was worse, and she had significant nocturnal symptoms at that time. She attributes her prior symptoms to repetitive lifting overhead. She thinks that it developed while she was working in the produce section. She states at that time she was treated with physical therapy and prednisone as well as anti-inflammatories and states she felt "75% better." She states that she returned to work with increased hours following that.

RX1 (Dep. Ex. 2). Dr. Atluri also noted Petitioner's reported work history that she works as an order selector for Respondent in a warehouse with duties that included lifting items below and above shoulder level up to 60 pounds. *Id.* He also noted "[s]he states that the work hours are variable; however, in July, 2014 when her symptoms developed she states she was working seven hour days which is longer than usual." *Id.*

Dr. Atluri diagnosed Petitioner with persistent left shoulder pain despite conservative treatment, including therapy and multiple cortisone injections. RX1 (Dep. Ex. 2). He noted that "[t]here are inconsistencies with regards to the history of injury. The patient reported a single lifting incident which precipitated her symptoms. This is directly contradicted by the clinical records from Dreyer Medical Clinic which indicated that the patient denied any specific incident causing her symptoms. There were several medical records which make reference to the gradual onset of symptoms from 2012. However, the details of the onset of symptoms varies (sic) throughout the records. I cannot explain these inconsistencies with regards to the description of the onset of symptoms." *Id.*

Dr. Atluri also found, after reviewing Petitioner's MRI, "no injury which could have plausibly occurred on July 11, 2014 causing this patient's left shoulder pain. Any actual injury from July 11, 2014 would have been expected to result in edema or an effusion on the MRI which was done less than two weeks later." RX1 (Dep. Ex. 2). He concluded that Petitioner's ongoing left shoulder complaints are not related to any specific injury from July 11, 2014. *Id.* Notwithstanding, Dr. Atluri indicated that an arthroscopy with distal clavical resection of the left shoulder was a reasonable surgical intervention. *Id.*

Continued Medical Treatment & Termination of Benefits

Dr. Glasgow continued to recommend surgery on January 20, 2015 and noted that Petitioner did respond well to a prior acromioclavicular joint injection. PX3, at 34-35, 73.

In a letter dated January 27, 2015, Candace Parks, a Senior Claims Representative from Gallagher Bassett Services, terminated Petitioner's continued treatment and temporary total disability benefits effective January 23, 2015 based on Dr. Atluri's independent medical evaluation report. RX5. Ms. Parks indicated that temporary total disability benefits were paid through January 23, 2015. *Id.*

On February 17, 2015, Dr. Glasgow noted her review of the independent medical evaluation report indicating that surgery was reasonable, but causation was the issue. PX3 at 36-37, 74. Given Petitioner's financial

circumstances and inability to undergo surgery on her own, Dr. Glasgow recommended a functional capacity evaluation to determine Petitioner's ability to lift. *Id.*

In a narrative report dated February 22, 2015, Dr. Glasgow summarized the medical care she provided to Petitioner related to the left shoulder. PX5. She diagnosed Petitioner with left shoulder disability with ongoing AC joint pain. *Id.* She indicated that, while Petitioner would be able to return to light duty work, it was unlikely that she would be able to return to the type of repetitive lifting at or above shoulder height required of her to perform her regular job duties. *Id.* Dr. Glasgow continued to recommend surgery followed by four months of physical therapy and possibly work conditioning. *Id.*

On March 20, 2015, Dr. Glasgow noted Petitioner's left AC joint arthropathy and that it was being contested as a work-related injury. PX3 at 44-45, 75. Dr. Glasgow indicated that she has "reviewed this history again with [Petitioner], which is fairly consistent as we go through it. [She has] discussed with the patient that a narrative has been produced by myself and [she has] requested additional records to clarify the exact timing of her complaints in 2013. For [her] purposes, the patient's history has been very consistent time to time, evaluation to evaluation." *Id.* Petitioner reported that her pain was about a 7.5/10 mostly with lifting and overhead use of the left arm. *Id.* Dr. Glasgow maintained Petitioner's diagnosis of acromioclavicular joint symptoms in the left shoulder and work restrictions. *Id.*

Section 12 Examination Report Addendum – Dr. Atluri

In a letter dated May 12, 2015, Dr. Atluri noted his review of additional physical therapy notes from the Dreyer Medical Clinic related to Petitioner's treatment there. RX1 (Dep. Ex. 3). He explained that the additional materials did not change his opinions as rendered in his January 2, 2015 report. *Id.*

Continued Medical Treatment

As of May 15, 2015, Petitioner reported to Dr. Glasgow that she found a job in a chiropractic office and has been doing some independent massage as she is a massage therapist. PX3 at 46-47. She also reported that her pain was generally better, but her shoulder bothered her if she lifted more than her restrictions, especially overhead, and when she lays on her left shoulder at night. *Id.* Dr. Glasgow noted that Petitioner had very significant improvement in her left shoulder pain associated with primary AC joint tenderness and that her provocative tests, including O'Brien's and cross-body abduction and supraspinatus tests were negative. *Id.* Dr. Glasgow noted that she would see Petitioner as needed with a three month follow up visit scheduled as a default. *Id.* She further noted that Petitioner's workers' compensation claim was still pending. *Id.*

Deposition Testimony – Dr. Atluri

On July 15, 2015, Respondent called Dr. Atluri as a witness and he gave testimony at an evidence deposition regarding his opinions about Petitioner's left shoulder condition. RX1. Dr. Atluri is a board-certified orthopedic surgeon. RX1 at 4-7; RX1 (Dep. Ex. 1).

Dr. Atluri testified that he reviewed Petitioner's MRI films and report, which showed some abnormality at the acromioclavicular joint, a little bit of displacement of the clavicle with respect to the acromion and widening at that joint. RX1 at 12. He explained that Petitioner had a Type 2 acromion, which is a typical finding. *Id.* He further explained that the acromion is the "roof" of the shoulder rated at Type 1 (flat), Type 2 (curved) or Type 3 (prominently curved), which is thought to indicate that the greater amount of curvature can indicate a greater

amount of bursa or rotator cuff problems. *Id.*, at 12-13. Dr. Atluri also explained that in Petitioner's case, the acromion was positioned higher than the acromion such that with Petitioner's symptoms involving the area between the collarbone and acromion "it suggests that the amount of displacement was abnormal for her and represented some degeneration of the joint, or even degeneration of the ligaments stabilizing the collarbone." *Id.*, at 14-15.

Dr. Atluri indicated that an arthroscopy with distal clavical resection was appropriate for Petitioner and would remove part of the AC joint creating more space and the painful part of the bone. RX1 at 15-16. He explained that this shoulder condition could be acutely caused or degenerative, but in Petitioner Dr. Atluri believed the condition was degenerative. *Id.*, at 16. Dr. Atluri diagnosed Petitioner with left shoulder acromioclavicular arthritis. *Id.*, at 22. He maintained his opinion that there was no injury that could have occurred on July 11, 2014 that could have caused Petitioner's left shoulder pain. *Id.*, at 24-25.

On cross examination, Dr. Atluri acknowledged that when he examined Petitioner she had mild tenderness over the lateral trapezius as well as subacromial space in the bicipital groove, significant maximal tenderness over the AC joint and occasional snapping when gently rotating her shoulder with a short arc range of motion at which time Petitioner reported pain. RX1 at 30-32. Petitioner also had a positive cross-arm test. *Id.* at 32.

Deposition Testimony – Dr. Glasgow

On July 17, 2015, Petitioner called Dr. Glasgow as a witness and she gave testimony at an evidence deposition regarding Petitioner's medical treatment and her opinions. PX10. Dr. Glasgow is a board-certified orthopedic surgeon subspecializing in the shoulder. PX10 at 4-7; PX10 (Dep. Ex. 1).

Dr. Glasgow continued to recommend surgical intervention to address Petitioner's left shoulder condition in the form of an acromioclavicular resection. PX10 at 28. Dr. Glasgow maintained the opinion explained in her narrative report that Petitioner's left shoulder pain was related to her work. *Id.*, at 30. She noted that the Dreyer medical records from July of 2014 reflect Dr. Johnston's note that, back in April of 2013, Petitioner had a gradual onset of left shoulder pain requiring medication and therapy as well as increased pain with increased activity levels and decreased pain with decreased lifting activities. *Id.*

Dr. Glasgow concluded, "[s]o the clinic notes of July of 2014 suggest that [Petitioner's] pain level was related to her activity level." *Id.* She further noted that after reviewing Petitioner's past medical history at each visit Petitioner's history was consistent in that her pain began in 2012 with discomfort it worsened in 2013 which necessitated treatment and, while the months varied sometimes in the medical records, "it's clear that the patient had experienced gradual onset of left shoulder pain over time, which worsened with higher levels of activity." *Id.*, at 31. Dr. Glasgow testified that "[b]ased on the consistency of her medical record, I believe, within a reasonable degree of medical certainly, the patient's current left shoulder pain is related to related work activities [as stated in her medical records] and supported by the records of Dr. Johnston." *Id.*

On cross examination, Dr. Glasgow testified that she understood that the average amount of weight that Petitioner had to lift at work was 50 pounds, but she did not have a specific number reported by Petitioner other than the report that she did heavy lifting. PX10 at 32-33. The only specific poundage referenced by Petitioner was related to the lifting of two cases of apples weighing 30 pounds. *Id.*, at 33. Dr. Glasgow then acknowledged that Petitioner reported that her symptoms began after lifting those two cases. *Id.*

Dr. Glasgow did not have any information from Petitioner at the July 29, 2014 visit that she attributed her pain

to overhead lifting. *Id.*, at 36. Dr. Glasgow also acknowledged that Petitioner had negative cross-body tests on July 29, 2014, August 6, 2014, September 5, 2014 and October 10, 2014 followed by a positive cross-body test on November 14, 2014. *Id.*, at 38-39. However, she explained that Petitioner had a positive O'Brien's test on July 29, 2014 and she administered an AC joint injection so it was not surprising that Petitioner had negative cross-body tests for three to four follow up visits. *Id.*, at 39-40. With regard to impingement sign testing, Dr. Glasgow noted that Petitioner had mildly positive tests on January 20, 2015 and February 17, 2015 with negative tests previously on July 29, 2014, September 5, 2014, October 10, 2014, November 14, 2014, December 19, 2014, March 20, 2015 and May 15, 2015 followed by a positive cross-body test on November 14, 2014. *Id.*, at 40-41.

Dr. Glasgow maintained that Petitioner had ongoing acromioclavicular pain with ongoing inflammatory findings at the AC joint that caused her pain. PX10 at 50-52. She acknowledged that a person could have inflammation without any trauma or pathology. *Id.*, at 52.

Dr. Glasgow testified that she did not have any reference at the time of her first encounter with Petitioner on July 29, 2014 that Petitioner sustained a July 11, 2014 accident. PX10 at 34-35, 37. Dr. Glasgow also testified after extensive questioning, that nothing in her July 29, 2014 note references a 2012 or 2013 accident, or Dr. Glasgow having been told by Petitioner about an accident occurring on July 11, 2014 other than to the extent that she references the Dreyer Medical Clinic's records. *Id.*, at 58-63. On re-direct examination, Dr. Glasgow was presented with a form from her office dated July 29, 2014 including handwritten notes reflecting Petitioner's present history of illness. *Id.*, at 65-67. She explained that the notes are written by either herself or her physician's assistant/nurse. *Id.* Dr. Glasgow testified that there was initially a date of onset noted to be July 11, 2014, but that was crossed out by someone and she would not recall who crossed it out or why. *Id.*, at 67.

Continued Medical Treatment

On August 14, 2015 Petitioner returned to Dr. Glasgow reporting pain at a level of 6/10 including days with no pain and two days a week with pain lasting all day. PX3(a). Petitioner was working about 20 hours per week in a chiropractic office performing some independent massage and assisting in the office. *Id.* Dr. Glasgow diagnosed ongoing acromioclavicular tenderness with provocative testing that was sometimes negative depending on Petitioner's level of discomfort. *Id.* At this visit, Petitioner had direct tenderness at the AC joint with cross-body adduction and discomfort at the AC joint. *Id.* Dr. Glasgow continued to recommend an arthroscopy of the left shoulder with AC joint excision. *Id.*

Additional Information

Petitioner testified that she has not returned to work with Respondent since her light duty work although she sought and obtained employment with other employers. PX7-PX8. Petitioner testified that she was not otherwise working while receiving treatment from Dr. Glasgow and she was accommodated by Respondent for light duty work restrictions from July 11, 2014 for six weeks. She testified that she did receive her temporary partial disability payments during the six weeks period.

Regarding her current condition, Petitioner testified that it is difficult to perform tasks such as putting on her bra or curling her hair. She also explained that she feels her arm get stuck when she lifts overhead. She also has difficulty picking things from overhead positions with her left arm, although she is right hand dominant. Petitioner also testified that she has difficulty playing in the park with her daughter and climbing a ladder or monkey bars.

Petitioner explained that she no longer sleeps on her left side because when she attempts to do so her shoulder hurts. She testified that she was not prescribed a home exercise program, but she attempted to perform one on her own without weights. Petitioner is not taking any prescription or other medications at this time and she has not sought to undergo medical treatment through any other insurance.

John Krahulik

Mr. Krahulik testified that he is the Director of Warehouse for Respondent and has been employed by Respondent for approximately 20 years. He was Petitioner's supervisor while she was employed for Respondent.

Mr. Krahulik testified that Petitioner was employed for Respondent as an Order Selector. He explained that Respondent has to drive a two-pallet tugger and use a "pick-by-voice" system that tells Petitioner which items to select from what slots in order to fill store orders. Mr. Krahulik explained that heavier or studier items are placed at the bottom of the pallets and closer to the front of the aisle. He added that most boxes are closed, but there are also open boxes.

With regard to Petitioner's performance, Mr. Krahulik testified that Petitioner struggled at times with productivity. He met with her at one point. Petitioner came into his office and he asked how they could help to which Petitioner responded that her shoulder was bothering her. Mr. Krahulik also testified that Petitioner told him that she wanted to try to work through it at the time. He testified that no discipline was issued to Petitioner related to productivity during her employment with Respondent.

Respondent also offered into evidence an exhibit breaking down the items that Petitioner and other order selectors would handle. RX6. Mr. Krahulik explained that the core range of items were items carried all year. Respondent stored cases of items weighing from 0-.999 pounds (i.e., yogurts, cottage cheese, sour cream, etc.). *Id.* According to the report, he explained that Respondent carried 168 items in the range of 10-19.99 pounds (i.e., fresh meats, produce items). *Id.* 107 types of items weighed from 20-29.99 pounds, 29 types of items weighed 30-39.99 pounds, and two types of items weighed from 40-49 pounds. *Id.* Mr. Krahulik testified that no items weighed over 50 Pounds. *Id.*

On cross examination, Mr. Krahulik testified that order selectors were supposed to "make rate" and ensure that the pieces per hours correct. Sometimes order selectors would have to stack items, and he acknowledged that there were 107 items in the 20-30 pound per case weight range, including cases of apples. Two cases of apples weigh 42 pounds. Mr. Krahulik acknowledged that if Petitioner was moving two cases that weighed 25 pounds each, the weight of those two cases together would total 50 pounds. Mr. Krahulik also acknowledged that there was no policy, procedure or regulation that prevented order selectors from stacking cases in order to make rate.

Mr. Krahulik testified that an order selector would only be disciplined if he or she did not make rate. He explained that the first month, the supervisor would talk to the employee on weekly basis. If the employee did not hit his or her numbers the second month, the supervisor would offer retraining, etc. and make efficiency recommendations. If the employee did not make rate during the third month, Mr. Krahulik would see the employee to determine if anything else could be done to help. He explained that the next step could be termination after he talked to the employee.

On re-direct examination, Mr. Krahulik testified that only time an order selector was expected to stack more

than two items was in the dry section, in which Petitioner did not work. Otherwise, Respondent did not require an employee to pick up two cases at a time.

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 facts must be closely examined in repetitive-injury cases to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006) (*citing Three "D" Discount Store*, 198 Ill. App. 3d 43, 49 (4th Dist. 1989)). Compensation is allowable where an injury is not sudden, but gradual so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66 (*citing Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529 (1987)).

However, an employee claiming that she suffered a repetitive-trauma injury must still point to a date within the statutory limitations period on which both the injury and its causal link to her work became plainly apparent to a reasonable employee. *Durand*, 224 Ill. 2d at 65 (*citing Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 209 (1st Dist. 1993)); *see also Peoria County*, 115 Ill. 2d at 531. "[B]ecause repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work." *Id.*, (*citing Oscar Mayer v. Industrial Comm'n*, 176 Ill. App. 3d 607, 610 (4th Dist. 1988)). "To deny an employee benefits for a work-related injury that is not the result of a sudden mishap *** penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand*, 224 Ill. 2d at 66 (*citing Peoria County*, 115 Ill. 2d at 529-30).

Given the totality of this record, the Arbitrator finds that Petitioner has established that she sustained a repetitive trauma injury manifesting on November 18, 2013 and incorporates by reference the findings and conclusions related to Petitioner's claim that she sustained an accident at work on July 11, 2014, which are contained in the concurrently issued decision in Case No. 14 WC 42032.

The facts of this case, which are unique, establish that Petitioner experienced left shoulder pain that manifested while at work performing repetitive work activities. Respondent asserts that Petitioner was merely present at work when her left shoulder symptoms ensued, which is insufficient to establish the necessary causal connection between her work and her left shoulder condition. However, a close inspection of Petitioner's testimony in light of the histories documented in her medical records and Dr. Atluri's reports reveals that Petitioner consistently reported symptoms in the left shoulder occurring as a result of repetitive work activities before November 18, 2013 followed by a breakdown in her tolerance of those symptoms on November 18, 2013 while engaged in work activities.

Dr. Glasgow plausibly opined that Petitioner's left shoulder symptoms were caused by Petitioner's activities at

work, and her opinions are supported by the testimony, although not the conclusions, of Dr. Atluri. Dr. Atluri articulately described how Petitioner's type 2 acromion predisposed her to degeneration and symptoms in the shoulder and collarbone area. He also agreed with Dr. Glasgow, without knowing as much, about the type of surgery recommendable to alleviate Petitioner of her left shoulder symptoms. Dr. Glasgow recommended a left shoulder arthroscopy with acromioclavicular joint excision and Dr. Atluri indicated that an arthroscopy with distal clavical resection was appropriate for Petitioner because it would remove part of the AC joint creating more space and the painful part of the bone.

Moreover, Petitioner had no left shoulder condition, symptoms or medical treatment outside of that which she reported in relation to her accidents at work on November18, 2013 and, later, on July 11, 2014. At the hearing, Petitioner attributed her left shoulder pain to her work activities of November 18, 2013 after experiencing months of symptoms that she could no longer tolerate. She testified that she sought medical treatment for the first time on November 18, 2013 after she picked up two cases of apples simultaneously at work. At that time, she felt pain as well as numbness and tingling going down her left arm. The history that Petitioner gave at the time of her initial evaluation at the Dreyer clinic also attributed Petitioner's left shoulder condition to an injury at work on November 18, 2013—preceded by repetitive work activities only.

In light of the record as a whole, the Arbitrator finds Petitioner's testimony to be credible as it is corroborated by the medical records and her reports to Dr. Atluri. The Arbitrator also gives greater weight to the opinions of Dr. Glasgow than those of Dr. Atluri in this case, and adopts the opinions of Dr. Glasgow herein. Based on all of the foregoing, the Arbitrator finds that Petitioner has established that she sustained a compensable repetitive trauma injury at work on November 18, 2013 as claimed.

Petitioner also claims that she sustained a second accident at work on July 11, 2014, which is addressed in Case No. 14 WC 42032. In that case, the Arbitrator finds that Petitioner established that she sustained a repetitive trauma injury manifesting on July 11, 2014.

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 18, 2013 and relies on the opinions of Petitioner's treating physician, Dr. Glasgow as well as Petitioner's credible testimony.

In addition, there is no evidence in the record that Petitioner had any traumatic injury to the left shoulder occurring outside of work before November 18, 2013 or at any time thereafter. There is no evidence in the record to support the conclusion that Petitioner's MRI's, showing little or no degeneration in the left shoulder, establish that degeneration is the sole cause of Petitioner's left shoulder condition. There is no evidence in the record contradicting Petitioner's consistently reported attribution of two onsets of left shoulder pain on November 18, 2013 and July 11, 2014 to anything other than the repetitive work activities in which she was engaged during her employment and at the time of the injuries.

Based on all of the foregoing, the Arbitrator finds that Petitioner has established continued causal connection between her injury at work on November 18, 2013 and her left shoulder condition as claimed.

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

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

As explained more fully above, the Arbitrator finds that Petitioner has established that she sustained a compensable injury to her left shoulder on November 18, 2013 as well as a continued causal connection between her accident at work and ongoing left shoulder condition. The outstanding bills submitted into evidence are for services related to Petitioner's left shoulder condition. Thus, the Arbitrator finds that Petitioner has established that these medical bills were 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 (M), whether penalties and fees should be imposed on Respondent, the Arbitrator finds the following:

Given the facts presented in this case, and after considering the parties' motion and response, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's alleged injuries on November 18, 2013 and July 11, 2014 were compensable and arose out of her employment as alleged. Respondent required Petitioner to submit to a Section 12 examination and the parties deposed both Petitioner's treating physician and Respondent's examiner, Dr. Atluri, about whether Petitioner's left shoulder condition was related to her work activities from a medical point of view. Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sandra Taormina,

Petitioner,

vs. NO: 14 WC 42032

17IWCC0716

Aldi, 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 all of the issues, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the below modification. 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 last full paragraph on Page 2 is corrected to read as follows: "Petitioner reported the incident to Anna or Matt and a report was made. Petitioner testified that she had no prior medical treatment or diagnosis regarding her left shoulder before November 18, 2013."

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 5/13/16 is modified and the case remanded as stated herein.

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.

17IWCC0716

Bond for the removal of this cause to the Circuit Court 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: NOV 9 - 2017
o:9/25/2017
TJT/knc
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

TAORMINA, SANDRA
Employee/Petitioner

Case# **14WC042032**
15WC005782

ALDI INC
Employer/Respondent

17IWCC0716

On 5/13/166, an arbitration decision on this case 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:

0657 TURNER LAW OFFICES
RICHARD L TURNER JR
107 W EXCHANGE ST
SYCAMORE, IL 60178

0481 MACIOROWSKI SACKMAN & ULRICH
ROBERT T NEWMAN
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

17IWCC0716

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

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

Sandra Taormina
Employee/Petitioner

v.

Aldi, Inc.
Employer/Respondent

Case # **14** WC **42032**

Consolidated cases: **15** WC **5782**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Geneva**, on **March 11, 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. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, July 11, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment 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 this injury, Petitioner earned $32,306.56; the average weekly wage was $621.28.

On this date of accident, Petitioner was 38 years of age, *married* with 3 dependent children.

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

Respondent shall be given a credit of $10,795.02 for TTD, $1,162.31 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $11,957.33.

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 shoulder on July 11, 2014 as well as a continued causal connection between this accident at work and an ongoing left shoulder condition.

Temporary Total Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $414.19/week for 30 weeks, commencing August 23, 2014 through March 20, 2015, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from July 11, 2014 through March 11, 2016, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be entitled to a credit of Petitioner's $10,795.02 for temporary total disability benefits paid.

Temporary Partial Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $156.99/week for 51 weeks, commencing March 21, 2015 through March 11, 2016 as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from July 11, 2014 through March 11, 2016, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be entitled to a credit of Petitioner's $1,162.31 for temporary partial disability benefits paid.

Medical Benefits

Respondent shall pay the reasonable and necessary medical services related to the left shoulder reflected in Petitioner's Exhibit No. 6 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 and associated post-operative care to the left shoulder as prescribed by Dr. Glasgow.

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 13, 2016
Date

MAY 13 2016

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

Sandra Taormina
Employee/Petitioner

v.

Aldi, Inc.
Employer/Respondent

Case # **14** WC **42032**

Consolidated cases: **15** WC **5782**

FINDINGS OF FACT

The issues in dispute include whether Petitioner sustained compensable accidents on November 18, 2013 and July 11, 2014, causal connection between Petitioner's condition of ill being and her alleged accidents, Respondent's liability for payment of certain medical bills, Petitioner's entitlement to temporary total disability benefits commencing on August 21, 2014 through March 21, 2015, Petitioner's entitlement to temporary partial disability benefits commencing on July 11, 2014 through August 22, 2014 and from March 22, 2015 through March 11, 2016, Petitioner's entitlement to prospective medical treatment in the form of a right shoulder surgery as prescribed by Dr. Glasgow, and Respondent's liability for penalties and fees pursuant to Sections 19(k), 19(l) and 16 of the Illinois Workers' Compensation Act ("Act"). Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

The issues in the above-referenced case relate to Petitioner's claimed accident of July 11, 2014. Petitioner's claims with regard to her injury at work on November 18, 2013 are addressed in the concurrent decision issued in Case No. 15 WC 5782.

Background

Sandra Taormina (Petitioner) testified that she was employed by Aldi, Inc. (Respondent) on November 18, 2013 and had been so employed since April of 2008. She explained that she was an Order Selector working in a warehouse in Batavia operated by Aldi in the cooler/freezer on November 18, 2013. Petitioner explained that she would receive orders through a headset and then "pick" products from either the cooler sections or the freezer, depending on her assignment that day, to fill the stores' orders.

Products in the cooler include cartons of yogurt, closed cases of hot dogs and cases of lunch meat, juices, cheeses and dairy products. Petitioner estimated that these products weighed anywhere from 5-50 pounds. She also explained that these items are stacked on pallets at levels requiring her to kneel down, at waist level or above her head. Petitioner explained that a lot of times these items are coming directly from the suppliers on stacked pallets at heights above her head, even though the items have been "down-stacked" after arrival at the warehouse. Petitioner also testified that some products are located at heights requiring her to kneel down.

Freezer products include pizzas, vegetables, ice cream and meats including chicken, ground beef and five pounds rolls of beef. The ice cream came in five gallon tubs or little cartons that sat in cardboard boxes with

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

approximately two inches of space along the sides. Chicken came in long rectangular boxes with a removable top, which Petitioner explained required her to maintain a good grip so that the top did not come off of the box. Other items in the freezer were in boxes, some of which were sealed and some of which were not. Petitioner estimated that freezer items were heavier than cooler items, which explained why her picking rate was lower than required in the cooler, but estimated that freezer products also weighed anywhere from 5-50 pounds.

To pick products, Petitioner used one of several different "tuggers" that have two forks in the back. To operate a tugger, Petitioner would grip its handles, which are like bicycle handles, with her palms facing downward. Petitioner explained that she would be told through the headset how many items to pick from a particular slot. Depending on whether the items were closer to the ground, at waist height or sometimes located above her height, she would step down from the tugger and physically pick up the item. She explained that there were also other employees picking items such that, depending on the location of the item, she might have to walk a little bit with the items to place them on the pallets behind the tugger.

Petitioner explained that she was required to pick products at a certain "rate" in order for her to be productive. The particular rate that she was required to meet by Respondent was different in all of the sections. Petitioner explained that the rate for the cooler was 256 pieces per hour and 229 pieces in the freezer. Respondent monitored how many pieces she picked per hour by averaging the time that she was logged into her headset and picking items subtracting break times and such. The averages were calculated over the period of a week or month so that, if an employee had a bad day, she could compensate with a good day picking over rate. Petitioner testified that if an employee did not pick at the required rate, Matt or Anna would talk to the employee. After so many occasions of counseling by Matt or Anna, the employee would then be referred to John Krahulik (Mr. Krahulik).

Petitioner testified that she had to meet with Mr. Krahulik previously. She explained that Mr. Krahulik talked to her about her rate and wanted to know what he could do to help her get up to her rate in order to stay productive. Petitioner also testified that they discussed the consequences of not meeting her rate, including termination. She could not recall whether she ever suffered any discipline as a result of failing to meet her rate.

November 18, 2013

On November 18, 2013, Petitioner testified that she was in the produce section by the apples. She picked up two cases together and felt numbness and tingling going down her left arm. Petitioner dropped the cases and said she could not take the pain. Previously, Petitioner testified that she did experience daily pain over a couple of months prior to this incident at work when she was lifting a lot at work. Petitioner explained that the pain was located in the front part of her shoulder and specifically localized the pain to the glenohumeral joint capsule[2].

Petitioner reported the incident to Anna or Matt and a report was made. Petitioner testified that she had no prior medical treatment or diagnosis regarding her left shoulder before November 28, 2013.

Medical Treatment

On November 18, 2013, Petitioner was transported by taxi to the Dreyer Medical Clinic for a drug test. The

[2] Petitioner testified that she is a licensed massage therapist as of April of 2013 with an Associate's degree in Applied Science as of 2012 that included studies in kinesiology, anatomy and physiology.

Dreyer medical records reflect that Petitioner saw a certified physician's assistant, Ms. Hillby, under the supervision of Dr. William Johnston. PX1 at 2-5. Petitioner provided the following history:

> Sandra Taormina is a 37 year old female who presents to the clinic today for a shoulder injury that occurred while at work. Patient is a warehouse employee at Aldi. Patient states that she lifts heavy items quite repetitively at work. She states that quite a few months ago she noticed some deep left shoulder pain after a long day of lifting. She thought that the pain would go away, but it has not improved. Patient states that the pain is located deep in the left shoulder joint. She does get some neck pain on the left side as well. Patient is not able to move the affected arm overhead without pain. Patient has tried ice, a chiropractor and a massage to help with the pain. She is complaining of some left arm/hand numbness and tingling that is positionally related. Patient does not have a history of any significant shoulder or neck injury. Patient is otherwise well.

Id. After an examination, Petitioner was diagnosed with a left shoulder strain, a neck strain and hand numbness. *Id.* She was instructed to ice the shoulder several times a day for several days and given Prednisone and Soma. *Id.* Petitioner was also placed on work restrictions including no lifting over 10 pounds with the left hand, limited repetitive lifting and no overhead lifting. *Id.*

On November 25, 2013, Petitioner reported that she was doing slightly better, but experienced continued pain and tenderness located in the posterior left shoulder. PX1 at 6-8. She reported that she was able to move the affected shoulder overhead, but continued to experience tingling in the left arm above shoulder height. *Id.* Petitioner was diagnosed with a left shoulder strain, probable tendonitis as well as a cervical strain and arm numbness. *Id.* Petitioner remained on work restrictions. *Id.*

Petitioner returned to Dreyer on December 2, 2013 with similar complaints, referred for physical therapy and kept on light duty work restrictions. PX1 at 9-11. She began physical therapy at Dreyer the following day, on December 3, 2013, which continued through January 8, 2014. PX1 at 12-42.

On January 10, 2014, Petitioner reported minimal discomfort in the posterior left shoulder and left neck area, no tingling in the left arm with lifting above shoulder height and she had discontinued pain medication usage. PX1 at 43-46. Ms. Hillby diagnosed Petitioner with a shoulder strain and cervical strain and recommended use of over-the-counter medications for mild residual discomfort. *Id.* Petitioner was returned to modified work with no lifting over 20 pounds and no overhead lifting through January 12, 2014 followed by a full duty release to work effective January 13, 2014. *Id.*

July 11, 2014

Petitioner testified that after she was discharged from care at the Dreyer clinic on January 10, 2014, she went back to work performing the same job, but explained that her hours were longer. Petitioner testified that as she continued working her condition worsened to the point of "square one" and the same type of injury occurred.

The medical records reflect that Petitioner returned to Dreyer Medical Clinic on July 11, 2014. PX1 at 47-49. Petitioner provided the following history:

> Initial Occupational Health visit for a 38-year-old female who has been having problems with her left shoulder for some time. Back in April of 2013, she noticed a gradual onset of pain in the left shoulder. She subsequently was seen where she went through physical therapy for approximately 2 months. Was thought to have overuse tendinitis in her left shoulder. She required medication and therapy. She states

> that the shoulder pain became waxing and waning after that to the point that when she increased her level of activity she would have more pain, but when she decreased her lifting she would have less pain. She describes no particular lifting incident that caused the onset of the pain over a year ago. She did not sustain any fall. She did not sustain any direct-blow trauma to the shoulder. She had x-rays last year which showed a mild widening of her AC joint on the left but no degenerative changes. She denied any prior problems with shoulder injury or separation in the past.
>
> She takes no medications. SHE HAS NO DRUG ALLERGIES. She is in here today. She states that she has been increasing her level of activity at work. They have had particularly heavy days and she has noticed over the past few days that her left shoulder pain has worsened to the point that she is having trouble with her lifting activities and trouble with her work activities. She again does not report any specific single event that precipitated the pain. She states the pain is primarily posterolateral. She states it does not go into the neck or upper back. She denies any radicular component of pain into the left upper extremity at this point in time. She denies any upper or lower back complaint.

Id. On physical examination, Petitioner had pain associated with various maneuvers and mild tenderness over the posterolateral aspect of the shoulder. *Id.* Dr. Johnston diagnosed Petitioner with chronic recurrent left shoulder pain, suspected rotator cuff tendinosis with acute tendinitis and suspected inflammatory rotator cuff disease with a differential diagnosis to rule out a tear. *Id.* Dr. Johnston also noted that "Today patient was counseled that as she has had waxing and waning shoulder pain that seems to worsen every time she increases her lifting level that MRI of her left shoulder is warranted to anatomically define the pathology. She was counseled that most likely she has tendinosis which places her at risk for overuse-type tendinitis. The MRI will be primarily to rule out any significant rotator cuff tear that may need surgical repair." *Id.* He imposed work restrictions, ordered a left shoulder MRI and prescribed a short course of prednisone. *Id.*

On July 23, 2014, Petitioner underwent the recommended left shoulder MRI. PX2. The interpreting radiologist noted collection in the subacromiodeltoid bursa, mild acromioclavicular joint arthropathy, a normal rotator cuff with no evidence of impingement and no obvious tear or cyst formation of the glenoid labrum. *Id.*

On July 29, 2014, Petitioner saw Dr. Michele Glasgow at Midwest Orthopaedic Institute. PX3 at 4-6, 68, 79. The following history was noted:

> Sandra is a 38-year-old right-hand-dominant female that presents to the office with a chief complaint of left shoulder pain. The patient describes first noticing left shoulder pain in November 2012. She initially attributed this to working long days at work. The patient does not report any discrete injury. In November 2013, she states that she picked up 2 cases of apples collectively weight 30 pounds. Since then, she reports progressively worsening anterior and superior left shoulder pain. The patient was seen by a doctor in November 2013. She states she was given muscle relaxers and prednisone for approximately 1-2 weeks. She did not feel the medication was helpful. She was then placed on anti-inflammatories, participated in approximately 6 sessions of physical therapy and massage which did help.
>
> Sice [sic] November, she reports numbness and tingling starting at the anterior left shoulder and radiating down the biceps, volar forearm and throughout all of her fingers, except her thumb. The numbness and tingling was noted to be worse with overhead activity and driving. She states that this also awakens her up at night. The numbness and tingling did subside when she returned to work full duty in January. Since then, the numbness and tingling has occurred intermittently and "once in a while." Her pain, however, was not 100% better when returning to work full duty in January. She states subjectively that she was only 70% better.
>
> Since January, her left shoulder pain has progressively worsened. She has not had any physical therapy

> since January. She denies any remote trauma or injury. She denies any prior injections. I have reviewed recent medical notes where the patient was again given 2 days of prednisone and sent for an MRI scan. Patient was referred to orthopedics.
>
> On the left, this patient subjectively reports significant difficulty sleeping on the left side, wading up her back, reaching a high shelf and lifting 10 pounds over her shoulder. Incidentally, she does report some mild right shoulder discomfort that she attributes to compensating for the left.

Id. On physical examination, Petitioner had significant tenderness at the AC joint to palpation, mild tenderness at the greater tuberosity and some tenderness at the posterior acromion. *Id.* Dr. Glasgow diagnosed Petitioner with left shoulder acromioclavicular joint pain, provided muscle relaxers, anti-inflammatories and prescribed a course of physical therapy. *Id.* She also administered Lidocaine injections in the acromioclavicular joint. *Id.* Petitioner began physical therapy on August 6, 2014. *Id.*, at 48-49.

On September 5, 2014, Petitioner reported that she went back to work full duty in January after feeling subjectively about 75% improved, but was unable to sustain this and had increasing left shoulder pain. PX3 at 7-8, 69, 80. She also reported that she was off work as Respondent did not have long-term light-duty options. *Id.* Petitioner explained that she worked light duty for six weeks and was then sent home understanding that she would be accepted back when she was 100%. *Id.* Dr. Glasgow diagnosed Petitioner with shoulder dysfunction mostly associated with trapezial droop and mechanical deviation. *Id.* She ordered physical therapy twice per week. *Id.*

Petitioner returned to Dr. Glasgow on October 10, 2014 reporting improvement with the numbness and tingling, but continued pain. PX3 at 20-22, 70. Dr. Glasgow ordered continued physical therapy for one month noting that she would consider a lidocaine injection at the next visit if Petitioner's condition did not improve. *Id.* Petitioner continued in physical therapy as of October 20, 2014. PX4 at 3-4.

Petitioner received a cortisone injection on November 14, 2014 and her physical therapy was put on hold for one week. *Id.*, at 82. Petitioner was discharged from physical therapy on December 18, 2014. *Id.*, at 67.

The following day on December 19, 2014, Dr. Glasgow recommended left shoulder arthroscopy with acromioclavicular joint excision. PX3 at 32-33, 72. She noted that Petitioner's MRI showed mild changes at the acromioclavicular joint and noted that the surgery might not alleviate all of Petitioner's pain. *Id.* Petitioner was discharged from physical therapy on December 26, 2014. PX4 at 20-21.

First Section 12 Examination – Dr. Atluri

On December 30, 2014, Petitioner submitted to a medical examination with Dr. Prasant Atluri at Respondent's request. RX1 (Dep. Ex. 2). Dr. Atluri examined Petitioner, reviewed various treating medical records and rendered opinions about Petitioner's condition and its relatedness, if any, to an accident at work. *Id.*

In his report dated January 2, 2015, Dr. Atluri noted the following history in pertinent part:

> The patient reports an injury from July, 2014. She states that she was picking up two cases of applies (sic) weighing approximately 20 pounds each. She states she felt numbness and tingling in her left hand involving the small and ring fingers as well as partially involving her middle finger and thumb. This was accompanied by pain at the superior aspect of her left shoulder. She indicates that she was lifting the cases from a pallet approximately waist high and was placing them onto her pallet. She demonstrates a

maneuver with her arms slightly flexed at her side and her elbows flexed as she was lifting.

She states she reported the injury and was referred to a doctor at Dreyer Medical Clinic. X-rays were taken, and prednisone was prescribed which did not help. She was then referred to obtain an MRI after a few weeks.

...

The patient does report a history of a left shoulder injury in November, 2013. She states the condition was "the same as what I have now", although she states the numbness and tingling was worse, and she had significant nocturnal symptoms at that time. She attributes her prior symptoms to repetitive lifting overhead. She thinks that it developed while she was working in the produce section. She states at that time she was treated with physical therapy and prednisone as well as anti-inflammatories and states she felt "75% better." She states that she returned to work with increased hours following that.

RX1 (Dep. Ex. 2). Dr. Atluri also noted Petitioner's reported work history that she works as an order selector for Respondent in a warehouse with duties that included lifting items below and above shoulder level up to 60 pounds. *Id.* He also noted "[s]he states that the work hours are variable; however, in July, 2014 when her symptoms developed she states she was working seven hour days which is longer than usual." *Id.*

Dr. Atluri diagnosed Petitioner with persistent left shoulder pain despite conservative treatment, including therapy and multiple cortisone injections. RX1 (Dep. Ex. 2). He noted that "[t]here are inconsistencies with regards to the history of injury. The patient reported a single lifting incident which precipitated her symptoms. This is directly contradicted by the clinical records from Dreyer Medical Clinic which indicated that the patient denied any specific incident causing her symptoms. There were several medical records which make reference to the gradual onset of symptoms from 2012. However, the details of the onset of symptoms varies (sic) throughout the records. I cannot explain these inconsistencies with regards to the description of the onset of symptoms." *Id.*

Dr. Atluri also found, after reviewing Petitioner's MRI, "no injury which could have plausibly occurred on July 11, 2014 causing this patient's left shoulder pain. Any actual injury from July 11, 2014 would have been expected to result in edema or an effusion on the MRI which was done less than two weeks later." RX1 (Dep. Ex. 2). He concluded that Petitioner's ongoing left shoulder complaints are not related to any specific injury from July 11, 2014. *Id.* Notwithstanding, Dr. Atluri indicated that an arthroscopy with distal clavical resection of the left shoulder was a reasonable surgical intervention. *Id.*

Continued Medical Treatment & Termination of Benefits

Dr. Glasgow continued to recommend surgery on January 20, 2015 and noted that Petitioner did respond well to a prior acromioclavicular joint injection. PX3, at 34-35, 73.

In a letter dated January 27, 2015, Candace Parks, a Senior Claims Representative from Gallagher Bassett Services, terminated Petitioner's continued treatment and temporary total disability benefits effective January 23, 2015 based on Dr. Atluri's independent medical evaluation report. RX5. Ms. Parks indicated that temporary total disability benefits were paid through January 23, 2015. *Id.*

On February 17, 2015, Dr. Glasgow noted her review of the independent medical evaluation report indicating that surgery was reasonable, but causation was the issue. PX3 at 36-37, 74. Given Petitioner's financial

circumstances and inability to undergo surgery on her own, Dr. Glasgow recommended a functional capacity evaluation to determine Petitioner's ability to lift. *Id.*

In a narrative report dated February 22, 2015, Dr. Glasgow summarized the medical care she provided to Petitioner related to the left shoulder. PX5. She diagnosed Petitioner with left shoulder disability with ongoing AC joint pain. *Id.* She indicated that, while Petitioner would be able to return to light duty work, it was unlikely that she would be able to return to the type of repetitive lifting at or above shoulder height required of her to perform her regular job duties. *Id.* Dr. Glasgow continued to recommend surgery followed by four months of physical therapy and possibly work conditioning. *Id.*

On March 20, 2015, Dr. Glasgow noted Petitioner's left AC joint arthropathy and that it was being contested as a work-related injury. PX3 at 44-45, 75. Dr. Glasgow indicated that she has "reviewed this history again with [Petitioner], which is fairly consistent as we go through it. [She has] discussed with the patient that a narrative has been produced by myself and [she has] requested additional records to clarify the exact timing of her complaints in 2013. For [her] purposes, the patient's history has been very consistent time to time, evaluation to evaluation." *Id.* Petitioner reported that her pain was about a 7.5/10 mostly with lifting and overhead use of the left arm. *Id.* Dr. Glasgow maintained Petitioner's diagnosis of acromioclavicular joint symptoms in the left shoulder and work restrictions. *Id.*

Section 12 Examination Report Addendum – Dr. Atluri

In a letter dated May 12, 2015, Dr. Atluri noted his review of additional physical therapy notes from the Dreyer Medical Clinic related to Petitioner's treatment there. RX1 (Dep. Ex. 3). He explained that the additional materials did not change his opinions as rendered in his January 2, 2015 report. *Id.*

Continued Medical Treatment

As of May 15, 2015, Petitioner reported to Dr. Glasgow that she found a job in a chiropractic office and has been doing some independent massage as she is a massage therapist. PX3 at 46-47. She also reported that her pain was generally better, but her shoulder bothered her if she lifted more than her restrictions, especially overhead, and when she lays on her left shoulder at night. *Id.* Dr. Glasgow noted that Petitioner had very significant improvement in her left shoulder pain associated with primary AC joint tenderness and that her provocative tests, including O'Brien's and cross-body abduction and supraspinatus tests were negative. *Id.* Dr. Glasgow noted that she would see Petitioner as needed with a three month follow up visit scheduled as a default. *Id.* She further noted that Petitioner's workers' compensation claim was still pending. *Id.*

Deposition Testimony – Dr. Atluri

On July 15, 2015, Respondent called Dr. Atluri as a witness and he gave testimony at an evidence deposition regarding his opinions about Petitioner's left shoulder condition. RX1. Dr. Atluri is a board-certified orthopedic surgeon. RX1 at 4-7; RX1 (Dep. Ex. 1).

Dr. Atluri testified that he reviewed Petitioner's MRI films and report, which showed some abnormality at the acromioclavicular joint, a little bit of displacement of the clavicle with respect to the acromion and widening at that joint. RX1 at 12. He explained that Petitioner had a Type 2 acromion, which is a typical finding. *Id.* He further explained that the acromion is the "roof" of the shoulder rated at Type 1 (flat), Type 2 (curved) or Type 3 (prominently curved), which is thought to indicate that the greater amount of curvature can indicate a greater

amount of bursa or rotator cuff problems. *Id.*, at 12-13. Dr. Atluri also explained that in Petitioner's case, the acromion was positioned higher than the acromion such that with Petitioner's symptoms involving the area between the collarbone and acromion "it suggests that the amount of displacement was abnormal for her and represented some degeneration of the joint, or even degeneration of the ligaments stabilizing the collarbone." *Id.*, at 14-15.

Dr. Atluri indicated that an arthroscopy with distal clavical resection was appropriate for Petitioner and would remove part of the AC joint creating more space and the painful part of the bone. RX1 at 15-16. He explained that this shoulder condition could be acutely caused or degenerative, but in Petitioner Dr. Atluri believed the condition was degenerative. *Id.*, at 16. Dr. Atluri diagnosed Petitioner with left shoulder acromioclavicular arthritis. *Id.*, at 22. He maintained his opinion that there was no injury that could have occurred on July 11, 2014 that could have caused Petitioner's left shoulder pain. *Id.*, at 24-25.

On cross examination, Dr. Atluri acknowledged that when he examined Petitioner she had mild tenderness over the lateral trapezius as well as subacromial space in the bicipital groove, significant maximal tenderness over the AC joint and occasional snapping when gently rotating her shoulder with a short arc range of motion at which time Petitioner reported pain. RX1 at 30-32. Petitioner also had a positive cross-arm test. *Id.* at 32.

Deposition Testimony – Dr. Glasgow

On July 17, 2015, Petitioner called Dr. Glasgow as a witness and she gave testimony at an evidence deposition regarding Petitioner's medical treatment and her opinions. PX10. Dr. Glasgow is a board-certified orthopedic surgeon subspecializing in the shoulder. PX10 at 4-7; PX10 (Dep. Ex. 1).

Dr. Glasgow continued to recommend surgical intervention to address Petitioner's left shoulder condition in the form of an acromioclavicular resection. PX10 at 28. Dr. Glasgow maintained the opinion explained in her narrative report that Petitioner's left shoulder pain was related to her work. *Id.*, at 30. She noted that the Dreyer medical records from July of 2014 reflect Dr. Johnston's note that, back in April of 2013, Petitioner had a gradual onset of left shoulder pain requiring medication and therapy as well as increased pain with increased activity levels and decreased pain with decreased lifting activities. *Id.*

Dr. Glasgow concluded, "[s]o the clinic notes of July of 2014 suggest that [Petitioner's] pain level was related to her activity level." *Id.* She further noted that after reviewing Petitioner's past medical history at each visit Petitioner's history was consistent in that her pain began in 2012 with discomfort it worsened in 2013 which necessitated treatment and, while the months varied sometimes in the medical records, "it's clear that the patient had experienced gradual onset of left shoulder pain over time, which worsened with higher levels of activity." *Id.*, at 31. Dr. Glasgow testified that "[b]ased on the consistency of her medical record, I believe, within a reasonable degree of medical certainly, the patient's current left shoulder pain is related to related work activities [as stated in her medical records] and supported by the records of Dr. Johnston." *Id.*

On cross examination, Dr. Glasgow testified that she understood that the average amount of weight that Petitioner had to lift at work was 50 pounds, but she did not have a specific number reported by Petitioner other than the report that she did heavy lifting. PX10 at 32-33. The only specific poundage referenced by Petitioner was related to the lifting of two cases of apples weighing 30 pounds. *Id.*, at 33. Dr. Glasgow then acknowledged that Petitioner reported that her symptoms began after lifting those two cases. *Id.*

Dr. Glasgow did not have any information from Petitioner at the July 29, 2014 visit that she attributed her pain

to overhead lifting. *Id.*, at 36. Dr. Glasgow also acknowledged that Petitioner had negative cross-body tests on July 29, 2014, August 6, 2014, September 5, 2014 and October 10, 2014 followed by a positive cross-body test on November 14, 2014. *Id.*, at 38-39. However, she explained that Petitioner had a positive O'Brien's test on July 29, 2014 and she administered an AC joint injection so it was not surprising that Petitioner had negative cross-body tests for three to four follow up visits. *Id.*, at 39-40. With regard to impingement sign testing, Dr. Glasgow noted that Petitioner had mildly positive tests on January 20, 2015 and February 17, 2015 with negative tests previously on July 29, 2014, September 5, 2014, October 10, 2014, November 14, 2014, December 19, 2014, March 20, 2015 and May 15, 2015 followed by a positive cross-body test on November 14, 2014. *Id.*, at 40-41.

Dr. Glasgow maintained that Petitioner had ongoing acromioclavicular pain with ongoing inflammatory findings at the AC joint that caused her pain. PX10 at 50-52. She acknowledged that a person could have inflammation without any trauma or pathology. *Id.*, at 52.

Dr. Glasgow testified that she did not have any reference at the time of her first encounter with Petitioner on July 29, 2014 that Petitioner sustained a July 11, 2014 accident. PX10 at 34-35, 37. Dr. Glasgow also testified after extensive questioning, that nothing in her July 29, 2014 note references a 2012 or 2013 accident, or Dr. Glasgow having been told by Petitioner about an accident occurring on July 11, 2014 other than to the extent that she references the Dreyer Medical Clinic's records. *Id.*, at 58-63. On re-direct examination, Dr. Glasgow was presented with a form from her office dated July 29, 2014 including handwritten notes reflecting Petitioner's present history of illness. *Id.*, at 65-67. She explained that the notes are written by either herself or her physician's assistant/nurse. *Id.* Dr. Glasgow testified that there was initially a date of onset noted to be July 11, 2014, but that was crossed out by someone and she would not recall who crossed it out or why. *Id.*, at 67.

Continued Medical Treatment

On August 14, 2015 Petitioner returned to Dr. Glasgow reporting pain at a level of 6/10 including days with no pain and two days a week with pain lasting all day. PX3(a). Petitioner was working about 20 hours per week in a chiropractic office performing some independent massage and assisting in the office. *Id.* Dr. Glasgow diagnosed ongoing acromioclavicular tenderness with provocative testing that was sometimes negative depending on Petitioner's level of discomfort. *Id.* At this visit, Petitioner had direct tenderness at the AC joint with cross-body adduction and discomfort at the AC joint. *Id.* Dr. Glasgow continued to recommend an arthroscopy of the left shoulder with AC joint excision. *Id.*

Additional Information

Petitioner testified that she has not returned to work with Respondent since her light duty work although she sought and obtained employment with other employers. PX7-PX8. Petitioner testified that she was not otherwise working while receiving treatment from Dr. Glasgow and she was accommodated by Respondent for light duty work restrictions from July 11, 2014 for six weeks. She testified that she did receive her temporary partial disability payments during the six weeks period.

Regarding her current condition, Petitioner testified that it is difficult to perform tasks such as putting on her bra or curling her hair. She also explained that she feels her arm get stuck when she lifts overhead. She also has difficulty picking things from overhead positions with her left arm, although she is right hand dominant. Petitioner also testified that she has difficulty playing in the park with her daughter and climbing a ladder or monkey bars.

Petitioner explained that she no longer sleeps on her left side because when she attempts to do so her shoulder hurts. She testified that she was not prescribed a home exercise program, but she attempted to perform one on her own without weights. Petitioner is not taking any prescription or other medications at this time and she has not sought to undergo medical treatment through any other insurance.

John Krahulik

Mr. Krahulik testified that he is the Director of Warehouse for Respondent and has been employed by Respondent for approximately 20 years. He was Petitioner's supervisor while she was employed for Respondent.

Mr. Krahulik testified that Petitioner was employed for Respondent as an Order Selector. He explained that Respondent has to drive a two-pallet tugger and use a "pick-by-voice" system that tells Petitioner which items to select from what slots in order to fill store orders. Mr. Krahulik explained that heavier or studier items are placed at the bottom of the pallets and closer to the front of the aisle. He added that most boxes are closed, but there are also open boxes.

With regard to Petitioner's performance, Mr. Krahulik testified that Petitioner struggled at times with productivity. He met with her at one point. Petitioner came into his office and he asked how they could help to which Petitioner responded that her shoulder was bothering her. Mr. Krahulik also testified that Petitioner told him that she wanted to try to work through it at the time. He testified that no discipline was issued to Petitioner related to productivity during her employment with Respondent.

Respondent also offered into evidence an exhibit breaking down the items that Petitioner and other order selectors would handle. RX6. Mr. Krahulik explained that the core range of items were items carried all year. Respondent stored cases of items weighing from 0-.999 pounds (i.e., yogurts, cottage cheese, sour cream, etc.). *Id.* According to the report, he explained that Respondent carried 168 items in the range of 10-19.99 pounds (i.e., fresh meats, produce items). *Id.* 107 types of items weighed from 20-29.99 pounds, 29 types of items weighed 30-39.99 pounds, and two types of items weighed from 40-49 pounds. *Id.* Mr. Krahulik testified that no items weighed over 50 Pounds. *Id.*

On cross examination, Mr. Krahulik testified that order selectors were supposed to "make rate" and ensure that the pieces per hours correct. Sometimes order selectors would have to stack items, and he acknowledged that there were 107 items in the 20-30 pound per case weight range, including cases of apples. Two cases of apples weigh 42 pounds. Mr. Krahulik acknowledged that if Petitioner was moving two cases that weighed 25 pounds each, the weight of those two cases together would total 50 pounds. Mr. Krahulik also acknowledged that there was no policy, procedure or regulation that prevented order selectors from stacking cases in order to make rate.

Mr. Krahulik testified that an order selector would only be disciplined if he or she did not make rate. He explained that the first month, the supervisor would talk to the employee on weekly basis. If the employee did not hit his or her numbers the second month, the supervisor would offer retraining, etc. and make efficiency recommendations. If the employee did not make rate during the third month, Mr. Krahulik would see the employee to determine if anything else could be done to help. He explained that the next step could be termination after he talked to the employee.

On re-direct examination, Mr. Krahulik testified that only time an order selector was expected to stack more

than two items was in the dry section, in which Petitioner did not work. Otherwise, Respondent did not require an employee to pick up two cases at a time.

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 facts must be closely examined in repetitive-injury cases to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006) (*citing Three "D" Discount Store*, 198 Ill. App. 3d 43, 49 (4th Dist. 1989)). Compensation is allowable where an injury is not sudden, but gradual so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66 (*citing Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529 (1987)).

However, an employee claiming that she suffered a repetitive-trauma injury must still point to a date within the statutory limitations period on which both the injury and its causal link to her work became plainly apparent to a reasonable employee. *Durand*, 224 Ill. 2d at 65 (*citing Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 209 (1st Dist. 1993)); *see also Peoria County*, 115 Ill. 2d at 531. "[B]ecause repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work." *Id.*, (*citing Oscar Mayer v. Industrial Comm'n*, 176 Ill. App. 3d 607, 610 (4th Dist. 1988)). "To deny an employee benefits for a work-related injury that is not the result of a sudden mishap *** penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand*, 224 Ill. 2d at 66 (*citing Peoria County*, 115 Ill. 2d at 529-30).

Given the totality of this record, the Arbitrator finds that Petitioner has established that she sustained a repetitive trauma injury manifesting on July 11, 2014 and incorporates by reference the findings and conclusions related to Petitioner's claim that she sustained an accident at work on November 18, 2013, which are contained in the concurrently issued decision in Case No. 15 WC 5782. In that case, the Arbitrator finds that Petitioner established that she sustained a repetitive trauma injury manifesting on November 18, 2013.

The facts of this case, which are unique, establish that Petitioner experienced left shoulder pain that manifested while at work performing repetitive work activities. Respondent asserts that Petitioner was merely present at work when her left shoulder symptoms ensued, which is insufficient to establish the necessary causal connection between her work and her left shoulder condition. However, a close inspection of Petitioner's testimony in light of the histories documented in her medical records and Dr. Atluri's reports reveals that Petitioner consistently reported symptoms in the left shoulder occurring as a result of repetitive work activities before November 18, 2013 followed by a breakdown in her tolerance of those symptoms on November 18, 2013 while engaged in work activities.

Dr. Glasgow plausibly opined that Petitioner's left shoulder symptoms were caused by Petitioner's activities at work, and her opinions are supported by the testimony, although not the conclusions, of Dr. Atluri. Dr. Atluri articulately described how Petitioner's type 2 acromion predisposed her to degeneration and symptoms in the shoulder and collarbone area. He also agreed with Dr. Glasgow, without knowing as much, about the type of surgery recommendable to alleviate Petitioner of her left shoulder symptoms. Dr. Glasgow recommended a left shoulder arthroscopy with acromioclavicular joint excision and Dr. Atluri indicated that an arthroscopy with distal clavical resection was appropriate for Petitioner because it would remove part of the AC joint creating more space and the painful part of the bone.

Moreover, Petitioner had no left shoulder condition, symptoms or medical treatment outside of that which she reported in relation to her accidents at work on November18, 2013 and, later, on July 11, 2014. At the hearing, Petitioner attributed her left shoulder pain to her work activities of November 18, 2013 after experiencing months of symptoms that she could no longer tolerate. She testified that she sought medical treatment for the first time on November 18, 2013 after she picked up two cases of apples simultaneously at work. At that time, she felt pain as well as numbness and tingling going down her left arm. The history that Petitioner gave at the time of her initial evaluation at the Dreyer clinic also attributed Petitioner's left shoulder condition to an injury at work on November 18, 2013—preceded by repetitive work activities only.

In light of the record as a whole, the Arbitrator finds Petitioner's testimony to be credible as it is corroborated by the medical records and her reports to Dr. Atluri. The Arbitrator also gives greater weight to the opinions of Dr. Glasgow than those of Dr. Atluri in this case, and adopts the opinions of Dr. Glasgow herein. Based on all of the foregoing, the Arbitrator finds that Petitioner has established that she sustained a compensable repetitive trauma injury at work on November 18, 2013 as claimed in the concurrently issued decision in Case No. 15 WC 5782.

In this case, Petitioner also claims that she sustained a second accident at work on July 11, 2014. Given the totality of the record, the Arbitrator finds that Petitioner has established that she sustained a second repetitive trauma injury manifesting on July 11, 2014 as claimed. In so concluding, the Arbitrator finds that the evidence establishes that this second accident was an aggravation of Petitioner's prior left shoulder condition. The medical records and Petitioner's testimony reveal that she had reached a plateau in her left shoulder condition when she was released from care at the Dreyer Clinic effective January 14, 2014. Petitioner's report to Dr. Atluri, the nurse practitioner at Dreyer and Petitioner's testimony at the hearing establish her own belief that she had recovered about 70%, but had not returned back to 100% despite the medical treatment rendered as ordered by the Dreyer clinic providers.

Petitioner then returned to the very same work activities for Respondent, but at an increased amount of hours. She consistently reported left shoulder pain associated with increased hours of repetitive work activities after her prior release from care from the Dreyer Clinic effective January 14, 2014. She testified about the increased hours, which she explained varied from week to week, and also reported as much to Respondent's examiner, Dr. Atluri. Petitioner testified that she then felt the same type of pain in the left shoulder after almost six months of work. Her reported onset of these left shoulder symptoms on July 11, 2014 is documented by Dr. Johnston at the Dreyer clinic. Indeed, Dr. Johnston noted Petitioner's report on July 11, 2014 that she "...has been having problems with her left shoulder for some time. Back in April of 2013, she noticed a gradual onset of pain in the left shoulder. ... thought to have overuse tendinitis in her left shoulder. She required medication and therapy. She states that the shoulder pain became waxing and waning after that to the point that when she increase her level of activity she would have more pain, but when she decreased her lifting she would have less pain. She describes no particular lifting incident that caused the onset of the pain over a year ago. ... She had x-rays last

year which showed a mild widening of her AC joint on the left but no degenerative changes. ... She is in here today. She states that she has been increasing her level of activity at work. They have had particularly heavy days and she has noticed over the past few days that her left shoulder pain has worsened to the point that she is having trouble with her lifting activities and trouble with her work activities. She again does not report any specific single event that precipitated the pain."

Despite her attempt to continue her work activities for Respondent, which required her to lift products of varying weights to and from locations at various heights, Petitioner was again engaged in work activities when she felt an onset of pain in the left shoulder that was no longer tolerable on July 11, 2014. Petitioner clearly related her left shoulder symptoms with her work activities on this date as well as on November 18, 2013. After inquiring further from Petitioner how she allegedly injured herself and noting the general consistency of Petitioner's reported onsets of pain on both claimed dates of accident, Dr. Glasgow agreed that Petitioner's left shoulder symptoms stemmed from Petitioner's repetitive work activities. Dr. Atluri explained that Petitioner had a predisposition to degeneration and symptoms in the acromion because of its shape.

While the repetitive activities explained by Petitioner, and by Respondent's witness, Mr. Krahulik, may not cause shoulder symptomatology in other patients, it is clear from this record that Petitioner related her symptoms to her repetitive work activities and that Respondent was aware that Petitioner related her left shoulder condition to her repetitive work activities. Indeed, Mr. Krahulik testified that he met with Petitioner on a date he could not specifically recall and he asked how he could help her meet her productivity rate. Petitioner responded that her shoulder was bothering her, but she wanted to try to work through it at the time. Dr. Glasgow's medical opinion that Petitioner's work activities were competent to cause Petitioner's left shoulder symptoms taken in light of the remainder of the record is persuasive.

Based on all of the foregoing, the Arbitrator finds that Petitioner has established that she sustained a compensable repetitive trauma injury at work on July 11, 2014 as claimed.

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

As explained more fully above, the Arbitrator finds that Petitioner has established that she sustained a compensable accident while working for Respondent on November 18, 2013 and July 11, 2014 and relies on the opinions of Petitioner's treating physician, Dr. Glasgow as well as Petitioner's credible testimony.

In addition, there is no evidence in the record that Petitioner had any traumatic injury to the left shoulder occurring outside of work before November 18, 2013 or at any time thereafter before her injury on July 11, 2014. There is no evidence in the record to support the conclusion that Petitioner's MRI's, showing little or no degeneration in the left shoulder, establish that degeneration is the sole cause of Petitioner's left shoulder condition. There is no evidence in the record contradicting Petitioner's consistently reported attribution of two onsets of left shoulder pain on November 18, 2013 and July 11, 2014 to anything other than the repetitive work activities in which she was engaged during her employment and at the time of the injuries.

Based on all of the foregoing, the Arbitrator finds that Petitioner has established continued causal connection between her injury at work on July 11, 2014 and her left shoulder condition as claimed.

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

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

As explained more fully above, the Arbitrator finds that Petitioner has established that she sustained a compensable injury to her left shoulder on July 11, 2014 as well as a continued causal connection between her second accident at work and ongoing left shoulder condition. The outstanding bills submitted into evidence are for services related to Petitioner's left shoulder condition. Thus, the Arbitrator finds that Petitioner has established that these medical bills were 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 shoulder on July 11, 2014 as well as a continued causal connection between her second accident at work and ongoing left shoulder condition. In so concluding, the Arbitrator relies on the opinions of Dr. Glasow who has ordered an arthroscopic surgery to address Petitioner's left shoulder symptoms. Respondent's examiner, Dr. Atluri, agreed 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. Alturi 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 shoulder as prescribed by Dr. Glasgow.

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

In light of the accident and causal connection analyses explained above, the Arbitrator addresses Petitioner's claim that she is entitled to temporary total disability and temporary partial disability benefits. She claims that she is entitled to temporary total disability benefits after her second injury at work on July 11, 2014.

Specifically, Petitioner claims temporary total disability benefits commencing August 21, 2014 through March 21, 2015. AX1. She also claims that she is entitled to temporary partial disability commencing July 11, 2014 through August 22, 2014 and from March 22, 2015 through March 11, 2016. *Id.* Respondent paid temporary partial disability benefits from July 11, 2014 through August 22, 2014 totaling $1,162.31. *Id.* In light of the record as a whole, the Arbitrator finds that Petitioner is entitled to certain periods of temporary total disability benefits and temporary partial disability benefits as a result of her injury at work on July 11, 2014.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

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

The record reflects that during the claimed temporary total disability and temporary partial disability periods Petitioner was under light duty work restrictions as imposed by Dr. Glasgow. Respondent was able to accommodate Petitioner's restrictions for a time, or paid her temporary total disability or temporary partial disability benefits, but later terminated Petitioner's benefits. Petitioner later found part-time work while under Dr. Glasgow's restrictions and worked for Carey Frazer / Fox Valley Care Clinic and Ginsberg Chiropractic. PX8. No evidence was submitted to suggest that Petitioner was able to work during the claimed temporary total disability period beyond what she was able to do within her restrictions working for other employers. Thus, the Arbitrator finds that Petitioner has established that she was temporarily totally disabled or temporarily partially disabled during the claimed periods as a result of her injury at work on July 11, 2014.

With regard to her claim of entitlement to temporary partial disability benefits, Petitioner submitted evidence of her gross earnings from that work totaling $19,289.50 for the 50-week period beginning March 21, 2015 through March 4, 2016. PX8. The earnings in her usual and customary employment with Respondent, per the stipulated average weekly wage of $621.28, would have been $31,064.00 for the same period. The Arbitrator calculates Petitioner's temporary partial disability benefits pursuant to Section 8(a) of the Act as follows: $621.28 AWW – ($19,289.50 ÷ 50 = $385.79) = $235.49 x 2 ÷ 3 = $156.99.

Based on the foregoing, the Arbitrator finds that the Petitioner is entitled to temporary total disability benefits from August 23, 2014[3] through March 20, 2015[4]. The Arbitrator also awards temporary partial disability benefits from March 21, 2015 through March 11, 2016 as a result of her injury at work on July 11, 2014.

[3] Petitioner received temporary partial disability benefits through August 22, 2014. AX1.

[4] Petitioner began working part-time within her restrictions at another job on March 21, 2015. PX8.

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

Given the facts presented in this case, and after considering the parties' motion and response, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's alleged injuries on November 18, 2013 and July 11, 2014 were compensable and arose out of her employment as alleged. Respondent required Petitioner to submit to a Section 12 examination and the parties deposed both Petitioner's treating physician and Respondent's examiner, Dr. Atluri, about whether Petitioner's left shoulder condition was related to her work activities from a medical point of view. Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Clarette Ramsay,

Petitioner,

vs.

NO: 13 WC 15481

17IWCC0717

Walker Brothers, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering all of the issues, and being advised of the facts and law, reverses the decision of the arbitrator, and substitutes the facts and findings that follow.

Facts

The following factual recitation is derived from evidence presented at the November 19, 2015, arbitration hearing on Petitioner's claim for benefits following shoulder, hip, and back injuries related to his fall on ice in an Ace Hardware parking lot near his work on February 13, 2013.

Evidence Regarding Parking

Petitioner testified that, on the morning of his accident, he parked in the Ace Hardware parking lot near Respondent's restaurant, because "[t]hat's where they give us permission to park." (Arb. Trans. P25). He said that supervisors for Respondent posted a note in the employee break room stating that "we only can park at Ace but not between Thanksgiving and Christmas, park on the street." (Arb. Trans. P26). On cross-examination, Petitioner agreed that there were no signs in the Ace Hardware parking lot reserving spots for Respondent's employees. (Arb. Trans. P43).

Jesus Salanas, like Petitioner, a cook for Respondent, testified that he had worked for Respondent for approximately 15 years at the time of Petitioner's accident. (Arb. Trans. P11). He said that workers are not allowed to park in Respondent's parking lot because it is too small.

Salanas normally parks either in an Ace Hardware parking lot, which is a two- to three-minute walk from Respondent's restaurant (Arb. Trans. P15), or on a side street. (Arb. Trans. P12). On cross-examination, Salanas said that employees are not required to park in the Ace Hardware parking lot, that "most of the employees" park on side streets because parking at Ace Hardware requires them to cross a street to reach work, and that some employees park in a Subway sandwich shop parking lot. (Arb. Trans. P17). He also testified that Respondent's employees are allowed to use only a certain part of the Ace Hardware lot and that they are not allowed to use it during holiday seasons. (Arb. Trans. P18-19).

John Weiss, the owner of the Ace Hardware store and parking lot located near Respondent's restaurant, testified via evidence deposition. He estimated that the distance between his store and Respondent's was one to two blocks, a two- to three-minute walk. (PX9 P13). Weiss said that Respondent's employees were allowed to park on his parking lot, but he said that the arrangement was so longstanding he could not remember how it originally came about. (PX9 P14-15). Weiss testified that he allows Respondent's employees to use the lot free of charge, as a courtesy, so long as there is no special event going on in the parking lot. (PX9 P15-16). He said that there are 13 spaces in his parking lot that Respondent's employees are allowed to use, but he noted that the general public is also allowed to use those spots. (PX9 P18). Weiss agreed that he alone pays for snow removal and maintenance costs for the parking lot. (PX9 P21-22).

Kevin Donoghue, Petitioner's former supervisor for Respondent, testified at the hearing that Respondent has no designated employee parking lot and that, pursuant to an "informal arrangement with Ace," some employees park in the Ace Hardware lot "across the street and down half a block." (Arb. Trans. P71). Donoghue testified that Respondent's employees are allowed to use only the section of parking spots farthest from Ace's entryway and that the employees do not receive priority over Ace customers. (Arb. Trans. P72). Donoghue also explained that Respondent's employees "have other options," including side street parking that requires no payment or permit. (Arb. Trans. P72-73). He said that not all of Respondent's employees park in the Ace Hardware lot and that Respondent does nothing to maintain or repair the lot. (Arb. Trans. P78-79). When asked to explain why Respondent arranged access to the Ace Hardware parking lot for its employees, Donoghue responded that the arrangement alleviated complaints resulting from employees' cars crowding a side street (not the side street he said employees may now park on) or a nearby store. (Arb. Trans. P.103).

Medical and Treatment Evidence

Petitioner said that, on the morning of the accident, he waited for another worker to arrive in the parking lot before exiting his car, because he did not have a key to unlock the restaurant doors. When he saw Salinas arrive and start to walk toward the restaurant, Petitioner got out of his car and rushed to follow Salanas, knowing Respondent's policy of disciplining employees who clock in even two minutes late. (Arb. Trans. P31). Petitioner slipped and fell on the snowy and icy parking lot surface. (Arb. Trans. P30-31). Petitioner recalled that he screamed and that Salanas came back to attend to him. (Arb. Trans. P32). On re-direct examination, Petitioner testified that Salanas was "beside" him when he fell. (Arb. Trans. P54). In his testimony, Salanas said that he saw Petitioner in his car on the morning of February 13, 2013, but did not see him fall or see him on the ground. (Arb. Trans. P15).

According to Petitioner, he felt pain in his shoulder, hip, and back after his fall. (Arb. Trans. P33). He testified that he reported his accident and went to the emergency room that day for treatment. At the emergency room, he was released home with a diagnosis of left hip and left shoulder contusions, and instructions for follow up treatment. (PX5 P7). He visited Dr. Jonathan Littman that same day (PX10 P84) and again in March, when he was referred for physical therapy (PX10 P87). In the meantime, on Dr. Littman's order, Petitioner did not work from February 15, 2013, through February 19, 2013.
In April 2013, Petitioner was referred to Dr. Gregory Dairyko. After an April 26, 2013, treatment visit, Dr. Dairyko ordered spine, hip, pelvis, and shoulder x-rays; he ordered continued physical therapy but commented that surgery may become necessary. (PX3 P58-60). The x-rays revealed evidence of arthritis in the lumbar spine and mild degenerative changes in the left shoulder. (PX3 P61-64).

A report of a May 31, 2013, MRI of Petitioner's left shoulder includes the conclusions that Petitioner suffered from tendinosis and a partial thickness tear at the distal insertion, and marked degenerative hypertrophic changes in the AC joint. (PX3 P47).

By August 2013, Petitioner reported to Dr. Dairyko that he continued to experience shoulder, hip, and back pain and that physical therapy was not resolving his issues. (PX3 P42). Dr. Dairyko recommended surgery.

On August 14, 2013, Petitioner underwent a left shoulder arthroscopy, subacromial decompression, distal clavicle excision, limited debridement, and rotator cuff repair. (PX3 P34-36). His post-operative diagnosis was left shoulder rotator cuff tear and left shoulder AC joint arthritis. (PX3 P34). Petitioner pursued a course of physical therapy following the surgery and continued to follow up with Dr. Dairyko. Dr. Dairyko's last treatment note, dated November 22, 2013, notes improvement in Petitioner's left shoulder but still some continued pain. (PX3 P6-8). His last physical therapy note, dated December 26, 2013, notes similar progress. (PX6 P93-94).

Petitioner testified that he took one week of vacation from work immediately following his injury, returned on February 20, did not stop work again until after his surgery on August 14, 2013, and then returned to work again on November 4, 2013. (Arb. Trans. P46). Petitioner said that Respondent terminated his employment because he was unable to perform his job functions. Donoghue, his former supervisor, testified that Petitioner was terminated for misconduct and earlier cited for mental lapses. (Arb. Trans. P93). Personnel records support Donoghue's account of mental lapses. (RX4B).

As of the time of his testimony, Petitioner had difficulty sleeping on his left shoulder and hip or raising items with his left shoulder, and back pain with extended sitting. (Arb. Trans. P37-38). He said that he is not seeking treatment for his back and hip pain, but instead managing it with medications. (Arb. Trans. P53).

Dr. Kevin Walsh, who examined Petitioner at Respondent's request on December 17, 2013, opined in his report that Petitioner had reached maximum medical improvement following his surgery. (RX1 P7). He further opined that Petitioner's shoulder problems were "more likely than not" degenerative and not traumatic, and that it was "not at all likely" that his current

problems are related to his February 13, 2013, fall. (RX1 P7).

In his report of an April 8, 2014, examination of Petitioner at Petitioner's attorney's request, Dr. Guido Marra recounted his physical examination results and treatment history before opined that, as a result of his February 13, 2013, fall, Petitioner suffered an exacerbation of preexisting AC joint arthritis and either an aggravation of a rotator cuff tear or an acute rotator cuff tear. (PX2 P4-5). Dr. Marra based this opinion on Petitioner's lack of prior shoulder complaints. (PX2 P4). He testified consistently in his October 31, 2014, evidence deposition.

Petitioner's undisputed average weekly wage was $576.10.

Findings

On review, the parties agree that Petitioner fell on February 13, 2013. They dispute (1) whether Petitioner's fall arose out of and in the course of his employment with Respondent; and (2) whether his condition of ill-being is causally connected to the accident. In the event those questions are answered in the affirmative, the parties further dispute (3) whether Petitioner's medical expenses were related to the accident, necessary, and reasonable; (4) the extent of temporary total disability (TTD) benefits Petitioner should be awarded; and (5) the extent of permanent partial disability (PPD) Petitioner should be awarded.

The Commission begins with the first issue, regarding whether Petitioner's fall on ice in the parking lot arose out of and in the course of his employment with Respondent. To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment. *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1037 (2004). An injury arises out of one's employment if it originates from a risk connected with, or incidental to, the employment and creates a causal connection between the employment and the accidental injury. *Mores-Harvey*, 345 Ill. App. 3d at 1037. An injury occurs in the course of employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties. *Mores-Harvey*, 345 Ill. App. 3d at 1037. Generally, injuries sustained on an employer's premises within a reasonable time before or after work are deemed to arise in the course of employment, while injuries sustained off premises while travelling to or from work are not so deemed. *Mores-Harvey*, 345 Ill. App. 3d at 1037-1038. In this case, the Ace Hardware parking lot was situated across the street from and thus not directly a part of the employer's premises. Therefore, absent some exception, Petitioner's alleged fall in that lot would not arise out of and in the course of his employment with Respondent.

As an exception to the above "general premises rule," however, recovery is permitted where the employee has sustained injuries in a parking lot provided by an employer (*Mores-Harvey*, 345 Ill. App. 3d at 1038; see also *Illinois Bell Tel. Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483-84 (1989)), where the parking lot poses some unusual hazard such as the ice Petitioner slipped on in this case (see *Dukich v. Ill. Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC ¶41). Although the neighboring Ace Hardware store, and not Respondent, maintained and operated the parking lot, our supreme court has held the question of ownership to be "immaterial" so long as the employer provides the lot. *De Hoyos*, 26 Ill. 2d at 113. Here, it is

undisputed that Respondent entered into an agreement with Ace Hardware to "provide" the lot for its employees' use. When it did so, Respondent made the parking lot part of its premises for purposes of this dispute. See *Mores-Harvey*, 345 Ill. App. 3d at 1090-91 (if a parking lot is provided by the employer, "the employer-provided parking lot is considered part of the employer's premises"). For that reason, the Commission finds that Petitioner's fall on ice in the Ace Hardware parking lot, on his way to work for Respondent, arose out of and in the course of his employment with Respondent.

The parties' second dispute whether Petitioner's condition of ill-being is causally connected to his parking lot fall. 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. *Hansel & Gretel Day Care v. Industrial Commission*, 215 Ill. App. 3d 284, 294 (1991) (citing *Board of Education v. Industrial Commission*, 44 Ill.2d 207, 214 (1969)). The parties focus their competing causal connection evidence on Petitioner's left shoulder injury. For its part, Respondent presented the conclusions of Dr. Walsh, who opined that Petitioner's shoulder injury was degenerative and not the acute result of a fall; Petitioner, on the other hand, presented the conclusions of his treating physician, Dr. Marra, who offered the opposite opinion. The Commission finds Dr. Marra's opinion to be the more credible, largely based on his observation that, even if Petitioner had preexisting rotator cuff problems, they were asymptomatic until his fall. Petitioner reported shoulder pain to medical professionals immediately after his fall. For that reason, the Commission finds that Petitioner's condition of ill-being is causally related to his workplace fall.

The third issue—whether Petitioner's medical expenses are compensable—turns entirely on the question of whether those expenses are related to a workplace accident. Because the Commission finds that his injury was tied to a workplace accident, the Commission also finds that the related medical expenses are compensable. In so doing, the Commission credits the testimony of Dr. Marra that the medical expenses are reasonable, necessary, and related to Petitioner's injury.

The fourth issue in this case is the amount of TTD to which Petitioner is entitled. An injured employee is entitled to TTD "from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of injury will permit. [Citations.] To be entitled to TTD benefits, it is the claimant's burden to prove not only that he did not work but also that he was unable to work." *Holocker v. Ill. Workers' Comp. Comm'n*, 2017 IL App (3d) 160363WC, ¶ 34. As with the previous issue, the parties' dispute regarding TTD centers on whether Petitioner is entitled to any benefits at all or whether his condition is not work-related. Because the Commission finds that it was, Petitioner is entitled to TTD benefits for the time the injury left him was unable to work. The evidence shows that Petitioner missed work from February 13, 2013, through February 19, 2013 (5 days), then again from the date of his surgery on August 14, 2013, through November 4, 2013 (11 weeks, 6 days). In total, then, Petitioner is entitled to 12 4/7 weeks of TTD, at a rate of $384.07 per week, a figure that represents the equivalent of 66 2/3% of his $576.10 average weekly wage. See 820 ILCS 305/8(b).

The final issue in this case is the extent to which Petitioner is entitled to PPD. The accident at issue occurred on February 13, 2013. Effective September 1, 2011, section 8.1b of the Act requires that the Commission base its determination of permanent partial disability on five factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. The Act states that "... [n]o single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." 820 ILCS 305/8.1b(b). The relevance and weight of each of the factors is explored below.

The first factor receives no weight, because there was no impairment rating in this case. The second factor, the occupation of the injured employee, weighs strongly in Respondent's favor. Petitioner was a chef and was able to return to work without restrictions. Likewise, Petitioner's age—he was 60 years old at the time of his fall—weighs in Respondent's favor. On the fourth factor, there was no evidence that Petitioner will suffer decreased earning capacity as a result of his injury; the Commission therefore accords this factor significant weight in Petitioner's favor. The fifth factor, however, weighs strongly in Petitioner's favor. Petitioner's disability is well corroborated by treating medical records, which include a post-operative diagnosis of a left rotator cuff tear.

The determination of permanent partial loss of use of a member is not capable of a mathematically precise determination, and estimation of partial loss is peculiarly the function of the Commission. *Steak 'N Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC (citing *Pemble v. Industrial Commission*, 181 Ill.App.3d 409, 417 (1989)). In all, Petitioner's injury has left him with continued back, hip, and shoulder pain, and an inability to raise his left arm. In light of the statutory factors, the Commission finds that Petitioner is permanently disabled to the extent of 12.5% of his person as a whole. That percentage triggers benefits in the amount of 60% of his average weekly wage (see 820 ILCS 305/8(b)2.1) for 12.5% of 500 weeks (see 820 ILCS 305/8(d)2), or, in this case, $345.66 per week for a period of 62.5 weeks.

Conclusion

The Commission finds:

- On February 13, 2013, Respondent was operating under and subject to the provisions of the Act.
- On that date, an employer-employee relationship did exist between Petitioner and Respondent.
- On that date, Petitioner did sustain an accident that arose out of and in the course of his employment with Respondent.
- Timely notice of the 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 $29,957.20; the average weekly wage

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was $576.10.

- At the time of the injury, Petitioner was 60 years of age, married with no children under 18 years of age.
- 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.
- Respondent shall pay Petitioner TTD benefits of $384.07 per week for 12 4/7 weeks, for the periods covering February 13, 2013, through February 19, 2013, and August 14, 2013, through November 4, 2013.
- Respondent shall pay Petitioner PPD benefits of $345.66 per week for a period of 62.5 weeks.
- Respondent shall pay all reasonable and necessary medical expenses as described by Dr. Marra.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 1/4/16 is reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner TTD benefits of $384.07 per week for 12 4/7 weeks.

IT IS FUTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner PPD benefits of $345.66 per week for 62.5 weeks.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all reasonable and necessary medical expenses.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,900.00. 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.

NOV 9 - 2017

DATED:
o:9/27/2017
TJT/knc
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would affirm and adopt Arbitrator Williams' well-reasoned decision.

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Barnes,
Petitioner,

vs.

No: 12 WC 44202

Parsec,
Respondent.

17IWCC0718

DECISION AND OPINION ON REMAND

This case now comes before the Commission on remand from the Circuit Court of Will County. Briefly, this claim originally proceeded to hearing pursuant to Sections 19(b) and 8(a) before Arbitrator Barbara Flores on July 27 and August 14, 2015. At hearing, the parties disputed the causal relationship between the original injury and the claimant's current complaints and condition of ill-being, the proper duration of temporary total disability benefits (TTD), liability for incurred medical treatment, liability and the need for future medical treatment, and the proper Average Weekly Wage (AWW) pursuant to Section 10 of the Act.

Arbitrator Flores, in a decision filed on October 26, 2015, concluded the claimant had proven an AWW of $651.07, including the claimant's wages for the respondent as well as income earned at a part-time job for NRJM, Inc. (a Domino's pizza franchise). She further determined that the claimant had demonstrated a causal relationship between the original injury and his current condition of ill-being to the right shoulder, right elbow, and lumbar spine, which required further medical treatment, specifically right shoulder surgery and right elbow injections as prescribed by Dr. Urbanowsky and lumbar spine surgery as prescribed by Dr. Templin. She also assessed incurred medical benefits and awarded 73 & 6/7 weeks of TTD, from November 15, 2012 through April 15, 2014. It was noted that, as this award was made pursuant to Sections 19(b) and 8(a) of the Act, it would not serve as a barrier to a further hearing for additional medical and/or disability benefits.

Respondent timely petitioned this matter for review regarding the above issues. The Commission determined that the claimant had not proven that he had adequately made his employer aware of contemporaneous outside employment, and therefore concurrent wages would not apply to the AWW calculation under Section 10. As such, the Commission found the claimant's proper AWW to be $540.00, and modified the benefit rates accordingly.

Regarding causal relationship and the prospective and incurred medical costs, the Commission affirmed the Arbitrator as to causal connection to the right shoulder and right elbow, as well as the prescribed prospective treatment therefore. However, regarding the lumbar spine, the Commission reversed the Arbitrator and found that the lumbar spine had achieved maximum medical improvement in February 2013 and further medical care for the lumbar spine, including the prescribed surgery, was not causally related to the accident at issue herein.

Relative to TTD, the Commission affirmed the Arbitrator as to the dates of disability, but modified the benefit rate pursuant to the above-noted findings as to AWW.

Following the issuance of the Commission decision, the claimant timely appealed this matter to the Circuit Court of Will County. In a decision dated October 18, 2017, the Circuit Court noted the case's procedural history and confirmed the Commission's decision regarding all issues save the AWW calculation, where the Circuit Court reversed the Commission. The Court remanded the claim with instructions, specifically that the Commission "enter an order finding that the Plaintiff was concurrently employed at the time of his work related accident and that his average weekly wage was $746.41 per week."

The Commission observes the recent Appellate Court case of *Bagwell v Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160407WC; 2017 Ill. App. LEXIS 567, where the Court noted that a claimant's outside wages were excluded from the AWW calculation because the employer knew of the claimant's outside activities as a pastor but did not know that those activities constituted gainful employment. In this case, the respondent-employer's only knowledge of the claimant's external job activities came before the claimant ever began working for the respondent. We do not believe it would be reasonable to infer, without supporting evidence, that an employer hiring someone for full-time employment would conclude that the hiree would continue working for their pre-employment employer after their new job began.

Regardless, the Commission further notes the holding in *Terry Noonan v Illinois Workers' Compensation Commission*, 2016 IL App (1st) 152300WC. "Where a cause is remanded by a court of review to a lower court with directions to enter a certain order or decree, the latter court has no discretion but to enter the decree as directed." *Id.*, internally citing *Northwestern University, v. Industrial Comm'n*, 409 Ill. 216, 219, 99 N.E.2d 18, 20 (1951) and *People ex rel. Campo v. Matchett*, 394 Ill. 464, 469, 68 N.E.2d 747, 749 (1946). Accordingly, while the Commission is unconvinced that the respondent-employer had any actual knowledge of the claimant's ongoing outside employment once he began working for the respondent, the Commission finds that the claimant demonstrated concurrent employment and that the proper AWW calculation would be $746.41, as ordered by the Circuit Court. Utilizing this AWW, the resultant TTD rate would be $497.61. All other findings were confirmed by the Circuit Court.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Commission modifying in part and affirming in part the Decision of the Arbitrator filed October 26, 2015, is hereby modified as stated herein and otherwise affirmed and adopted.

17IWCC0718

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's average weekly wage is modified to be $746.41.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified, and that Respondent pay Petitioner the sum of $497.61 per week, commencing November 15, 2012 through April 15, 2014, totaling 73-6/7 weeks, that being the period of temporary total incapacity from work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that with regard to Petitioner's low back injuries, Respondent shall pay Petitioner only the reasonable and necessary medical expenses through his date of MMI, February 28, 2013, pursuant to §8(a) and §8.2 of the Act. The award of prospective lumbar surgery expressed in the Arbitrator's award is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the respondent shall pay for the prospective right shoulder arthroscopic surgery and right elbow PRP injections, as recommended by Dr. Urbanosky, subject to the limits of Sections 8.2 and 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, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980), but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $45,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 9 – 2017

Joshua D. Luskin

o-11/01/17
jdl/mcp
68

L. Elizabeth Coppoletti

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

Patricia Thompson-Taylor,
Petitioner,
vs.

NO: 16WC 14103

United Cerebral Palsy Seguin,
Respondent,

17IWCC0719

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, 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 4, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: NOV 14 2017

Charles J. DeVriendt

Joshua D. Luskin

Kevin W. Lamborn

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

THOMPSON-TAYLOR, PATRICIA
Employee/Petitioner

Case# **16WC014103**

UNITED CEREBAL PALSY SEGUIN
Employer/Respondent

17IWCC0719

On 5/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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

2461 NYHAN BAMBRICK KINZIE & LOWRY
GARY J WALLACE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

17IWCC0719

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)

PATRICIA THOMPSON-TAYLOR,
Employee/Petitioner

Case # **16 WC 14103**

v.

UNITED CEREBRAL PALSY SEGUIN,
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 **GARY GALE**, Arbitrator of the Commission, in the city of **CHICAGO**, on **January 12, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, 4/19/2016, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $19,476.08; the average weekly wage was $374.54.

On the date of accident, Petitioner was 43 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 $6,006.00. for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $6,006.00.

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

ORDER

TTD
Petitioner's claim for TTD beyond 9/21/2016 is denied as Petitioner's current condition of ill-being is not causally related to the accident date of 4/19/2016.

Medical Benefits
Petitioner's claim of medical benefits in Petitioner's Exhibits 1 through 5 is denied as the medical treatment rendered is not causally related to the accident of 4/19/2016.

Prospective Medical
Petitioner's claim for prospective medical treatment is denied as Petitioner's current condition of ill-being is not causally related to the accident of 4/19/2016.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 4, 2017
Date

ICArbDec19(b

MAY 4 - 2017

17IWCC0719

PATRICIA THOMPSON-TAYLOR,
Employee/Petitioner

Case # **16 WC 14103**

v.

UNITED CEREBAL PALSY SEGUIN
Employer/Respondent

FINDINGS OF FACT

This case was tried before Arbitrator Gale under Section 19b on January 12, 2017. As Arbitrator Gale is no longer an Arbitrator, this case has been reassigned to Arbitrator David Kane. By agreement of the parties, Arbitrator Kane will render a Decision under Section 19b based on his review of the transcript.

On April 19, 2016, Petitioner was employed by the Respondent. Petitioner testified that her duties were to pass out medication and maintain charts. The Petitioner sat down at a table to complete her paperwork when her chair collapsed. The Petitioner fell backwards striking her head and falling on her lower back. The Petitioner testified that she had pain in her head, neck, lower back and both legs. The Arbitrator notes that the parties stipulate to the issue of accident.

The Petitioner's initial medical treatment was at the Clearing Clinic and then subsequently with the Illinois Orthopedic Network. (PX 1). The Petitioner was treated by Dr. Murtaza beginning April 27, 2016. The Petitioner underwent a course of physical therapy and medication. An MRI of June 10, 2016 revealed a possible L5-S1 disc herniation. Subsequent to the MRI, the Petitioner underwent a series of epidural injections.

The Petitioner continued under the care of the Illinois Orthopedic Network. The Petitioner began seeing Dr. Jeffrey Dixon on July 25, 2016. Dr. Dixon ordered an

EMG. According to Dr. Dixon, the EMG indicated possible L5 radiculopathy. Thereafter, Dr. Dixon recommended a microdiscectomy at L4-L5 and L5-S1.

At the request of the Respondent, Petitioner was evaluated by orthopedic surgeon, Dr. Wellington Hsu. The Arbitrator notes that Dr. Hsu is on the faculty of Northwestern University, Department of Orthopedic Surgery. Dr. Hsu issued his first report on September 16, 2016. (RX 1). The Arbitrator notes that Dr. Hsu examined the Petitioner and evaluated the medical records to date. Following his examination and review of medical records, Dr. Hsu concluded that the MRI indicated degenerative disc disease at L3-4 and L5-S1. There was no evidence of any instability or formal stenosis. There was no evidence of any acute disc herniation. Accordingly, Dr. Hsu concluded the Petitioner had suffered a lumbar strain (resolved), a cervical strain (resolved), and lumbar spondylosis. It was Dr. Hsu's further opinion that the Petitioner's current condition of ill-being was not related to the incident of April 19, 2016. Dr. Hsu concluded that the incident of April 19, 2016 had caused nothing more than a cervical and lumbar strain. Dr. Hsu further stated that based on the MRI evaluation, there was no objective evidence that the Petitioner sustained any structural injury to her lumbar spine as a result of that injury. Moreover, Dr. Hsu concluded that the Petitioner's subjective complaints of lower back pain were not supported by the objective examination findings. Dr. Hsu felt that the Petitioner was not a surgical candidate as a result of her accident of April 19, 2016. Finally, Dr. Hsu concluded that the Petitioner had reached maximum medical improvement as of the date of the IME. Dr. Hsu did not feel any further medical treatment was warranted as a result of the injury of April 19, 2016 based upon his examination and review of medical records.

On October 3, 2016, Dr. Dixon authored a response to Dr. Hsu's findings. (PX 1). Dr. Hsu indicates that his surgical recommendation was based, in part, on an EMG study which he claims was suggestive of subacute and chronic radiculopathy. Dr.

Dixon again reiterated his recommendation for an L4-L5 and L5-S1 micro lumbar decompression and discectomy.

Dr. Dixon's report was then forwarded to Dr. Hsu for further opinion. Dr. Hsu issued a supplemental report on October 20, 2016 (RX 2). After re-reviewing the his original findings and Dr. Dixon's report, Dr. Hsu again concluded that the Petitioner had suffered a lumbar strain, resolved, lumbar cervical strain, resolved, and lumbar spondylosis. Dr. Hsu specifically commented on Dr. Dixon's recommendation based on the EMG. Dr. Hsu opined that the evidence based literature demonstrates that the reliability of an EMG and NCV test as a positive indicator for surgical treatment is very poor. Dr. Hsu would not place any voracity in the EMG findings with regard to his surgical recommendation. Dr. Hsu concluded that since there was no evidence of central or foraminal stenosis that the surgery as recommended by Dr. Dixon was not medically indicated. Again, Dr. Hsu concluded that the Petitioner had reached MMI as a result of her injury of April 19, 2016 following his examination in September, 2016.

The Petitioner testified that she continues in physical therapy and takes prescription medication. The Arbitrator notes that the Petitioner did apply for unemployment benefits indicating that she was ready, willing and able to work. The Petitioner was awarded those benefits (RX 3) for the period of time of November 20, 2016 through December 3, 2016. The Petitioner also testified that she attempted to return to school.

CONCLUSIONS OF LAW

F) Causal Connection

The Arbitrator notes that the issue of causal connection rests on the opinions of Dr. Dixon and Dr. Hsu. The Arbitrator finds that the opinion of Dr. Hsu is more credible. Dr. Hsu is on the staff of the Fienberg School of Medicine, Department of

Orthopedic Surgery, Northwestern University. Dr. Hsu had the opportunity to review all medical records and examine the Petitioner. Dr. Hsu also was able to review the opinion of Dr. Dixon. The Arbitrator finds credible Dr. Hsu's discount of the EMG findings as stated in Dr. Hsu's October 20, 2016 report. (RX 2). The Arbitrator also notes Dr. Hsu's findings that the Petitioner suffered from mild degenerative disc disease. Dr. Hsu further found that there was no evidence of central or foraminal stenosis. Accordingly, Dr. Hsu's opinion with regard to the Petitioner's condition of ill-being is well reasoned. Accordingly, the Arbitrator finds that Dr. Hsu's opinion is more credible than that of Dr. Dixon's. Therefore, the Arbitrator finds that the Petitioner's current condition of ill-being is not related to the April 19, 2016 accident.

J) Medical Expenses

Based upon the Arbitrator's conclusion that the Petitioner's current condition of ill-being is not related to the original accident, the medical bills contained in Petitioner's Exhibits 1 through 5 are hereby denied. All medical treatment indicated in those medical bills was incurred after September 21, 2016. Medical bills submitted by Petitioner in Exhibits 1 through 5 are hereby denied.

L) Temporary Total Disability Benefits

Based upon the Arbitrator's findings of no causal relationship between the Petitioner's current condition of ill-being and her accident of April 19, 2016, temporary total disability benefits beyond September 21, 2016 are hereby denied. The Arbitrator notes that the Respondent did pay temporary total disability benefits from April 28, 2016 through and including September 21, 2016 for a period of 21 weeks. Based on the findings of Dr. Hsu that the Petitioner had reached maximum medical improvement, no further TTD is awarded.

O) Prospective Medical Treatment

Based on the Arbitrator's findings that the Petitioner's current condition of ill-being is not related to the injury of April 19, 2016, prospective medical as prescribed by Dr. Dixon is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Harry Pinkerton,
Petitioner,

vs. No. 08 WC 45139

Springfield Coal Company,
Respondent.

17IWCC0720

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, causal connection, permanent disability, and legal and evidentiary error under Sections 1(d) to 1(f) of the Occupational Diseases Act, and being advised of the facts and law, affirms the Decision of the Arbitrator attached hereto and made a part hereof, as stated below.

Petitioner, a coal miner for 28 years, alleges he sustained coal workers' pneumoconiosis ("CWP") and other lung diseases as a result of exposure to coal dust, fumes and smoke during his coal mining employment, on and before his last day in the mines on January 11, 2008. Then, Petitioner voluntarily retired because his pension was "locked in," and because he did not want to wind up with a persistent cough and breathing problems like some other miners. Within weeks of retiring from the coal mine, Petitioner began another full-time job as a truck driver, which he worked for six and a half years. He currently works as a part-time driver for another company.

Petitioner presented the deposition testimony of Dr. Glennon Paul, MD, who opined that as a result of his exposures, Petitioner suffers from CWP, obstructive and restrictive lung disease, hyperreactive airway disease, asthma, chronic bronchitis, and possibly, emphysema and COPD. Petitioner also offered written reports of Dr. Henry Smith, DO, who read Petitioner's August 19, 2008 and October 13, 2011 chest x-rays, and also chest CT scans from July 12, 2010 and February 8, 2013. Dr. Smith reported finding evidence of CWP on each of those studies.

Respondent presented the deposition testimony of Christopher Meyer, MD, and Jeffrey Selby, MD, both of whom reviewed Petitioner's radiographic studies and opined those studies showed no evidence of CWP. Dr. Selby also examined Petitioner twice, and opined Petitioner did not suffer from any respiratory or pulmonary abnormality as a result of coal mine dust inhalation, including bronchitis, asthma or emphysema. Dr. Selby found Petitioner had the respiratory and pulmonary capacity to perform any and all of his previous coal mine duties.

The Commission has considered all of Petitioner's numerous claims of Arbitrator error, and while some have merit,[1] it nonetheless agrees with the Arbitrator that the opinions of Drs. Meyer and Selby are more persuasive than those of Petitioner's experts.

Dr. Selby is board certified in internal medicine and pulmonary diseases and has been a certified B-reader since 1985. At his Section 12 examinations of Petitioner, Dr. Smith documented Petitioner's obesity (240 lbs.) and his 30-40 pack-year history of cigarette smoking. He found Petitioner's spirometry, lung volumes, diffusions and post-treadmill peak arterial blood gasses to all be normal; the latter showed no objective respiratory cause for Petitioner's claimed shortness of breath. Dr. Selby's review of Petitioner's October 13, 2011 high-resolution chest CT confirmed the finding of Dr. Anthony Perkins, MD, the board-certified radiologist who initially read it and found no evidence of CWP. The Commission disagrees with Petitioner that Dr. Selby's logic is "faulty," and his reasoning "inconsistent," because he acknowledged the possibility that Petitioner could have CWP even with a negative x-ray. Physicians often rely upon and base their opinions on tests which are not 100% accurate. Dr. Selby found no evidence of emphysema either on Petitioner's x-rays, other pulmonary tests, or at his two physical examinations. Dr. Selby's admission that a pathological exam of tissue could show emphysema not visible on an x-ray, does not constitute proof that Petitioner more likely than not suffered from that condition.

Of the experts who testified in this case, Dr. Meyer is the most credentialed in the field of radiology, having devoted most of his career to cardiothoracic imaging. Not only is he a B-reader, but he is board certified in radiology, and he has served on the board of examiners for the Academy of Radiology. He testified he reads an average of 200 to 250 chest x-rays per week; 10 to 15 times as many as Dr. Paul. He also does 160-200 B-readings per month.

Dr. Paul, Petitioner's deposed expert, is neither a certified B-reader nor board-certified in radiology or pulmonary disease. He reads only 15-20 chest x-rays per week. Although he testified that one of Petitioner's x-rays evidenced CWP, he did not know the date of that x-ray; he did not give it a profusion rating, and he mischaracterized an opacity on it as, "coal," when asked to describe it. Despite documentary evidence in the record, Dr. Paul denied giving prior sworn testimony, on three other occasions, that he had received approximately 250 patient referrals from Petitioner's counsel in a five-year period.

---

[1] For example, the Commission agrees with Petitioner that that the findings on his x-rays taken prior to the two-year period commencing with his last date of exposure, are irrelevant in proving whether he became disabled by occupational disease *during* that period; the NIOSH B-readers' interpretations do not prove, *per se*, that Dr. Selby's and Dr. Meyer's opinions are more credible than Petitioner's experts' opinions, and Dr. Paul's opinions in his initial report are not less credible because he did not review Petitioner's prior medical records before writing it. And even if the majority of B-readers who found Petitioner did not have CWP was not an "overwhelming majority," as reported by the Arbitrator, given the other evidence of record, the Commission does not find that and other findings in the Arbitration Decision to be grounds for reversal.

17IWCC0720

Dr. Smith is a board-certified radiologist and a certified B-reader; however, he was not deposed nor subject to cross-examination in this case, as were the other experts.

Lastly, the Commission finds Petitioner has not proven he suffered impairment or disability from earning full wages as a coal miner within the two years following his last exposure on 1/11/08. Section 1(e) of the Occupational Diseases Act describes, "disablement" as: "an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment; and 'disability' means the state of being so incapacitated."

The record shows Petitioner voluntarily quit his mining job for reasons other than any doctors' orders. He found a full-time replacement job three weeks later. He worked in that capacity for over six years. Dr. Selby opined that following his exam, Petitioner had the respiratory and pulmonary capacity to perform any and all of his previous coal mine duties.

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as noted above, the Arbitrator's Decision filed on November 20, 2015 is hereby affirmed and adopted.

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

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: NOV 16 2017

o-10/04/17
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PINKERTON, HARRY
Employee/Petitioner

Case# **08WC045139**

17IWCC0720

SPRINGFIELD COAL COMPANY
Employer/Respondent

On 11/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.33% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

HARRY PINKERTON
Employee/Petitioner

v.

SPRINGFIELD COAL COMPANY
Employer/Respondent

Case # **08** WC **45139**

Consolidated cases: **n/a**

17IWCC0720

An *Application for Adjustment 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 **Springfield**, on **September 29, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ 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 **Disease/exposure, causation, Sections 1(d)-(f) and 19(d) of the Occupational Diseases Act, average weekly wage**

FINDINGS

On **January 11, 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 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 **$N/A**; the average weekly wage was **$N/A**.

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

Petitioner did not claim that Respondent was liable for any unpaid medical bills.

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 he suffers from coal workers' pneumoconiosis, chronic obstructive pulmonary disease, emphysema, asthma or bronchitis that arose out of and in the course of the exposures of his coal mine employment, and that his current condition of ill-being is casually related to his employment. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

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

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

Melinda M. Pace-Sullivan

Signature of Arbitrator

11/19/15

Date

NOV 20 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Harry Pinkerton
Employee/Petitioner

Case # 08 WC 45139

17IWCC0720

v.

Consolidated cases: N/A

Springfield Coal Company
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified at the time of arbitration that he was 66 years of age and lived in Litchfield. He did not graduate from high school but received his GED. He had 28 ½ years union time and pension time of 22 years, and all but five months of that time had been spent underground.

Petitioner testified in addition to coal dust, he was exposed to silica or rock dust, roof bolting glue fumes, diesel fumes, and smoke from coal fires. The last day that he worked in the coal mine was January 6, 2008 in the Freeman Crown III mine, and his job classification on that date was that of underground repairman. He retired from the mine, but the mine was worked for six more years and was not shut down at that time.

Petitioner testified after the coal mine, he drove a truck for six and one half years for Earl L. Henderson Trucking in Salem. His average income was between $40,000-43,000 per year for the timeframe of 2008 through 2014. He then began working for Roby Farm & Sales, which is where he currently works and earns $15.00/hour in his seasonal job for which he works 7-8 months per year. He earns approximately $16,000-18,000 per year as a truck driver delivering grain bins to job sites. He is not directly exposed to any of the grain dust.

Petitioner testified he worked for Monterey Coal from 1979 to 1981, and that when he left he was a miner operator but before that he was a repairman. When he left Monterey he went directly to Freeman in November of 1981, where he worked until 1982 as an underground repairman. In 1982 he was laid off for approximately one and a half years, after which he returned to Freeman and worked as a repairman. He was laid off again approximately three years later, during which time he worked in a small factory as a forklift operator. He returned to Freeman in 1993 after he went to school to get his CDL. He worked for Freeman from 1993 to 2008. Petitioner testified for the first two months he was a conveyor belt repairman, after which he returned to the repair classification for the remainder of his work.

Petitioner testified he repaired and overhauled mining equipment, which included taking the machines apart and putting them back together as well as servicing and maintaining the machines. He would get the belt drives which were always dusty, and there was dust from the miners and machines

working around him. When he was diagnosed with black lung he stayed away from the diesel equipment as much as he could.

Petitioner testified that he received a letter from MSHA in 2005, and that he continued to work another 3 years or so. He started noticing breathing problems in 2004, and he noticed that when he was walking or doing something strenuous he was starting to get short of breath pretty quickly. From the first time he noticed his breathing problems to the time he left the mine his symptoms had gotten worse, and from the time he left the mine until the time of arbitration his symptoms had also gotten worse. He can walk on level ground at a normal pace before becoming short of breath for approximately a half mile, and he does not typically climb stairs but believed he could climb perhaps two flights of stairs before having to stop and rest.

Petitioner testified he is not currently on any breathing medications because he is unable to afford them. His breathing problems cause difficulty with walking, he does not pick up anything very heavy, and if he does anything strenuous for any amount of time he notices that he becomes short of breath. He used to have a passion for pheasant, rabbit and deer hunting, but had to walk far to do that so he just quit. He used to ride his bike with his eldest grandsons but gave that up as well because he no longer has the stamina.

Petitioner testified that his treating physician is Dr. Epplin, and he talked to Dr. Epplin about his breathing problems and made him aware that he worked in the coal mine. He quit smoking 31 years ago this past June, and prior to then he had smoked 16-17 years. He had been averaging two packs per day when he quit. He takes medications for his high blood pressure and diabetes, and he also takes medication for his cholesterol imbalance. When asked if he were offered a job in the coal mine today would he take it, he testified that he would not take the job due to his health.

With respect to Petitioner's Exhibit 10, the Bituminous Wage Agreement, Petitioner testified that he was a Grade 5 and that as of January 1, 2015, he would be earning $29.41 and a half cents per hour. He had no reason to dispute if the records showed that his last day at the mine was January 11, 2008.

On cross-examination, Petitioner admitted that he worked at Crown III and that the mine was now closed. With respect to the Bituminous Wage Agreement (PX 10), he admitted that the signatory coal company to that agreement no longer exists and there is no employment with that coal mine anymore.

On cross-examination, Petitioner admitted that during his years of mining from time to time he would undergo screening by NIOSH for black lung in the form of a chest x-ray, and he would then receive a letter telling him what the chest x-ray revealed. He admitted that he received a dust letter after a chest x-ray had been taken for screening purposes by NIOSH on July 25, 2005. He admitted that he continued to work for the mine after receiving his dust letter in November of 2005 until the point at which he quit. He admitted that he underwent a subsequent NIOSH black lung screening chest x-ray but could not recall the date on which it was performed. He admitted that after he had his last x-ray by NIOSH he received a letter regarding what the film revealed, but he did not bring that letter with him to the arbitration hearing.

On cross-examination, Petitioner admitted that when he left the mine on January 11, 2008, he signed a resignation from the mine and that the resignation severed all rights of recall to any of the

company's mines. He admitted that Dr. Epplin had performed Department of Transportation physical examinations for the purpose of his obtaining his CDL license on both December 18, 2009 and March 12, 2010, but his employer would not accept them so he had to go to their doctor. He admitted that he was honest with Dr. Epplin in sharing with him any physical problems he was having. He admitted that his attorney sent him to see Dr. Tazbaz in Carbondale, Dr. Paul and June Blaine who performed the vocational assessment. He further admitted that he was seen by Dr. Tazbaz only one time, and that he saw Dr. Paul only one time as well.

On cross-examination, Petitioner admitted that he was taking at the time of arbitration Metformin, Glipizide, Lostantin and Lisinopril which he testified were not expensive. He testified that the Metformin was for diabetes, that the Glipizide was for diabetes, that the Lisinopril was for hypertension and that the Lostantin was for his cholesterol imbalance.

With respect to Petitioner's Exhibit 8 pertaining to his W-2 from Springfield Coal for 2007, Petitioner agreed that his gross wages that were reflected would include his overtime wages and that he was not sure whether it included his clothing allowance. He admitted that he has been receiving Social Security since September of 2014, and that he is receiving the old age benefit as opposed to the disability benefit.

The deposition transcript of Dr. Glennon Paul was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. He is the medical director of St. John's respiratory therapy and clinical assistant professor of medicine at SIU School of Medicine. He performs and reads chest x-rays and pulmonary function tests on a regular basis. He testified that in his practice he has had occasion to treat coal miners for coal mine-induced lung disease and has examined coal miners for federal coal workers' pneumoconiosis claims as well as state coal workers' pneumoconiosis claims. His board certification is in allergy, immunology and asthma. (PX1).

With respect to the report that he prepared, Dr. Paul testified that it was his understanding that Petitioner had 28 years of coal mining, and that except for seven months in the prep plant, all of the 28 years were underground. Dr. Paul attributed Petitioner's coughing attacks to bronchitis and asthma attacks, and testified that Petitioner's smoking history could be significant in that he had smoked one and a half packs per day for 12 years which could cause bronchitis and emphysema. Dr. Paul testified that Petitioner reported that he quit smoking 19 years ago, and that on physical examination Petitioner had mild wheezing and rhonchi on auscultation of the lungs which he attributed to Petitioner's COPD and asthma. (PX1).

With respect to Petitioner's pulmonary function test results, Dr. Paul testified that Petitioner had restrictive lung disease with a decreased carbon monoxide diffusing capacity and mild obstruction. Petitioner had a positive methacholine stimulation test which confirmed the presence of hyperreactive airways disease, and Petitioner improved after bronchodilators which again confirmed the presence of hyperreactive airway disease or asthma and/or bronchitis. (PX1).

Dr. Paul testified that he was of the opinion that Petitioner has coal workers' pneumoconiosis, which was caused by the coal dust environment (which included all the other exposures that one can find in a coal mine) and dust exposure. He was also of the opinion that Petitioner has asthma, which he believed was caused by coal dust inhalation and the coal mine environment. Dr. Paul testified that in the

pulmonary function testing he found both obstructive and restrictive lung disease, and he attributed the obstructive lung disease to COPD and asthma. (PX1).

With respect to Petitioner's restrictive disease, Dr. Paul testified that he attributed it to coal dust and the coal mine environment. He testified that Petitioner has a decreased diffusing capacity, which he attributed to Petitioner's coal workers pneumoconiosis and/or his emphysema. He was of the opinion that Petitioner also has emphysema, which he believed was caused by coal dust and the coal mine environment. Dr. Paul also opined that Petitioner had chronic bronchitis and COPD, which he believed was caused by coal dust and the coal mine environment. He testified that Petitioner's past history of cigarette smoking could have played a part in his chronic bronchitis, emphysema, COPD and obstructive lung disease. He also testified that Petitioner was not that heavy of a smoker and that it may have had an influence whether Petitioner formed bronchitis, but probably did not in and of itself do it. (PX1).

Dr. Paul testified that in light of his diagnosis of coal workers' pneumoconiosis, Petitioner could not have any further exposure to the environment of a coal mine without endangering his health, which would also be the same for Petitioner's asthma, emphysema, chronic bronchitis and COPD conditions. He testified that it would be sufficient to diagnose coal workers' pneumoconiosis from a positive x-ray assuming a sufficient history of coal mine exposure, but that a negative x-ray for pneumoconiosis was not sufficient to rule it out because Petitioner could still have it in the lungs. (PX1).

Dr. Paul testified that Petitioner had clinically significant pulmonary impairment based on his symptoms, complaints and examination of the chest, which he believed was caused by coal dust and the coal mine environment although he also testified that Petitioner's cigarette smoking could possibly have played a part. He further testified that Petitioner has radiographically apparent pulmonary impairment, which he opined was caused by coal dust. He testified that radiographically apparent pulmonary impairment was present given the abnormalities seen on x-ray, and that Petitioner has physiologically significant pulmonary impairment as demonstrated on pulmonary function testing as well. He was of the opinion that Petitioner was medically precluded from working as a coal miner on a permanent basis, and that Petitioner could not work beyond a light level. (PX1).

When asked to assume that Petitioner left the coal mine in 2008, Dr. Paul testified that he was of the opinion that Petitioner's coal workers' pneumoconiosis was present to some degree when Petitioner left the mine. He further opined that based on the nature of the other diseases of emphysema, COPD, chronic bronchitis and asthma and the severity of such conditions when he examined Petitioner, he was of the opinion that such conditions would have been present at least within two years of when Petitioner left the coal mine. (PX1).

With respect to the pneumoconiosis condition, Dr. Paul agreed that in order to have pneumoconiosis you must have in addition to coal mine dust deposited in the lungs a tissue reaction to it called scarring or fibrosis. He testified that the scarring of coal worker's pneumoconiosis could not perform the function of normal healthy lung tissue. He agreed that, by definition, if you have coal workers' pneumoconiosis, it is true that you necessarily have some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. He further testified that spirometry measures global impairment of the lung, and that it is possible to have injury or disease in the lung despite having normal pulmonary function test results. He testified that a person can have shortness of breath despite having pulmonary function tests within the range of normal, and that a person can have a

lobe of a lung surgically removed and still have pulmonary function tests within the range of normal. He further testified that the range of normal represents a bell-shaped curve, that the bell-shaped curve covers 95 percent of the population in terms of age, height, race and sex, and that two and a half percent of the population would be lower than the range of normal and two and a half percent would be above. (PX1).

Dr. Paul testified that in addition to talking about a range of normal there is also a predicted normal value for each test for the person, and that it is possible that a patient could well be below that predicted normal but still be within the normal range of normal. He testified that when you have pulmonary function tests and compare them to a range of normal, it does not tell you anything about what was the prior position of the specific miner. He testified that it was reasonable to have serial pulmonary function tests if one wanted to know whether or not a specific exposure had caused impairment of a miner's lungs. (PX1).

Dr. Paul agreed that it was true that pulmonary function testing would tell you the type of abnormality – whether it was obstructive or restrictive and how severe it was – but it would not tell the etiology of the condition. He testified that emphysema in any of its forms, if significant enough to cause a measurable defect, would be obstructive, and that scarring of pneumoconiosis can be both obstructive and restrictive. He agreed that a person can have coal workers' pneumoconiosis that is radiographically significant but not have shortness of breath, and that a person can have radiographically significant coal workers' pneumoconiosis and have normal pulmonary function testing, normal blood gases and a normal physical examination of the chest. (PX1).

Dr. Paul agreed that coal workers' pneumoconiosis is considered to be a progressive disease, and that with further exposure it can progress to progressive massive fibrosis or complicated pneumoconiosis which can be life-threatening. He further agreed that with further exposure it can progress and involve the heart in a condition called cor pulmonale, which is life-threatening. He testified that there is no cure for coal workers' pneumoconiosis, and that if a coal worker with the condition ends his exposure to coal mine dust, the condition can still progress. He agreed that if a person has coal workers' pneumoconiosis that is progressing, there is no way to stop that progression. He further testified that if a coal miner has coal workers' pneumoconiosis, they cannot have further exposure to coal mine dust without endangering their health as the coal exposure may increase the progression of the disease. (PX1).

Dr. Paul testified that the progression of coal workers' pneumoconiosis is usually gradual, and that it is true that when you first develop coal workers' pneumoconiosis it will come on so slowly that you may have it for some time before you recognize it. He agreed that there are exposures in the environment of a coal mine that can injure the lungs in addition to coal dust, including silica, diesel fumes, fumes from other petroleum products, smoke and fumes from sulfur coal fires, smoke and fumes from electrical cable fires, fumes from the glues used in the roof bolting process, and welding fumes. (PX1).

Dr. Paul testified that COPD is an umbrella term for a number of obstructive diseases, which include emphysema, chronic bronchitis and asthma. He testified that when you have scarring in the lungs, there is a decreased ability of the lungs to expand and open up fully. He testified that with obstructive lung disease the elasticity is gone, but some of the small airways are destroyed as that seen with cigarette-induced emphysema. He testified that as emphysema progresses, it can progress through a series of centrilobular, panlobular and bolus emphysema. He testified that bolus emphysema is

represented by spaces in the lungs or holes in the lungs of one centimeter or larger, and that obstructive lung disease can be multifactorial in origin. (PX1).

Dr. Paul testified that the inhalation of coal mine dust can result in shortness of breath, chronic cough, emphysema and chronic bronchitis, and that there are exposures in the environment of a coal mine that can result in occupational asthma and can also aggravate such conditions as emphysema, chronic bronchitis and asthma. (PX1).

Dr. Paul testified that no matter what would be found in treatment records, this would not change what was seen on x-rays nor would this change the results obtained on pulmonary function testing nor the physical examination performed. He agreed that if a person has chronic obstructive pulmonary disease or obstructive lung disease, the best medical practice would be to avoid any further exposure to those agents that could cause or aggravate it. When asked to opine how many years it takes to develop pneumoconiosis once you begin to mine as a susceptible host, Dr. Paul testified it varies from individual to individual. (PX1).

Dr. Paul admitted that he is not a B-reader, but that he has been doing examinations for coal workers' pneumoconiosis for approximately 30 years. He agreed that a CT scan has approximately one hundred times more radiation exposure than a regular analog chest x-ray, and that one of the advantages of a CT scan is that it can be programmed or adjusted to emphasize certain types of diseases that you may be looking for. (PX1).

Dr. Paul testified that if you have further exposure to coal mine dust after you have chronic bronchitis, it can be a progressive disease and that anything you inhale that is dusty can make a chronic bronchitis worse. Reactive airway disease, or asthma, is characterized by asthma attacks or certain responses to triggers in the environment. He testified that when you have a reactive airway disease, it can also be called bronchospasm. He testified that when you have a reactive airways disease, bronchospastic disease or asthma, the condition can be aggravated by the environment, the dust, smoke and fumes of a coal mine. He further testified that when a person has repeated bronchospasms or asthma attacks, there can be a medical phenomenon called remodeling in which their reactive airway disease becomes a fixed obstruction. (PX1).

Dr. Paul testified affirmatively that when a miner leaves the coal mine after 20 years or more, they will have coal mine dust that stays trapped in their lungs that they cannot get out and will remain there for the rest of their life. He agreed that the lung tissue that is next to the trapped coal mine dust will have exposure to coal mine dust for the rest of the miner's life, and that this is one of the reasons it can progress. He testified that if you read a person's x-ray as positive for coal workers' pneumoconiosis and they have enough exposures as a coal miner to cause coal workers' pneumoconiosis, this is a sufficient basis for him to make a diagnosis of coal workers' pneumoconiosis. Dr. Paul agreed that a person can have coal workers' pneumoconiosis and have a normal chest x-ray, and that this can be found on both pathology and autopsy and not show up on x-ray. (PX1).

Dr. Paul testified that when you have abnormalities such as pneumoconiosis that show up on pathology, at autopsy or biopsy, they are the same as those seen on x-ray but more diffuse, smaller lesions. He testified that the lesions will have the same ability to progress as larger lesions, and that at

their location there is an impairment in the function of the lung in the affected tissue. He opined that a negative x-ray cannot rule out the existence of coal workers' pneumoconiosis. (PX1).

On cross-examination, Dr. Paul agreed that he saw Petitioner one time at the request of Petitioner's attorney. He agreed that he has seen hundreds of individuals at Petitioner's attorney's request. He admitted that in the past he has seen as many as 50 individuals per year for Petitioner's attorney. (PX1).

On cross-examination, Dr. Paul admitted that he stated in his report that he saw Petitioner on March 15, 2013. He admitted that he saw Petitioner on only one occasion, and that he performed testing on the same day. He then subsequently clarified, indicating that he performed testing on September 28, 2012 but only saw Petitioner on one occasion. He testified that he assumed that Petitioner underwent pulmonary function testing on September 28, 2012 because that was the date on which the pulmonary function study was performed but clarified that he did not see Petitioner on that date. (PX1).

Dr. Paul admitted on cross-examination that he did not ask Petitioner whether he was taking any breathing medication, as he did not think it was relevant. He admitted that Petitioner was taking Lisinopril, an ACE inhibitor, which is associated with chronic cough. He admitted that he did not review any medical at the time that he saw Petitioner, but that later Petitioner's attorney sent him the medical records of Dr. Epplin. When asked to provide the dates of treatment records that he reviewed of Dr. Epplin, Dr. Paul indicated that he no longer had the records and had no idea when Dr. Epplin diagnosed Petitioner with coal workers' pneumoconiosis. When asked about the basis for the diagnosis by Dr. Epplin, Dr. Paul testified that he did not know and did not look at any basis. He testified, however, that he assumed that Dr. Epplin based his diagnosis on x-ray evidence, pulmonary function study evidence, and history of exposure to coal dust. (PX1).

Dr. Paul admitted on cross-examination that dyspnea on exertion can be due to causes other than respiratory disease. He testified that deconditioning may be associated with exertional dyspnea. He testified that nothing else caused Petitioner to have shortness of breath because he had coal workers' pneumoconiosis. Dr. Paul further testified on cross-examination that Petitioner's coal workers' pneumoconiosis could have caused his restrictive disease, and that it also could have been the emphysema but that was also caused by the coal dust. He testified that the fall in the forced vital capacity and the FEV1 confirmed the presence of bronchitis, emphysema, COPD, coal workers' pneumoconiosis and asthma, and that the fall in the total lung capacity and the residual volume confirmed that the patient had restrictive airways disease and coal workers' pneumoconiosis. (PX1).

On cross-examination, Dr. Paul confirmed that simple pneumoconiosis classically presents without symptoms, and that it was more likely than not to not progress once the exposure ceases. He admitted that he did not know the date of the x-ray film that he reviewed, and testified that the opacity type present was that of "coal." He admitted that he did not have anything in his file that told him what the profusion rating was for the film that he reviewed, as he "just [knows] if it was present or absent." He admitted on cross-examination that he was not an A or B reader, and that he is not certified in pulmonary disease. (PX1).

The evidence deposition transcript of June Blaine was entered into evidence at the time of arbitration as Petitioner's Exhibit 2. Ms. Blaine testified that she is a vocational rehabilitation counselor,

and has been doing so for some 34 years. She testified that she was asked to perform a vocational assessment on Petitioner at the request of Culley & Wissore. (PX2).

Ms. Blaine testified that she was asked to make two assumptions in doing the vocational assessment: that Petitioner cannot go back to coal mining and that there were no other physical limitations for Petitioner. She testified that Petitioner gave her background information including his age, height, weight, right-hand dominance, marital status, and residential living arrangements, as well as his prior work for Springfield Coal since 1981. (PX2).

Ms. Blaine testified that Petitioner reported that he did not graduate from high school but later obtained his GED. She testified that Petitioner reported that he served in the US Navy from April 1969 to May of 1972, and received an honorable discharge. She further testified that Petitioner reported that he did attend truck driver training in Granite City in the mid-1990s and obtained his Illinois Class A CDL with tanker endorsement. She also testified that Petitioner reported that he had an electrical card as well. (PX2).

With respect to Petitioner's work history, Ms. Blaine testified that Petitioner reported that he went to work for Olin in 1967, went into the military, and then returned and worked for Olin for nearly 12 years. She testified that Petitioner reported that in July of 1979 he went to work for Monterey #2 in Albers and worked in the mine, working different classifications including laborer, repairman and mine operator. She further testified that Petitioner reported that in 1981 he went to work at Freeman United in Farmersville, where he worked for over 26 years primarily repairing equipment, although he did work for a period of time in the prep plant. (PX2).

Ms. Blaine testified that Petitioner reported that he left the mine in 2008, and that he was experiencing issues with shortness of breath when he walked any distance. She testified that Petitioner also reported that he had problems when he was doing lifting. She testified that Petitioner reported that he was earning $19 per hour but was working a lot of hours, so his earnings were approximately $64,000 per year. (PX2).

Ms. Blaine testified that Petitioner reported that after leaving the mine he went to work as an over-the-road truck driver as a point-to-point driver, so he does not do any loading or unloading. She testified that Petitioner reported that he is usually out of town ten to eleven days at a time, and that he drives to various parts of the country. She further testified that Petitioner reported being paid by the mile, and he estimated his salary over the last couple of years as $36,000-$38,000 per year. (PX2).

On cross-examination, Ms. Blaine admitted that she had seen approximately 25 individuals at the request of Culley & Wissore, and that she charged $1,000 which included the meeting, report and deposition. She admitted that she was not provided any medical records to review, and that she customarily asks for an individual's Application for Adjustment of Claim, medical records and an employment/educational history from the referring attorney. She admitted that she prefers to see the medical records in order to know what physical limitations a claimant has as revealed by medical to be determine what jobs would be available for them from at least a functional standpoint. (PX2).

On cross-examination, Ms. Blaine admitted that other than Culley & Wissore, she could not remember the last time an attorney sent her a file to perform an assessment without any medical records.

She admitted that she has placed individuals in over-the-road truck driving jobs, has placed individuals in over-the-road driving jobs similar to what Petitioner is currently doing and that, generally speaking, truck drivers typically earn more than the $36,000-$38,000 reported by Petitioner. She further admitted that she did not do anything to confirm what Petitioner reported having earned at the mine nor did she confirm what Petitioner reported earning as a truck driver. (PX2).

On cross-examination, Ms. Blaine admitted that Petitioner reported that approximately three weeks after he left the mine he started working for the trucking company, and she did not know whether he applied for any other jobs. She admitted that Petitioner did not ask for any help in improving his employment status from what he has now, and that she did not get the impression that Petitioner wanted to leave the job that he was in as he was comfortable with what he was doing. (PX2).

On cross-examination, Ms. Blaine admitted that she cannot say that but for Petitioner's diagnosis of a work-related lung condition he would still be a coal miner, and that she was not aware of Petitioner's medical condition beyond what she was asked to assume and what he reported to her. She admitted that she did not know when Petitioner was first diagnosed with a work-related lung condition, and that she was not aware that the mine at which Petitioner previously worked had closed. (PX2).

The reports from Smith Radiology, Inc. were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. In a letter directed to Culley & Wissore dated September 24, 2008, Dr. Henry Smith indicated that his interpretation of Petitioner's PA and lateral chest x-rays of August 19, 2008 revealed findings consistent with coal workers' pneumoconiosis with small opacities of classification p/s, mid to lower zones involved, left greater than right, profusion 1/1; associated diffuse pleural thickening noted width/extent A/3, associated chest wall plaque face-on extent 1 in the left lung; chronic pleural thickening vs. pleural effusion blunting the left lateral and posterior costophrenic angles. (PX3).

In a letter directed to Culley & Wissore dated February 8, 2013, Dr. Smith indicated that his interpretation of Petitioner's PA chest x-rays of October 13, 2011 revealed simple coal workers' pneumoconiosis with small opacities, primary p, secondary p, upper, mid and to lower zones bilaterally, profusion 1/1; no large opacities seen; diffuse pleural thickening in-profile and face-on in the lateral left lower lung and obscured left lateral CP angle. (PX3).

In a second letter directed to Culley & Wissore dated February 8, 2013, Dr. Smith indicated that his interpretation of Petitioner's CT of the chest dated July 12, 2010 performed with and without IV contrast revealed findings consistent with simple coal workers' pneumoconiosis with small opacities, primary p, secondary p, upper, mid and lower zones bilaterally, profusion 1/1; associated chronic pleural thickening extending along the posterolateral left lower lung and old granulomatous calcifications of the right hilus and in the spleen. (PX3).

In a third letter directed to Culley& Wissore also dated February 8, 2013, Dr. Smith indicated that he received CT chest films performed at Methodist Hospital on October 13, 2011, which he reviewed in conjunction with the PA chest B-read. Dr. Smith indicated that his interpretation of Petitioner's high resolution CT chest without contract suggested simple coal workers' pneumoconiosis with small opacities, primary p, secondary p, upper, mid and lower zones bilaterally, profusion 1/1; associated diffuse pleural thickening along the lateral left lower lung with obscured lateral CP angle. (PX3).

The report of Dr. Michael Alexander was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The letter dated March 17, 2013 suggested that Dr. Alexander performed a Pneumoconiosis Chest Film Interpretation, the impression of which was that of coal workers' pneumoconiosis, category p/p, 1/1, aa, co. The corresponding Roentgenographic Interpretation referenced a date of x-ray of October 13, 2011. (PX4).

The medical records of Dr. Epplin were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner presented on March 2, 2012 for his annual exam and reported that he felt well with no complaints, had good energy and was sleeping well. Petitioner presented on October 14, 2011 for hypertension management. Petitioner was seen on February 22, 2011 for hypertension management on that date as well. (PX5).

The medical records of Dr. Epplin reflect that Petitioner was seen on June 28, 2010, at which time he was seen for a medication check and to discuss his findings on an old chest x-ray. Dr. Epplin's note suggested that the chest x-ray showed pneumoconiosis consistent with coal miner's lung, and that he recommended that Petitioner undergo a CT with and without contrast. Prior thereto, Petitioner was seen on March 12, 2010 for hypertension and follow up for his DOT physical, for which Petitioner was given a two-year clearance. (PX5).

The medical records of Dr. Epplin reflect that Petitioner was also seen on December 18, 2009 for a DOT physical examination. Petitioner's blood pressure was noted to be markedly elevated, and it was noted that he qualified for a three-month certificate. Petitioner was seen on September 14, 1998, at which time it was noted that Petitioner was feeling well and no problems were noted. Petitioner was also seen on April 21, 2000, at which time it was noted that Petitioner's blood pressure was elevated and that he felt tired and fatigued. (PX5).

The medical records of Dr. Epplin reflect that Petitioner was seen on May 30, 2000, at which time it was noted that Petitioner felt as well as he had for some time. Petitioner was seen on November 27, 2000, at which time it was noted that Petitioner's weight had increased. Petitioner was seen on June 14, 2001, at which time it was noted that Petitioner's blood pressure was satisfactory and that he felt well; it was recommended that Petitioner's chest x-ray be re-checked. Petitioner was seen on January 14, 2002, at which time it was noted that Petitioner's blood pressure had been staying high. (PX5).

The medical records of Dr. Epplin reflect that Petitioner was seen on September 16, 2002, at which time he was seen for follow up on his blood pressure medication. Petitioner noticed that when he exerted himself he was a little bit winded and felt that it was probably because of his pulse which had been running in the 40s and 50s. Petitioner was also seen on April 1, 2003, at which time it was noted that Petitioner was still "SOB" and even though he had gone down to 25 mg of his Atenolol he still had a pulse oftentimes in the 50s. Petitioner's chest x-ray from two years ago was supposed to be repeated in three months, so he was going to order another chest x-ray to make sure his "SOB" was not due to anything else. Petitioner was seen on April 24, 2003, at which time it was noted that Petitioner had not yet undergone the repeat chest x-ray, so he was given another requisition for the procedure. (PX5).

The medical records of Dr. Epplin reflect that Petitioner was seen on July 29, 2003, at which time it was noted that Petitioner felt much better on the Lisinopril than he did on the Atenolol as far as energy, that his chest was clear and that his exam was normal. Petitioner was seen on February 12, 2004, at

which time Petitioner was seen in follow up for his blood pressure. Petitioner was also seen on October 6, 2004, at which time he was seen in follow up for his hypertension and medications. (PX5).

Included within the Litchfield Family Practice records was that of a Medical Examination Report For Commercial Driver Fitness Determination dated March 2, 2012, on which Petitioner referenced that he had been diagnosed with "Black Lung" but did not indicate the onset date, treating physician's name and address, or current limitation. Petitioner also indicated that he had a "Health History" that was significant for shortness of breath. Also included within the Litchfield Family Practice records was that of ER records for a December 23, 2011 visit at St. Francis Hospital, at which time it was noted in the Respiratory History Comment that Petitioner had a diagnosis of Black Lung. (PX5).

Additionally, included within the Litchfield Family Practice records was that of the interpretive report for a CT of the chest performed on July 12, 2010. In the report, Dr. Lara Dennis noted that she was provided with a history of pneumoconiosis. The report reflects that Dr. Dennis' impression was that of no pulmonary nodules; some mild chronic pleural disease inferiorly on the left with associated mild degree of chronic atelectasis. (PX5).

Also included within the Litchfield Family Practice records was that of a Medical Examination Report For Commercial Driver Fitness Determination dated March 12, 2010, on which Petitioner referenced that he had been diagnosed with Black Lung Disease five years ago but did not indicate the treating physician's name and address or any current limitation. There was also included within a Medical Examination Report For Commercial Driver Fitness Determination dated December 18, 2009, on which Petitioner referenced that he had been diagnosed with Black Lung Disease five years ago but did not indicate the treating physician's name and address or any current limitation. (PX5).

The medical records of Southern Illinois Respiratory Disease Clinic/Dr. Tazbaz were entered into evidence at the time of arbitration as Petitioner's Exhibit 6 as well as Respondent's Exhibit 5. Petitioner was seen on a self-referral basis (although reference was made to Dr. Epplin as the referring physician) on April 16, 2010 for exposure to coal mine dust with possible coal worker's pneumoconiosis. It was noted that Petitioner worked in the coal mines and quit in 2008, and that he presented because of his coal workers' pneumoconiosis. It was noted that Petitioner coughed more when he was in the coal mines, and that he was bringing up black phlegm. Petitioner reported that his cough had eased up. Petitioner denied wheezing; indicated that he could walk about three miles more than five years ago; and indicated that he was not currently on any inhalers. (PX6/RX5).

The records of Dr. Tazbaz reflect that Petitioner had no diagnosis of asthma in the past, and that Petitioner denied nocturnal coughing, wheezing or PND. Spirometry performed suggested that Petitioner had a mild reduction in FVC with normal FEV1 with increased FEV1/FVC ratio, that Petitioner had no obstructive defect, and that a restrictive defect could not be ruled out by spirometry and should be confirmed with measurement of lung volumes if clinically indicated. Chest x-rays from August 2008 were reviewed and showed mid to lower dorsal dextro, kyphoscoliosis and spondylosis; interstitial fibrosis PS with a profusion of 1/1, more pronounced on the left than on the right; curly B septal lines on the left lower lung; thicker interlobar fissures; diffused chest wall plaque and pleural thickening seen laterally, mostly due to chronic pleural thickening; cannot rule out an effusion, cardiomegaly; x-ray repeat or CT scan is recommended. Dr. Tazbaz's impression was that of x-rays compatible with coal workers' pneumoconiosis with interstitial lung disease; pleural plaques; cardiomegaly. Petitioner was instructed

not to get exposed to coal mine dust, was given a prescription for Albuterol, and was recommended to undergo a repeat x-ray and/or CAT scan. (PX6/RX5).

A letter from the U.S. Department of Labor directed to Petitioner dated November 4, 2005 was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. According to the letter, Petitioner's chest x-rays performed on July 25, 2005 at St. Francis Hospital showed that he had enough coal workers' pneumoconiosis ("Black Lung") to be eligible for the option to work in a low dust area of the mine. (PX7).

Petitioner's W-2 for 2007 was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. Petitioner's W-2 for 2009 from Premium Enterprises, Inc. was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The Standard Hourly and Standard Daily Wages Rates was entered into evidence at the time of arbitration as Petitioner's Exhibit 10. A letter dated September 22, 2015 from Julie A. Webb with Craig & Craig, LLC directed to Bruce R. Wissore was entered into evidence at the time of arbitration as Petitioner's Exhibit 11.

The deposition transcript of Dr. Cristopher Meyer was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Meyer testified that he is a radiologist, and he is a certified B-reader. He testified that he is board-certified in radiology and has been so since 1992. He further testified that he previously served as the Chief of Thoracic Imaging at Madigan Army Medical Center in Tacoma, Washington. He testified that, as the Chief of Thoracic Imaging, he was in charge of all imaging procedures related to the chest, which included chest x-rays predominantly and CT scans, as well as some ultrasound of the chest, and all of the biopsy procedures that were done at the medical center. He further testified that he was in charge of training the Army residents in thoracic imaging and preparing them for their boards. (RX1).

Dr. Meyer testified that his average week involves review of approximately 200-250 chest x-rays in a week, and roughly depending on the business of the service, 20-40 chest CT scans. He testified that he became a B-reader in 1999. He testified that he has been asked to interpret chest x-rays and CT scans for exposures including coal workers' pneumoconiosis, silicosis and asbestosis as well as having read CT scans for obliterans bronchiolitis. (RX1).

Dr. Meyer testified that he reviewed films for Petitioner at the request of Respondent's counsel. He testified that he reviewed a PA and lateral chest x-ray from Harrisburg Medical Center dated August 19, 2008, a chest CT scan dated July 12, 2010 and another PA chest x-ray from Advanced Diagnostic Imaging dated October 13, 2011. He testified that the films were of diagnostic quality. (RX1).

Dr. Meyer testified that his interpretation of the films from August 19, 2008 revealed a left subpulmonic pleural effusion and a linear band at the left lung base, but that the lungs were otherwise clear. As to the October 2011 examination, he testified that his interpretation was that the lungs were clear and he did not see any pleural abnormality. As to the July 2010 CT, he testified his interpretation was that of some mild pleural thickening posteriorly in the left chest with an area of linear opacity suggesting post-inflammatory scarring but no findings of coal workers' pneumoconiosis. He testified that the pleural findings and the linear opacity at the left base were a result of either a prior aspiration episode or prior pneumonia with an area of scarring being left behind along the pleura and in the lung itself. He further testified that the findings had no association at all to his exposure at the mine. He testified that the

classic manifestation of coal workers' pneumoconiosis is the chest x-ray or chest CT manifestation of the coal macule, which is a small nodule typically in the center of the secondary lobule of the lung. He testified that there were no nodules in the CT he reviewed. (RX 1). When asked whether there was any difference in his findings as compared to Dr. Laura Dennis for the CT scan of July 12, 2010, Dr. Meyer testified that Dr. Dennis described no pulmonary nodules and mild chronic pleural disease inferiorly on the left with a mild degree of chronic atelectatis, which he indicated was essentially identical. (RX1).

On cross-examination, Dr. Meyer agreed that NIOSH gives standard films for the radiologist to compare with in order to grade the patient's film under the ILO system, and that there are no such standard films approved by NIOSH for B-readings for CT scans. He agreed that there are also standards set for the equipment used in the taking of analog x-rays, but there is no NIOSH-approved standard for the equipment used in CT scans nor are there any standards set by NIOSH for the equipment used to review CT scans for coal workers' pneumoconiosis. (RX1).

On cross-examination, Dr. Meyer agreed that if an x-ray was reviewed for coal workers' pneumoconiosis and there were abnormalities seen that were consistent with coal dust exposure, the abnormalities would be similar to the abnormalities seen if silicosis were the disease you were concerned with. He indicated, however, that typically coal workers' pneumoconiosis has smaller nodules that are a little less distinct while with silicosis, the nodules have a tendency to be a little larger and a bit more distinct (but the distribution is the same). He agreed that if one wanted to determine the existence of lung disease, the gold standard was pathologic review of the tissue itself rather than radiology. (RX1).

On cross examination, Dr. Meyer agreed that his assumption when asked to do a B-reading is that the worker has an appropriate exposure history to warrant having the chest x-ray, that he is looking for coal workers' pneumoconiosis, and he wants to interpret as objectively as possible. He agreed that if he had a patient history that had PFT's, blood and gases, etc., one of the problems is that this might prejudice his reading. He agreed that there can be disagreement among B-readers as to whether they think they are seeing small opacities or not, and that making the distinction between 0/1 and 1/0 opacities is one of the most difficult processes of the B-reader form. (RX1).

On cross-examination, Dr. Meyer agreed that it would be possible for a person to appreciate the existence of coal workers' pneumoconiosis by CT that he may have missed or that was not as readily apparent on a standard chest x-ray. He testified that it was his understanding that symptomatic disease should be evidence at analog chest x-ray. He agreed that entries in treatment records would not change what he saw in the x-ray, nor would pulmonary function tests. He testified that symptoms could vary by the reporting individual, and that he would treat the chest x-ray as a piece of hard data. (RX1).

On cross-examination, Dr. Meyer agreed that it was a fair statement that all long-time coal miners were going to come out with some dust deposit trapped in their lungs, but that the majority of those people would not have changes in their lungs that qualified for coal workers' pneumoconiosis. He testified that the manifestation of pneumoconiosis was based on the body's ability to clear the dust. He testified that the presence of the coal macule was the pathologic lesion that defined coal workers' pneumoconiosis. (RX1).

On cross-examination, Dr. Meyer agreed that when there was mixed dust exposure resulting in macules instead of pure coal dust, it was fair to say that there can be more toxicity to the lung tissue if

there was more silicone involved, and that as a result you can have macules of different shapes and sizes and location in the lungs. He agreed that the macule of coal workers' pneumoconiosis was a permanent abnormality. He also agreed that coal workers' pneumoconiosis could be considered a progressive disease in some coal miners and that in some coal miners, it can progress even after the coal miner leaves the exposure. (RX1).

On cross-examination, Dr. Meyer agreed that if a person has coal workers' pneumoconiosis at any time in their life, it would be true that they probably had that coal workers' pneumoconiosis at some level when they left the coal mine. He agreed that simple coal workers' pneumoconiosis can progress to a condition called progressive massive fibrosis, and that this condition can progress to significantly impair pulmonary function and progress to involve the heart in a condition called cor pulmonale which, if significant enough, can also be life-threatening. (RX1).

On cross-examination, Dr. Meyer agreed that generally you would imagine that coal workers' pneumoconiosis would appear first radiographically or pathologically and then later as it becomes more significant, it would begin to manifest itself in pulmonary function or clinical abnormalities. He agreed that the medical term for scarring in the lungs is fibrosis. He agreed that when a coal worker has coal workers' pneumoconiosis that progresses, it is true that the rate of progression would vary from miner to miner rather than be exactly the same for all miners, and that the exact shape, size and location of the macule would also vary from miner to miner. (RX1).

On cross-examination, Dr. Meyer agreed that if the Department of Labor and NIOSH had taken official positions on the cause of the developments of the fibrosis and emphysema of the coal macule, he would not have any reason to disagree with them, and that if the Department of Labor and NIOSH had taken positions regarding the cause of COPD and emphysema, he would not have any reason to disagree with them. He agreed that coal workers' pneumoconiosis at the level of 1/0, simple coal workers' pneumoconiosis, may take ten years or more to develop. (RX1).

On cross-examination, Dr. Meyer testified that he does on average approximately 160-200 B-readings per month, and that he would read 20-40 CT scans per month for the purpose of determining the presence, absence or severity of occupational lung disease. He agreed that generally he is retained by the coal company rather than the coal miner. (RX1).

On cross-examination, Dr. Meyer admitted that he took and failed the B-reader test the first time. He testified that the first time he took the test, he did not realize that there was a home study syllabus published by NIOSH, and that he just took the weekend course and did not pass the test. He testified that he later got the home study syllabus, studied the syllabus and then took the test and passed it. (RX1).

Dr. Meyer testified on cross-examination that when he looks at films for B-reading interpretation, he starts with the oldest films first and works his way forward so that he does not let the older films bias his early interpretation. He agreed that if he sees opacities consistent with pneumoconiosis, he is required to mark them on his B-reader form no matter where they are. He agreed that it was possible for a miner to have pneumoconiosis determined by pathology that was not appreciated on a radiographic study, and that it was possible that a miner who has had a split opinion on the existence of pneumoconiosis on radiographs to have pneumoconiosis found at autopsy or biopsy. (RX1).

On redirect examination, Dr. Meyer testified that simple pneumoconiosis typically will not progress once exposure ceases. He testified that Petitioner has neither progressive massive fibrosis nor cor pulmonale. He testified that there was also no evidence of bulla or hyperinflation. (RX1).

With respect to his failure to pass the B-reader exam the first time, Dr. Meyer testified on redirect examination that he flew to Washington, DC and took a day-and-a-half course and then sat for the exam not fully understanding the difficulty or the fact that there was some preparation work that should have been done ahead of time. He further testified that after not passing it the first time, he studied for it, passed in 1999 and has subsequently passed the recertification three times since then. (RX1).

The report of Dr. Meyer was attached to the deposition transcript as Exhibit B. In the report dated April 22, 2011, Dr. Meyer indicated that he review the PA-Lat chest x-rays dated August 19, 2008 from Harrisburg Medical Center, his interpretation of which was that of (1) no radiographic findings of coal workers' pneumoconiosis; (2) left pleural effusion. In his report, Dr. Meyer indicated that he also had the opportunity to review the narrative summary and B-reading form of Dr. Henry Smith, and indicated that he disagreed with Dr. Smith's interpretation. Dr. Meyer indicated in his report that pleural fluid was not a manifestation of coal dust exposure, and that there were no small opacities on the chest x-ray. Dr. Meyer further indicated that Dr. Smith's interpretation was based on the findings of pleural opacity which was consistent with a pleural effusion, and that there were multiple causes for pleural fluid but that coal dust exposure was not one of them. (RX1).

A second report dated April 22, 2011 was also attached to the deposition transcript as part of Exhibit B. In the second report, Dr. Meyer stated that he reviewed a chest CT dated July 12, 2010; his interpretation of which was that of (1) no CT findings of coal workers' pneumoconiosis; (2) mild posterior pleural thickening with linear scarring in the left lower lobe suggesting post-inflammatory etiology, and that pleural disease was not a manifestation of coal dust exposure. (RX1).

A third report of Dr. Meyer dated April 6, 2013 was also attached to the deposition transcript as Exhibit B. In the third report, Dr. Meyer indicated that he reviewed PA chest x-rays dated October 13, 2011 from Advanced Diagnostic Imaging, and that his interpretation was that of no radiographic findings of coal workers' pneumoconiosis. In his report, Dr. Meyer indicated that he also had the opportunity to review the narrative summary and B-reading form of Dr. Michael Alexander dated March 17, 2013, and indicated that he disagreed with Dr. Alexander's interpretation. Dr. Meyer indicated in his report that there were no findings of nodular opacities, and that there were no pleural plaques. (RX1).

The deposition transcript of Dr. Jeffrey Selby was entered into evidence at the time of arbitration as Respondent's Exhibit 2. Dr. Selby testified that he is a pulmonologist, and that he is board certified in internal medicine and pulmonary disease. He testified that he is a B-reader and has been so since 1985, and has been recertified on approximately seven occasions. (RX2).

With respect to evaluations, Dr. Selby testified that he performs evaluations in the occupational disease area both as asked by claimants and by third parties to determine the presence or absence of occupational lung disease, the nature and severity of it, and general chest examinations. He testified that he gets asked more frequently by employers to evaluate for coal mining exposures, but he is asked more frequently by employees in regards to asbestos exposure. (RX2).

Dr. Selby testified that he examined Petitioner at his Henderson, Kentucky office on October 13, 2011. He testified that the occupational history provided by Petitioner included Petitioner's reporting that he quit school in his senior year one month before graduation in 1967. He testified that Petitioner reported that from 1967 to 1969 he worked at Olin Corporation as a machinist, and that from 1969 to 1972 he was in the US Army as a gunner's mate. He testified that Petitioner reported that from 1972 to 1979 he returned to Olin as a machinist, and that from 1979 to 1981 he worked for Monterey Coal Company as an underground miner for three months and then a repairman. He testified that Petitioner reported that from 1981 to 2008 he worked for Freeman Coal Company, and had worked underground as a repairman and in belt maintenance. He testified that Petitioner reported that he was laid off for a total of five years, but not all at one time. He testified that Petitioner reported that the last six months of Petitioner's work at Freeman he was on the surface at the prep plant, and that his last day was January 11, 2008 at which time he was working as a repairman. He testified that Petitioner reported that he quit work because of his health and that he was told he had black lung, but he worked an additional two years before he quit. He testified that Petitioner reported that from 2008 to present, he has worked as an over-the-road truck driver and was gone twelve days at a time. (RX2).

With respect to his medical history, Dr. Selby testified that Petitioner reported that he is short of breath on exertion, walking up stairs, and when in hot air, and that he denied wheezing, cough and hemoptysis. He testified that Petitioner reported that he could walk one-half to three-quarters of a mile on level surface at his own pace, and that he could go up two flights of stairs before he noticed shortness of breath. With respect to his social history, Dr. Selby testified that Petitioner reported that he started smoking in 1968 and quit in 1984 and had been smoking two-and-a-half packs per day when he quit. He testified that Petitioner reported that he was around his father's secondhand smoke until the age of 20, and that he lived with his wife of 43 years who is a smoker. He testified that a conservative estimate of Petitioner's smoking history was about 30 to 40 pack years, plus much secondary smoke inhalation. (RX2).

With respect to the physical examination performed, Dr. Selby testified that Petitioner's chest exam was normal with good air flow and clear breath sounds, and that Petitioner has normal fremitus and percussion notes, without wheezes, crackles or rhonchi. With respect to testing performed, Dr. Selby testified that a chest x-ray showed a grade II quality film due to underinflation, that there were no parenchymal or pleural abnormalities consistent with pneumoconiosis, that there were multiple calcified and noncalcified granulomas and a questionable nodule at cardiac apex, and that the film was negative for coal workers' pneumoconiosis. He with respect to the high-resolution CT scan of the chest that he agreed with Dr. Perkins that there was no evidence of pneumoconiosis, and that the area of focal pleural thickening appeared to be related to trauma or infection but not related to pneumoconiosis. He testified that the overall interpretation of pulmonary function testing was normal spirometry without significant improvement post-bronchodilator, normal lung volumes and normal diffusion capacity. He also testified that neither the chest x-ray nor the CT scan revealed the presence of emphysema. (RX2).

Dr. Selby testified that in regard to interpreting a chest x-ray for pneumoconiosis, it is important to note the date of the film and the opacity type, and that it was also important to note the profusion. He testified that it was possible to have x-ray evidence of simple pneumoconiosis and yet it caused no pulmonary impairment that can be measured. (RX2).

With respect to his interpretation of the August 19, 2008 chest x-ray, Dr. Selby testified that it looked to be a quality 2, due to underinflation, without parenchymal or pleural abnormalities consistent with pneumoconiosis present, with multiple calcified and noncalcified granulomas present especially around the right hilum. He testified that there was cardiomegaly or enlargement of the heart, and there was some blunting of the left costophrenic angle suggesting a posttraumatic pleural reaction versus a pleural effusion and that there was some moderate scoliosis but the film was considered negative for coal workers' pneumoconiosis. He testified that the CT scan that was dated July 12, 2010 showed pleural scarring or reaction of the left hemithorax posteriorly and laterally, and there was no evidence of coal workers' pneumoconiosis. (RX2).

Dr. Selby testified that the spirometry he performed on Petitioner was normal, and that there was no obstruction. He testified that the lung volumes performed were normal, and there was no restriction. He further testified that the diffusion capacity performed was also normal, and that there was no evidence of an impairment in gas exchange. With respect to the exercise testing performed, Dr. Selby testified that it was normal and submaximal, it showed no abnormalities to his heart or lungs or to the two of them working together, and it confirmed his normal diffusion capacity, normal spirometry, normal exam and normal x-ray. (RX2).

Dr. Selby testified that in Petitioner, if cardiomegaly is seen on a chest x-ray and he is short of breath, one must start considering congestive heart failure as the leading cause of shortness of breath. He admitted that he did not, however, make that diagnosis for Petitioner. He testified that within a reasonable degree of medical certainty, Petitioner's deconditioning explained his shortness of breath along with his mild obesity. He testified that within a reasonable degree of medical certainty, there was nothing revealed by the objective pulmonary function testing that would point to a ventilatory cause for his complaint of shortness of breath. (RX2).

With respect to the issue of causation, Dr. Selby testified that based on his occupational and medical history, physical examination, and various laboratory data, it was his opinion to a reasonable degree of medical certainty that Petitioner did not suffer from any respiratory or pulmonary abnormality as a result of coal mine dust inhalation or coal mine employment. He testified that Petitioner does not have coal workers' pneumoconiosis, and that Petitioner has the respiratory and pulmonary capacity to perform any and all previous coal mine employment duties, including his last duty as a repairman. He further testified that Petitioner has a very significant tobacco smoke exposure history, and that if Petitioner is ever found to have obstructive lung disease or pertinent pulmonary disease, tobacco smoke inhalation would be the prime suspect regarding causation. (RX2).

Dr. Selby further testified that Petitioner's obesity is the primary, if not the only, cause of his dyspnea on exertion, and that if Petitioner should lose to his ideal body weight, dyspnea would almost surely disappear. He testified that Petitioner is deconditioned and "out of shape," which he suggested could alone be causation of all of his dyspnea on exertion. With respect to his review of Petitioner's treatment records, Dr. Selby testified that the records that he reviewed for the years 1980 to 2010 did not support a diagnosis of chronic bronchitis, nor did the records reveal any pathologic evidence of pneumoconiosis. (RX2).

Dr. Selby testified that he saw Petitioner a second time so as to perform methacholine challenge testing, and that he issued a report following the second visit dated January 20, 2014. He testified that he

followed the American Thoracic Society Guidelines in performing the testing on Petitioner, and that at the highest dilutional level of the methacholine Petitioner was administered, his reduction in FEV1 was nineteen percent. He testified that according to the American Thoracic Society for that test to be diagnostic of asthma, a twenty percent drop is required for his FEV1. He testified that Petitioner's testing was not diagnostic of asthma. (RX2).

On cross-examination, Dr. Selby agreed that, by definition, if a person has pneumoconiosis, they would necessarily have impairment in the function of their lung at the site of the scarring, whether the impairment could be measured by spirometry or not. He agreed that a person can have shortness of breath and pulmonary function tests within the range of normal, and that a person could have a lobe of the lung surgically removed and still have pulmonary function tests within the range of normal. He agreed that pulmonary function tests tell you the kind of abnormality you have, whether it is obstructive or restrictive, and how severe it is, but not the etiology of it. He agreed that if one wanted to know if a miner's pulmonary function was impaired from what it used to be, the way to measure that would be to compare his pulmonary function to what it was before the insult or injury rather than comparing it to a range of normal. (RX2).

On cross-examination, Dr. Selby agreed that removal of any further exposure to coal dust is the only treatment for coal workers' pneumoconiosis, and that coal workers' pneumoconiosis does not have a cure. He agreed that continued exposure and progressing pneumoconiosis can progress to conditions called progressive massive fibrosis or cor pulmonale. He testified that cor pulmonale is not life-threatening, but progressive massive fibrosis is potentially life-threatening. (RX2).

On cross-examination, Dr. Selby agreed that if you diagnose someone with coal workers' pneumoconiosis at some time in their life, because of the nature of the disease your expectation is that they probably had the same level of pneumoconiosis when they left the mine. He agreed that it is possible for a person to have radiographically-significant coal workers' pneumoconiosis and have normal findings on physical exam of the chest, normal pulmonary function tests and normal arterial blood gas tests. (RX2).

On cross-examination, Dr. Selby agreed that CT scans are not officially recognized by NIOSH for the purposes of making B-readings and neither are digital chest x-rays. He agreed that NIOSH has sample films for reading analog chest x-rays to be guidelines for the reader, but they have no such films for digital x-rays or CT scans. He agreed that while NIOSH has standards for the equipment used and how you are supposed to take analog chest x-rays, they have no such protocol for the machines that take CTs or the machines that display them. (RX2).

On cross-examination, Dr. Selby agreed that while a chest x-ray may not be used to measure the impairment, you can see things on a chest x-ray that can be consistent with measurable impairment taken on pulmonary function studies. He agreed that if a person has asthma, it is a reactive airways disease and it would mean that the person's complaints as well as pulmonary function testing could wax and wane over time. He agreed that if Petitioner did have reactive airways disease and/or asthma, that could be one explanation for the difference in pulmonary function testing over time. (RX2).

On cross-examination, Dr. Selby agreed that cardiomegaly is something that is easily seen on a chest x-ray. He agreed that when you are looking at an x-ray or CT and your main inquiry has to do with

any lung problems, determining whether or not there is cardiomegaly would be an important part of the evaluation. He agreed that a person can have shortness of breath despite having pulmonary function testing that is within the range of normal. He agreed that he did not check the "cg" box on the II.O form but did explain it on the back of the document. He further agreed that you could have emphysema pathologically that might not show up on radiographic study, and that the same could be true for coal workers' pneumoconiosis. (RX2).

On cross-examination, Dr. Selby agreed that in his assessment, Petitioner had a very significant tobacco smoke history, and that he considered him to have a significant coal mine environment exposure history as well. He testified that Petitioner has a very significant tobacco smoke history exposure, and that if he is ever found to have obstructive lung disease or pertinent pulmonary disease, tobacco smoke inhalation would be the prime suspect regarding causation. He further testified that he believed a conservative estimate of Petitioner's exposure or pack years was that of 30-40 pack years in addition to a considerable amount of secondary smoke inhalation. He further testified that Petitioner reported that he quit smoking in 1984, although he noted that "smokers are not notoriously accurate." (RX2).

On cross-examination, Dr. Selby agreed that a miner with category 1/0, simple pneumoconiosis, can have the condition with no complaints, normal blood gases, normal PFTs, and not even know he has it. He agreed that the onset of coal workers' pneumoconiosis is slow and insidious, and the individual is not going to know they have it until the proper tests are performed. He further agreed that because of the fact that the miner can never clear all of the coal and silica dust, pneumoconiosis can first manifest itself on x-ray even after the coal miner leaves the active coal mine. (RX2).

On redirect examination, Dr. Selby testified that you can diagnose emphysema based upon the chest film. He testified that fibrosis could be characteristic of emphysema, but it was more the lack of lung tissue that is present. He further testified that flattened or lower hemidiaphragm was very characteristic of emphysema. He also indicated that CTs of the chest were much more sensitive for the presence of emphysema. (RX2).

On redirect examination, Dr. Selby testified that Petitioner did not give him a past history of taking any sort of inhaler, and from his examination Petitioner did not have asthma. He further testified that he administered a bronchodilator, and Petitioner did not have a significant response. He also testified that in his review of the medical records up through the summer of 2010, he did not see any reference to asthma nor did he see any treatment for it. (RX2).

Dr. Selby testified that it was very unusual for coal workers' pneumoconiosis to first occur after an individual leaves the mine, and he testified that it was more likely than not that it would not occur. He agreed that next to pathologic sampling of the lung tissue, the gold standard for determination of the presence of lung disease was a CT scan of the chest. He further agreed that Petitioner does not have cor pulmonale, nor does he have progressive massive fibrosis.

On recross, Dr. Selby admitted that he did not know whether Dr. Epplin talked to the radiologist about the CT scan or came to any conclusions concerning it. He further admitted that a person can have emphysema that can be found pathologically but may not be appreciated radiographically. (RX2).

The medical records of NIOSH, the Appalachian Laboratory for Occupational Safety and Health, Coal Workers' Health Surveillance Program, were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records at page 3 reflect that Petitioner underwent a B-reading on January 16, 1980, which was not read as completely negative by one B-reader given the presence of residuals of chronic granulomatous disease; the same x-rays were, however, read to be completely negative by another B-reader. A subsequent set of x-rays were performed on March 28, 1996, which were read as completely negative by two different B-readers. Petitioner underwent another set of chest x-rays on October 2, 2000, which were read as completely negative by one B-reader but was interpreted as being suggestive of parenchymal abnormalities consistent with pneumoconiosis by another reader. (RX3).

The NIOSH records further reflect that Petitioner underwent additional x-rays on July 25, 2005, which were interpreted as revealing no parenchymal abnormalities consistent with pneumoconiosis by one B-reader but suggestive of the presence of small opacities in the upper, middle and lower zones on both the right and left with profusion of 1/0. A third B-reader apparently also reviewed the July 25, 2005 x-rays as well, and suggested the presence of small opacities in the middle and lower zones on both the left and right with profusion of 1/1 although it was significant to note that the film quality was suggested to have poor contrast. (RX3). Petitioner thereafter underwent a subsequent set of chest x-rays on May 8, 2007, which were interpreted by two different B-readers as having no parenchymal abnormalities consistent with pneumoconiosis. (RX3).

The medical records of Litchfield Family Practice were entered into evidence as Respondent's Exhibit 4. The records reflect that Petitioner was seen on May 19, 2015 for diabetes, hypertension and hyperlipidemia management. Petitioner reported dyspnea, but he denied abdominal discomfort, chest pain, disturbed sleep, headache or lightheadedness. Petitioner was also seen on February 25, 2015, at which time he reported dyspnea, but denied abdominal discomfort, chest pain, disturbed sleep or lightheadedness. Petitioner denied cough and difficulty breathing on exertion. Petitioner denied cough and difficulty breathing on exertion on January 20, 2015 as well. (RX4).

The medical records of Petitioner's February 3, 2014 office visit at Litchfield Family Practice reflect that Petitioner denied cough, decreased exercise tolerance and difficulty breathing on exertion. Normal breath sounds and no adventitious sounds were noted on the January 24, 2014 visit. Petitioner denied chronic cough, cough, decreased exercise tolerance, difficulty breathing, dyspnea, snoring and wheezing at the time of his June 21, 2013 office visit with Dr. Epplin. At the time of Petitioner's June 1, 2013 office visit with Dr. Epplin, he noted the presence of a cough and difficulty breathing on exertion, but denied sputum production and wheezing. Petitioner was seen on February 22, 2011, at which time he denied chronic cough, cough, decreased exercise tolerance, difficulty breathing, dyspnea, snoring and wheezing. (RX4).

The medical records of Litchfield Family Practice reflect that Petitioner was seen on June 28, 2010, at which time Petitioner was seen in follow-up. Petitioner reported that he felt well with no complaints and had good energy. Petitioner also presented to discuss his findings on an old chest x-ray, which showed pneumoconiosis consistent with coal miner's lung. Petitioner was recommended to undergo a CT with and without contrast. The records from the March 12, 2010 office visit reflect that Petitioner denied chronic cough, cough, decreased exercise tolerance, difficulty breathing, dyspnea, snoring and wheezing,

and that no reference was made to coal workers' pneumoconiosis. Petitioner was, however, given his two-year DOT clearance at that time. (RX4).

The medical records of Litchfield Family Practice reflect that Petitioner was seen on October 6, 2004, at which time he presented for follow up for his hypertension and medicine check. Petitioner was seen on July 29, 2003, at which time it was noted that Petitioner was doing much better on the Lisinopril than he did on Atenolol as far as energy, and that his chest was clear and examination was normal. Petitioner was seen on February 12, 2004, at which time Petitioner was seen in follow up for his blood pressure. (RX4).

The medical records of Litchfield Family Practice reflect that Petitioner was seen on April 24, 2003, at which time he was seen for a recheck on his hypertension and shortness of breath. Petitioner was short of breath prior and had a low pulse on Atenolol 25 mg daily, and he had not yet undergone a repeat chest x-ray for which he was given another requisition. Petitioner was also seen on September 16, 2002, at which time it was noted that Petitioner noticed that when he exerted himself he was a little bit winded and felt it was probably because of his pulse which has been running in the 40s and 50s. Petitioner was also seen on April 1, 2003, at which time it was noted that Petitioner was still short of breath and even though his Atenolol had been decreased to 25 mg, Petitioner still had a pulse oftentimes in the 50s. (RX4).

The medical records of Litchfield Family Practice reflect that Petitioner was seen on June 14, 2001, at which time it was noted that Petitioner complained of "breathing heavy" when he was very active. Petitioner was also seen on April 21, 2000, at which time it was noted that Petitioner was short of breath, his heart was pounding, and he had no energy. He was seen on April 2, 1987, at which time he complained of occasional shortness of breath, and that he was lightheaded at times. Petitioner was also seen on May 30, 1980, at which time it was noted that Petitioner had possible interstitial fibrosis. (RX4).

The wage statement from Springfield Coal Company was entered into evidence at the time of arbitration as Respondent's Exhibit 6.

CONCLUSIONS OF LAW

With respect to disputed issues of disease and causal connection, to recover compensation under the Workers' Occupational Diseases Act, a claimant must prove that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. An occupational exposure need not be the sole or principal causative factor, as long as it was a causative factor in the condition of ill-being. *Bernardoni v. Indus. Comm'n*, 362 Ill.App.3d 582, 596 (2005).

In this case, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffers from coal workers' pneumoconiosis that arose out of and in the course of the exposures of his coal mine employment, and that his current condition of ill-being is casually related to his employment. In so concluding, the Arbitrator relies, in part, on the findings of NIOSH that Petitioner's chest x-rays of May 8, 2007 – which was some seven months prior to Petitioner's resignation in January 2008 – did not reveal any parenchymal abnormalities consistent with coal workers' pneumoconiosis. (RX3). The Arbitrator notes that the overwhelming majority of NIOSH B-readers found that each of

Petitioner's x-rays of January 16, 1980, March 28, 1996, October 2, 2000, July 25, 2005 and May 8, 2007 to be negative for coal workers' pneumoconiosis.

The Arbitrator finds it to be noteworthy that the NIOSH x-ray interpretations found to be positive for coal workers' pneumoconiosis that were based on the July 25, 2005 by "APN" noted a graded film quality as "2" and indicated they were overexposed (dark), while Dr. Sood noted a film quality of "3" and indicated they were of poor contrast. Furthermore, it is also noteworthy that "APN" found the presence of small opacities in the upper, middle and lower zones on both the right and left gave a profusion rating of 1/0. Petitioner thereafter in November 2005 received a dust letter based on the B-reader findings and interpretations. Petitioner, however, admitted that he underwent a subsequent NIOSH screening chest x-ray but could not recall the date on which it was performed. Petitioner also admitted that after he had his last x-ray by NIOSH he received a letter regarding what the film revealed, but he did not bring that letter with him to the arbitration hearing. The Arbitrator notes that both NIOSH B-readers found Petitioner's May 8, 2007 x-rays to be negative for coal workers' pneumoconiosis. It is well settled that the failure of a party to a suit to produce evidence available to him gives rise to a presumption against him. *Tepper v. Campo*, 398 Ill. 496, 76 N.E.2d 490 (1947). That said, the Arbitrator infers that the subsequent NIOSH letter revealing the results of the May 8, 2007 chest x-rays was perceived to be unfavorable to Petitioner.

The Arbitrator relies on the majority of opinions of the NIOSH physicians, as NIOSH is the governmental agency responsible for administering the health surveillance program for the benefit of coal miners. NIOSH is not a party to this action, and the x-rays were taken and reviewed for reasons independent of litigation. As such, the Arbitrator places greater weight on the readings and conclusions of the NIOSH B-readers than the physicians and/or B-readers hired by either party involved in this claim.

The Arbitrator recognizes that Petitioner's alleged condition of coal workers' pneumoconiosis may have developed in the time period subsequent to his final NIOSH x-ray of May 8, 2007. Nonetheless, the Arbitrator finds the x-rays interpretations of Drs. Meyer and Selby to be more persuasive than the interpretations of Drs. Smith, Alexander and Paul. While Dr. Paul opined that Petitioner has coal workers' pneumoconiosis, he completely failed to identify the date of the x-rays that he reviewed in coming to such a conclusion. Furthermore, Dr. Paul admitted on cross-examination that he was not an A or B reader, and that he is not certified in pulmonary disease. Dr. Meyer, on the other hand, is board-certified in radiology, and Dr. Selby is board-certified in pulmonology. Additionally, both Dr. Meyer and Dr. Selby were thorough in their evidence deposition testimony regarding the basis for their finding of a lack of causal connection in this case based on their interpretation of the chest x-rays and CT scans reviewed, while the reports of Dr. Smith and Dr. Alexander were cursory in providing the basis for their respective opinions. It appears that the one thing that Drs. Meyer, Selby, Smith and Alexander appeared to agree on, however, was their consistent lack of notation of "EM" (emphysema) or "BU" (bulla) on the B-reading forms prepared. As such, the Arbitrator places greater weight on the testimony of both Dr. Meyer and Dr. Selby in support of Petitioner's failure to prove that he suffers from coal workers' pneumoconiosis that is casually related to his coal mine employment.

The Arbitrator finds the opinions of certified B-readers Dr. Selby and Meyer compelling in conjunction with the significant number of negative x-ray interpretations performed by NIOSH, as discussed above, and the Arbitrator notes that the totality of the evidence demonstrates that the overwhelming majority of B-readers concur that Petitioner does not suffer from coal workers'

pneumoconiosis. The Arbitrator further notes that while Dr. Paul opined that Petitioner has coal workers' pneumoconiosis, the Arbitrator is not persuaded by his opinion given his inability to identify the date of the x-rays reviewed nor did he assign a profusion rate. (PX1)

Based upon the foregoing, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he suffers from coal workers' pneumoconiosis that is casually related to his coal mine employment.

The Arbitrator further finds that Petitioner failed to prove by a preponderance of the evidence that he has chronic obstructive pulmonary disease, emphysema, asthma or bronchitis causally related to the exposures of his coal mine employment. In making such a conclusion, the Arbitrator finds the opinions of Dr. Selby to be more informed and well-founded in the records than the opinions of Dr. Paul. The Arbitrator notes that Dr. Selby reviewed Petitioner's treating records, whereas Dr. Paul admitted that he did not review any medical records at the time that he saw Petitioner, but that later Petitioner's attorney sent him the medical records of Dr. Epplin related to which he authored a letter dated August 28, 2013. (PX1). The Arbitrator notes that Dr. Selby's opinion that Petitioner does not suffer from chronic obstructive pulmonary disease, emphysema, asthma or bronchitis is consistent with the lack of reported consistent symptomatology in Petitioner's treating records. The Arbitrator recognizes that there are several notations within Dr. Epplin's records suggesting that Petitioner voiced complaints of shortness of breath and difficulty breathing on exertion which appeared to be intermittent in nature, but the Arbitrator also notes that the vast majority of such complaints were documented subsequent to the filing of Petitioner's Application for Adjustment of Claim, which the Arbitrator finds to be significant.

Additionally, the Arbitrator notes that Dr. Paul originally only diagnosed Petitioner with coal workers' pneumoconiosis and asthma in his report dated March 15, 2013 and did not even suggest the diagnoses of chronic obstructive pulmonary disease, bronchitis or emphysema until the time of his evidence deposition on May 11, 2015. Finally, the Arbitrator notes that not a single physician who was retained by either party in this case noted the presence of "EM" or "BU" on the B-reading forms so as concur with Dr. Paul's diagnosis of emphysema in this case. As such, the Arbitrator is not persuaded by the causation opinions tendered by Dr. Paul on behalf of Petitioner.

Based upon the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove that he suffers from coal workers' pneumoconiosis, chronic obstructive pulmonary disease, emphysema, asthma or bronchitis that arose out of and in the course of the exposures of his coal mine employment, and that his current condition of ill-being is casually related to his employment. All benefits are denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF DEKALB)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carolyn Giachetti,
Petitioner,

vs.

No: 14 WC 16250

Northern Illinois University,
Respondent.

17IWCC0721

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, average weekly wage, medical expenses, temporary total disability, the nature and extent of the injury, and the claimant's entitlement to penalties and attorney's fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The 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 Commission further affirms the Arbitrator's determinations as to accident, causal connection between the accident and the injuries sustained, and the medical expenses incurred of $6,233.81 subject to the limits of Sections 8(a) and 8.2 of the Act.

With regards to average weekly wage (AWW), the parties concurred that the claimant earned $53,549.00 in salary, but disputed whether a tuition stipend of $1,800.00 should be added to that amount for purposes of determining the AWW pursuant to Section 10 of the Act. Testimony was not presented as to how the stipend was paid (e.g., to the claimant, or directly to the school's bursar office, or simply deducted from the tuition before a bill would be sent to the claimant). Moreover, there was no testimony as to what that stipend applied; only to tuition, or

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to books and supporting materials as well, or simply as a cash bonus to the claimant to be spent as she saw fit. Nor was there was information presented as to whether that amount would have been paid if the claimant was not actually enrolled in school or other classes. Additionally, no information was available regarding whether the entire $1,800.00 would be paid if class or certification costs were less than $1,800.00. It does not appear that taxes were paid on this stipend, or that any other benefit (such as 401(k) contribution, for instance) was based off of it. This appears more akin to expense reimbursement than incentive pay or performance bonus. As such, the Commission excludes the stipend from the salary assessment for purposes of Section 10 of the Act; the claimant's 52-week earnings are deemed to be $53,549.00, which produces an AWW of $1,029.79. Given the above findings as to average weekly wage, the TTD and PPD rates are accordingly set at $686.53 and $617.87, respectively.

The Arbitrator awarded one week of temporary disability benefits, which is characterized as temporary partial disability on the decision cover sheet and temporary total disability in the rider of the decision. The Commission first notes that the claimant's counsel stated on the record that they were not seeking temporary partial disability (see transcript p.7). With regard to temporary total disability, the Commission noted that the claimant did not introduce off work slips into evidence, and further notes that the claimant's testimony was that she missed approximately three and a half days of work over a two-month period, not one week (see transcript p.61). The Arbitrator also did not consider the three-day waiting period under Section 8(b) of the Act. In light of the above, the Commission vacates the award of temporary disability as unsupported by the evidence.

The Commission notes the Arbitrator did not delineate a nature and extent analysis pursuant to the five factors specified in Section 8.1b of the Act, specifically (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 Commission first notes that no AMA rating is apparent, and therefore the Commission relies on the other four factors in making its determination and place no weight on this factor.

The claimant has continued to pursue her pre-injury employment with the Department of Police and Public Safety for the university following her June 2014 discharge from medical care, which she characterized as a desk job. No evidence of any loss of salary or impairment of likely future earnings is apparent from the record. The Commission finds such factors to be mitigating. The claimant was 59 years old at the time of the injury; no substantial information as to how her age would relate to the injury or her recovery from it is overtly apparent, and so the Commission gives minimal aggravating weight to this factor. The claimant did describe some ongoing symptoms, not inconsistent with the injury; the Commission finds this factor to be aggravating. In light of all the facts and circumstances, the Commission finds that an award of 6% loss to the left foot as permanent partial disability pursuant to Section 8(e) is appropriate, and modifies the Arbitrator's award accordingly.

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Lastly, the Commission reviews the Arbitrator's denial of penalties and fees. We first adopt the Arbitrator's findings regarding this issue, and further note that the respondent's legal defense and actions regarding this case do not appear unreasonable, vexatious, or in bad faith. The denial of penalties and fees are affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Order is modified as stated above and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary disability benefits is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $617.87 per week for a period of 10.02 weeks, as provided in §8(e) of the Act, as the injuries sustained caused the loss of use of Petitioner's left foot to the extent of 6%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses of $6,233.81, subject to the limits of Sections 8(a) and 8.2 of the Act, as delineated in the Arbitrator's 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 Section 19(f)(1)(1) of the Act, in this case, where the Respondent is the State of Illinois, the decision of the Commission shall not be subject to judicial review.

DATED: NOV 16 2017

Joshua D. Luskin

o-10/11/17
jdl-mcp
68

Charles J. DeVriendt

Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GIACCHETTI, CAROLYN
Employee/Petitioner

Case# **14WC016250**

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

17IWCC0721

On 2/2/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5367 BART DURHAM & ASSOC LTD
400 N SCHMIDT RD
SUITE 200
BOLINGBROOK, IL 60440

5462 ASSISTANT ATTORNEY GENERAL
MAGGIE TIMLIN
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
P O BOX 19208
SPRINGFIELD, IL 62794-9208

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

FEB 2 - 2016

MICHAEL A. MASSIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CAROLYN GIACCHETTI
Employee/Petitioner

v.

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

Case # 14 WC 16250

Consolidated cases: ____

17IWCC0721

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Elgin**, on **October 7, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 16, 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 **$55,349**; the average weekly wage was **$1,064.40**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

- Respondent shall pay reasonable and necessary medical services for unpaid medical bills from Edward Hospital and ATI totaling $6,233.81, pursuant to the Illinois Fee Schedule, as provided in Section 8(a) of the Act.

- Respondent shall pay Petitioner temporary partial disability benefits of $709.60/week for one week, consisting of parts of workdays thereon commencing April 18, 2014 through Jun 23, 2014, as provided in Section 8(a) of the Act.

- Respondent shall pay Petitioner permanent partial disability benefits consistent with the Arbitrator's finding that Petitioner sustained a 10% loss of the left foot, as provided in Section 8(e) of the Act.

- The petition for penalties/fees submitted by Petitioner to the Arbitrator on the day of hearing is denied as Petitioner failed to properly file the petition with the IWCC and give Respondent proper notice.

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

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

17IWCC0721

Signature of Arbitrator

1/28/16
Date

FEB 2 - 2016

STATE OF ILLINOIS)
)
COUNTY OF KANE)

17IWCC0721

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CAROLYN GIACCHETTI,

Petitioner,

v.

NORTHERN ILLINOIS UNIVERSITY,

Respondent.

14 WC 16250

Elgin, IL

ADDENDUM TO THE DECISION OF THE ARBITRATOR

An Application for Adjustment of Claim was filed in this matter with Petitioner seeking relief from Respondent, Northern Illinois University ("NIU"), under the Illinois Workers' Compensation Act. On October 7, 2015, this matter was heard before Arbitrator Jessica A. Hegarty in Elgin, Illinois. Respondent was represented by the Illinois Attorney General's Office. Counsel for Petitioner and Respondent were present and participated in the arbitration.

FINDINGS OF FACT

Petitioner's Testimony

Petitioner testified that she was employed as an Emergency Management Planning Specialist for the Department of Police and Public Safety at NIU on the date of the accident. Petitioner's position was classified primarily as a desk job with her office located on the NIU campus at the Telephone and Security Building. Petitioner's job duties also included putting together incident/action plans for the NIU Police Department and being assigned to the police command post during emergencies and events with large capacity crowd expectations. There are over 59 buildings on the NIU campus and Petitioner's job duties require that she travel from her office, located at Telephone and Security building on Wirtz drive, to other buildings on campus. Petitioner testified that she usually walks to the other buildings and that her job duties require she traverse the streets, sidewalks and paths on the NIU campus to get from her building to other buildings.

Petitioner testified that on April 16, 2014, she was assigned by her commander,

Lieutenant Jason John, to attend a work project meeting at Founders Library on the NIU campus. When it came time to attend the 3:00 p.m. meeting, Petitioner set out at around 2:45 p.m. for the two block walk from her office to Founders Library using the pedestrian campus sidewalks. Petitioner walked from her building toward Normal Road where she turned left and walked to the third pedestrian crosswalk directly across from the library. (PX 4) Petitioner testified this was the most direct route to the library from her office and was the usual route she had taken when attending prior meetings at the library.

Petitioner testified she was carrying a purse on her left shoulder and a folder and notepad in her right hand. Petitioner testified that the folder contained work related material and she brought the notepad so she could take notes at the meeting.

She was wearing dress pants and "trouser" shoes with a two inch heel.

According to her testimony, while walking to Founders Library on the sidewalk adjacent to Normal Road, the two-inch heel of her left trouser shoe got stuck in a sidewalk divot, causing her to fall forward, landing on her hands and knees and roll her left ankle. She heard a crunch and crack when she rolled her ankle. The sidewalk where Petitioner fell was next to an area of sidewalk the University had previously repaired. The portion of sidewalk where Petitioner fell had not been repaired at the time of accident. (PX 7)

After Petitioner's fall, she felt immediate pain in her left ankle and was unable to bear weight on her left foot. A student helped her get to a bench where she was able to sit and call for help. NIU police officer John Bennett arrived at the scene in a patrol car and helped Petitioner to her car that was parked in a lot on campus. Petitioner then drove herself to Edward Hospital in Naperville, where her primary care doctor is located, for treatment.

Edward Hospital records from April 16, 2014, note a history of a left ankle inversion injury and contusion to Petitioner's right patella. (PX 1). Left ankle x-rays were taken and Petitioner was diagnosed with a left ankle sprain and right knee contusion. (Id.) Petitioner was fitted with an ankle splint, prescribed Norco and instructed to follow up in one week. (Id.)

Petitioner followed up at Edward Hospital on April 25, 2014 where swelling on the top and outer side of her left foot were noted. Petitioner reported pain with weight bearing. (Px 7) She also reported that she had taken one day off work after the accident and has since been working at her normal desk job. The treating doctor advised Petitioner to continue Ace wrapping, icing and elevating her ankle. (Id.) Petitioner was prescribed Naproxen for the next three days and then as needed. Petitioner was advised to follow up in one week at the Oswego clinic for follow up treatment. (Id.)

Petitioner presented to Edward Hospital Immediate Care Clinic in Oswego, Illinois on May 1, 2014 with complaints of continued pain and swelling in the lateral aspect of

her left ankle and foot. (Id.) Petitioner reported she had been resting the foot and taking Naprosyn which helped a little. Using crutches did not help with the pain. Repeat X-rays of the left foot and ankle were obtained. (Id.) The left ankle X-ray came back negative; however, the left foot X- ray revealed a cortical irregularity on the anterolateral margin of the calcaneum consistent with an avulsion fracture. (Id.) Petitioner was diagnosed with an avulsion fracture of the calcaneum. (Id.) Petitioner was fitted with a post mold splint and referred to an orthopedic doctor. (Id.) Petitioner was instructed to walk with crutches; however, she informed the treating doctor she could not walk with the crutches. (Id.) Petitioner was restricted to sit down duty only and told not to bear weight on her left foot. (Id.)

Petitioner presented for evaluation at Castle Orthopaedics on May 5, 2014. (PX 2). Repeat X-rays of the left foot were obtained. The orthopedic doctor diagnosed Petitioner with a Grade 1 lateral left ankle sprain and a minimally displaced avulsion fracture of the calcaneus. (Id.) Petitioner was instructed to continue with immobilization in a CAM boot and follow up in three weeks. (Id.) The orthopedic doctor returned Petitioner to work with no restrictions outside of wearing her CAM boot. (Id.)

On May 23, 2014, Petitioner followed up at Castle Orthopedics where her complaints of mild left ankle stiffness were noted. The treating doctor noted that Petitioner's left avulsion fracture and ankle sprain were resolving. (Id.) Petitioner was told she could transition to a comfortable shoe and continue working without restrictions. (Id.) The treating doctor recommended Petitioner initiate a course of physical therapy to correct lingering deficits. (Id.)

Petitioner began physical therapy at ATI Physical Therapy on May 30, 2014. (PX 3). She returned for seven additional physical therapy sessions throughout the month of June, 2014. (Id.) During her course of physical therapy, Petitioner experienced functional improvements as a result of the physical therapy treatment.

Petitioner's final visit to Castle Orthopedics was on June 23, 2014. (PX 2). Repeat X-rays of the left foot continued to show an area of cortical irregularity involving the anterolateral edge of the calcaneus. (Id.) However, the treating doctor noted this defect was not as visible as prior exams, which he considered suggestive of healing. (Id.) Petitioner was instructed to complete her physical therapy treatment; however, the records show this treatment visit to be Petitioner's final appointment with Castle Orthopedics. (Id.)

Petitioner was discharged from physical therapy on June 25, 2014. (PX 3). At this time, she reported an overall perceived improvement of 85 per cent since her initial evaluation. (Id.)

Petitioner testified that she has not treated for her left ankle or foot since her June 25, 2014 discharge from physical therapy.

Petitioner testified that her left foot has not returned to the condition it was before

the accident. The foot aches when it rains and swells on the top and on the outside of the ankle bone. Due to pain, Petitioner is not able to run or roller-skate with her grandkids. She has not been able to do the outdoor activities she enjoyed doing prior to the accident such as hiking and bike riding. Her left foot swells up a couple times a month depending on the weather and physical activity. Petitioner has some difficulty and swelling with going up and down stairs.

Petitioner further testified that she missed one week of work in order to attend doctor's appointments for treatment of her work injury (PX 9). She testified that she utilized paid vacation and sick time for all missed work.

According to her testimony, at the time of her accident, she had been employed at NIU for almost five years and maintained a yearly salary of approximately $53,549.00. She testified to also receiving a stipend for education in 2014 for $1,800.00.

CONCLUSIONS OF LAW

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

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

The Arbitrator found Petitioner presented as an exceedingly credible witness. She appeared honest and confident in her testimony.

Petitioner's undisputed testimony established that on April 16, 2014 at around 3:00 pm, she was walking from her campus office to a work meeting at the campus library and took the most direct route to the library. This was the same pedestrian route she had taken prior occasions when attending meetings at the library. Petitioner was injured while walking to the library when her left heel caught in a crack or divot in the sidewalk, causing her to fall and injure her left foot. The crack and divot are clearly visible in the photographs of the accident scene entered into evidence. (PX 7) Petitioner testified she is required to transverse the streets and sidewalks of the NIU campus as part of her job duties. She was ordered to attend the meeting by her commander and if she failed to attend the meeting she would have been fired for insubordination. Respondent did not dispute any of this evidence.

Clearly the accident occurred "in" the course of employment as Petitioner was attending a work related meeting at the time of accident that she was required to attend as part of her employment.

The Arbitrator finds that the accident also arose "out" of the course of employment. This case involved a trip and fall that occurred on a route to the employers premises (NIU library) and involved a fall caused from a defect in the sidewalk. Moreover, as

part of her job duties the Petitioner was required to traverse the sidewalks of the campus, and thus the tripping hazard created by the sidewalk divot became part of her employment. Thus, the "arising out of" requirement of the Act has been met and the Arbitrator finds that Petitioner's accident arose out of and in the course of Petitioner's employment with Respondent.

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

Based on the testimony presented at trial and the medical records entered into evidence, the Arbitrator finds that Petitioner's left foot injury was causally related to the work injury. The Petitioner testified that she was in excellent health prior to the accident and had never suffered from a foot injury or foot complaints prior to the accident. The Petitioner immediately complained of foot injury complaints following the accident. (PX 1, 11 and 12) The foot injury was ultimately diagnosed as a fractured calcaneus and required a short stint of treatment consisting of immobilization and physical therapy. No IME testimony was presented. The Petitioner's testimony regarding the injury was unrebutted.

G. What were Petitioner's earnings?

The Petitioner testified her annual salary at the time of accident was $53,549 plus she earned a stipend for $1800 for a total 2014 annual salary of $55,349. Respondent does not contest Petitioner's annual salary, only the yearly stipend. Petitioner's testimony with respect to the annual stipend was, credible and unrebutted. The Arbitrator finds the Petitioner's earnings for the 52 week period prior to the date of accident to equal $55,349 and establishes her AWW as same.

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 the medical treatment rendered by Edward Hospital, Castle Orthopedics and ATI to be reasonable and necessary and related to treatment of the foot injury caused by the accident. (PX 1, 2 and 3)

The Petitioner presented unpaid medical bills for this treatment from Edward Hospital and ATI (PX 5 & 6) for $3,461 and $2,772.81 respectively. The Arbitrator awards payment of these outstanding bills, subject to the Fee Schedule.

K. What temporary total disability benefits are in dispute?

Petitioner testified she missed one week of work in order to attend doctors and physical therapy appointments. Petitioner presented absence slips from NIU as further evidence of the missed time. The Arbitrator notes the copies admitted into evidence are very difficult to decipher. (PX 9). Petitioner testified she was forced to use personal time for the missed work. The Arbitrator finds, based on the Petitioner's credible testimony, coupled with Petitioner's Exhibit 9, that Petitioner has sustained her burden of proof with respect to her allegations of one week lost

time at work due to her work accident. Petitioner is entitled to TTD benefits for the missed work time and awards Petitioner payment of one week of TTD benefits.

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

Petitioner sustained a left foot injury diagnosed as a minimally displaced fracture of the calcaneus bone and grade one ankle sprain.(PX 1,2 and 3) The injury led to severe swelling and bruising of the foot. (PX 7) The injury required immobilization by cast and walking boot. Petitioner was required to use crutches in the early stages of her treatment. Petitioner underwent approximately a month of physical therapy before being discharged from treatment.(PX 3) The Petitioner testified that currently, the foot aches when it rains and it still swells on top and on the outside of the ankle bone. Petitioner testified she is not able to run or roller-skate with her grandkids. She has not been able to do the outdoor activities she enjoyed doing prior to the accident. Petitioner has some difficulty going up and down stairs, a requirement of her job and her foot swells when she does this a lot. This testimony was unrebutted. The Arbitrator finds the Petitioner sustained a 10% loss of her left foot as a result of the injury.

M. Should penalties or fees be imposed upon Respondent?

Petitioner submitted a Petition for penalties and/or fees on the day of the hearing that was objected to by the Respondent. (PX 13)

Respondent received no notice of Petitioner's penalties petition and objected at hearing to the petition under 50 Ill. Adm. Code 7020.70(b)(1)(A). In relevant part, 50 Ill. Adm. Code 7020.70(b)(1)(A) states:

> For all motions except Petitions for Immediate Hearing and motions requesting a date for trial, notices of motion shall be in writing and shall be served upon the Arbitrator or Commissioner and the attorney of record of all other parties or, where any other party is not represented by counsel, upon the party himself, by personal or office delivery or by mailing of a copy of the notice with copies of the supporting papers.
>
> Such service, if by personal or office delivery, shall be effected 3 days preceding the day of the status call set forth in the notice...

Petitioner failed to provide proper notice of a properly filed penalties petition to Respondent three days before the status call. Respondent first learned of Petitioner's unfiled penalties petition on the date of the arbitration hearing; and therefore, did not have any opportunity to prepare or provide a written response to the penalties petition. Without proper notice and filing, the Arbitrator must find Petitioner's penalties petition to be improper and is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrzej Krzeptowski,
Petitioner,

vs. NO: 15 WC 15720

Corrugated Supplies Company,
Respondent.

17IWCC0722

DECISION AND OPINION ON REVIEW

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

The underlying facts of this claim were laid out in the Arbitrator's Decision, which is incorporated herein. However, we do not share the Arbitrator's findings as to credibility of the witnesses, including the claimant, nor the weight assigned to each piece of evidence.

The petitioner was a machine operator for the respondent, who manufactures corrugated cardboard. His primary role (see Tr.101, 103-105) was that of a "bander," which is responsible for applying bands of thin plastic around units or bundles of cardboard. Machine operators are not typically called upon to do anything such as frequent, heavy lifting or overhead work; the manufacturing operations are highly automated, with machines fabricating the cardboard as well as cutting the cardboard into rectangular sheets pursuant to customers' specifications. Machines also assemble the cut sheets into horizontal stacks, and finally apply bands of thin plastic around these bundles. At that point, the finished, tied-up bundle is sent to the shipping department and thence on to the respondent's customers (box or display companies). The machine operators use

computers, buttons and knobs to operate the machinery; personal contact of the product in the machines is not required, nor is overhead work necessary. In addition to the production manager, Mr. Kenworthy, testifying as to the tasks involved, the employer submitted an "Ergonomic Analysis Report" and job video as RX13.

Regarding the accident in question, at about noon on September 27, 2014, a misfeed occurred in one of the machines, which caused sheets of cardboard to shoot out and scatter on the floor. Mr. Kenworthy noted these would happen on occasion, and when they did, workers would head to the mess, gather up the cardboard sheets, restack them, and move the stacks aside to keep the floor clear and the production lines running. While not particularly heavy, the sheets could be large and unwieldy, so sometimes it would require two men to lift as a team. The petitioner testified that he and a co-worker were together lifting a 20-pound stack of corrugated cardboard when the claimant felt pain in his right shoulder.

At hearing, the claimant denied injuring either of his shoulders prior to September 27, 2014, but did acknowledge that he had pain in both shoulders prior to the accident (see Tr.34, Tr.55). His treating medical records corroborate the pre-existing symptoms; for example, the records of claimant's primary care provider, Dr. Vasireddy Bhoopal, were admitted as PX4, and while the handwriting is largely illegible, the petitioner acknowledged that, prior to the date of accident, Dr. Bhoopal told him to do shoulder exercises "if anything hurts." Tr.56. His physical therapy notes also relate that he reported bilateral shoulder pain before the date of accident. PX1. According to the petitioner's testimony (see Tr.28), he developed disabling left shoulder pain without any acute or inciting incident within two to three weeks following the acute right shoulder pain; the claimant submits this is related to the original accident based on an overuse theory. Records suggest the asserted left side exacerbation started earlier than that; a physical therapy record of November 27, 2014 noted he "reports exacerbation of left shoulder pain approximately 1 week after the onset of right shoulder pain." PX1.

The claimant presented at Excel Occupational Health on the day of accident for right shoulder pain. There, Dr. Marsiglia noted a consistent history of accident but noted longstanding bilateral shoulder pain: "He does describe a history of pain to both shoulders. He has been having pain to the right shoulder for at least one year. His own physician told him to perform exercises for the pain. She [sic] has an appointment to follow up with his physician in October for bilateral shoulder pain...." See RX1. Following examination, Dr. Marsiglia assessed the claimant with a right shoulder strain. He also noted "Patient may have underlying rotator cuff tendonopathy/ impingement. He has had pain not only in the right shoulder but the left shoulder and for quite some time." RX1. Dr. Marsiglia recommended ice and acetaminophen (Tylenol), maintained the claimant on full duty work and instructed him to follow up with the clinic. RX1.

On October 3, 2014, the petitioner returned to Excel and saw a different physician, Dr. Joseph Laluya. The claimant reported regarding his right shoulder pain, "'it is a lot better'" (RX2) and that he was continuing to use ice. Following examination, Dr. Laluya assessed him with "R[ight] shoulder strain – superimposed on BL [bilateral] rotator cuff tendinopathy & impingement. He has an appointment with his PCP and I encouraged he pursue PT for his chronic issues. Acutely, he is improving back to his baseline." See RX2.

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On October 10, 2014, the petitioner returned to Excel, where he saw a different physician, Dr. Thomas Cronin. The claimant brought up his left shoulder pain, and this time specifically related it to his job; however, there is no indication in this chart note that the petitioner reported the duration of his bilateral symptoms beyond that he "now has developed" left shoulder pain. Dr. Cronin did not describe what activities the petitioner was engaging in other than that Dr. Cronin assessed it as "secondary to overuse," though the claimant averred to Dr. Cronin that his right shoulder "has improved somewhat." See PX1.

On October 27, 2014, the claimant presented at Excel and at physical therapy, where the claimant again denied acute trauma to the left shoulder but reported that his left shoulder was now more bothersome than the right; the therapist wrote that the claimant reported "he has had right shoulder pain for over a year, pain gradually started and has just gotten worse and worse until 9/27/14 when lifting at work. ... Reports his left shoulder started to gradually hurt him too..." The claimant began physical therapy that day and was also prescribed restricted duty at work at that time. See PX1, RX3.

The therapy records show claimant's right shoulder symptoms began improving in physical therapy, but his left shoulder complaints persisted and worsened. On November 14, 2014, he presented to Dr. Pillar and underwent an injection to his left shoulder for pain control. PX1. Dr. Pillar thereafter prescribed a left shoulder MRI, which was conducted on December 23, 2014. It demonstrated extensive degenerative findings, including a complete rupture of the long head of the biceps tendon, infraspinatus and supraspinatus tendinopathy, a possible superior glenoid SLAP tear, and degenerative changes involving the humeral head and AC joint. RX4.

On January 2, 2015, the claimant saw Dr. Pillar, who noted that the petitioner "continues to complain of bilateral shoulder pain with the left side more affected than the right at this point" and that the left shoulder MRI findings were "the result of chronic degenerative changes." Dr. Pillar assessed the claimant with "right shoulder pain and previous strain" and "left shoulder pain and overuse syndrome." Dr. Pillar recommended ongoing therapy for the left shoulder, and thereafter referred him to an orthopedist. PX1.

On January 20, 2015, Petitioner presented to orthopedic surgeon Dr. Michael Maday of Midland Orthopedic Associates. Dr. Maday discussed left shoulder arthroscopic surgery with possible rotator cuff repair and SLAP tear debridement. He released Petitioner to work with no lifting over horizontal and no lifting over 5 pounds. PX2. Dr. Maday thereafter ordered a right shoulder MRI scan, which was done on February 25, 2015 and, as had the left shoulder, demonstrated extensive degenerative findings including multifocal tearing of the glenoid labrum, glenohumeral joint osteoarthritis, a proximal rupture of the long head biceps tendon and possible low-grade partial-thickness interstitial tearing of the subscapularis tendon insertion. See RX5.

The respondent commissioned a Section 12 examination with Dr. Sam Biafora. On March 17, 2015, he examined the claimant and issued an opinion report. He issued an addendum report in December 2015 following his review of Dr. Nirav Shah's opinion (see below). Dr. Biafora testified in deposition on February 3, 2016. See RX9-11. Dr. Biafora opined that Petitioner's current bilateral shoulder conditions were not causally related to any acute trauma and were due to the natural progression of the underlying preexisting degenerative disease process. Dr. Biafora

believed that "although it is possible Mr. Krzeptowski had a manifestation of pain in the shoulder when lifting a box from the ground, this would not have caused a permanent aggravation of his underlying condition. Rather, it caused a temporary exacerbation of his underlying chronic degenerative process of the shoulder." Dr. Biafora noted that the parallel findings on the two MRI scans suggested the longstanding and progressive nature of the disease process, rather than any acute trauma, and that the extensiveness of the internal pathology would be consistent with symptoms being provoked by routine daily activities. Dr. Biafora also noted that the petitioner, despite having a Polish interpreter, denied ever having had prior shoulder pain three times during the examination.

The petitioner was evaluated by Dr. Nirav Shah on May 4, 2015; at the request of Petitioner's attorney, Dr. Shah authored a narrative report on August 3, 2015 and was deposed on September 30, 2015. See PX5-6. Dr. Shah diagnosed the claimant with bilateral shoulder impingement and AC joint osteoarthritis, as well as tears of the supraspinatus tendons. Dr. Shah opined that the claimant's need for bilateral arthroscopic surgery was causally related to the work accident. Dr. Shah acknowledged that he did not know the mechanics of the lifting incident, including the position of the petitioner's body or arms, and that his opinion was based in part on the petitioner's history that he had little or no pain in his shoulders prior to the accident, and that the pre-existing shoulder pain was a long time prior and had improved prior to the accident.

Following Dr. Biafora's opinion, the petitioner's light duty restrictions could no longer be accommodated pursuant to union rules on work-related accidents. Mr. Kenworthy and Rebecca Hill, benefits administrator, met with the claimant in the presence of a translator and instructed him to submit FMLA paperwork; the petitioner failed to submit this paperwork or respond to subsequent correspondence mailed to his home regarding this issue. The petitioner was thereafter notified of his termination for being absent from work without authorization, and he seeks TTD starting from the date he went off work; the Arbitrator fixed this date at May 4, 2015.

After consideration of the evidence presented, the Commission affirms the Arbitrator's determination as to the occurrence of the accident. However, regarding causal connection between the accident and the injuries sustained and the request for prospective medical treatment, the Commission does not reach the same conclusions as did the Arbitrator.

While it is certainly true that the aggravation of a pre-existing condition is compensable, the extent of the pre-existing condition is notable. Dr. Biafora concluded that the bilateral findings are such that there does not appear to be any acute damage, nor evidence of damage by "overuse" of merely a few weeks duration. Dr. Shah admitted the extent of the degeneration, though he maintained his opinion as to causation. Regarding that, the Commission notes that the claimant provided inaccurate histories to Dr. Biafora and Dr. Shah; the histories provided are such that it would be more likely that a medical opinion would be generated in favor of a causal relationship. Given that Dr. Biafora had access to reliable evidence, and Dr. Shah admitted on cross-examination that the history he had been relying on did not mesh with the accurate history, Dr. Biafora's opinion is given greater persuasive weight. This is especially reinforced by the fact that the claimant's own physicians noted that his right shoulder injury was only a strain and merely superimposed over the underlying degeneration, and was in fact returning to baseline shortly after the occurrence of this apparently minor incident. As such, the opinions that the petitioner's right

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shoulder condition was a strain of brief duration which reached MMI and returned to the claimant's baseline health situation no later than the end of 2014, and that his left shoulder condition was not causally related to the accident at issue herein, are credible and well supported by the evidence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated above. The awards of temporary total disability and prospective medical care pursuant to Section 8(a) are accordingly vacated.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,000.00. 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:

Joshua D. Luskin

o-10/11/17
jdl/ac
68

Charles J. DeVriendt

Kevin W. Lamborn

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

KRZEPTOWSKI, ANDRZEJ
Employee/Petitioner

Case# **15WC015720**

CORRUGATED SUPPLIES COMPANY
Employer/Respondent

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On 3/23/2016, 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 RUBEN & KRESS
FRANK D KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
STEVEN JACOBSON
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Andrzej Krzeptowski
Employee/Petitioner

v.

Corrugated Supplies Company
Employer/Respondent

Case # **15** WC **15720**

Consolidated cases: **D/N/A**

17IWCC0722

An *Application for Adjustment 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 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. ☒ 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 _____

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FINDINGS

On the date of accident, **September 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.

The accident of September 27, 2014 was a cause of Petitioner's current bilateral shoulder condition of ill-being. See the attached decision for more detailed causation-related findings.

In the year preceding the injury, Petitioner earned **$45,760.00**; the average weekly wage was **$880.00**.

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

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

Respondent shall be given a credit of **$0.00** 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

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ 586.67/week for 42 2/7 weeks, commencing 5/4/15 through 2/23/16, as provided in Section 8(b) of the Act.

Prospective Medical

Respondent is ordered to pay for an evaluation with Dr. Shah for a determination as to which shoulder to repair first. Respondent is also ordered to pay for that 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.

Molly C Mason

Signature of Arbitrator

3/23/16
Date

ICArbDec19(b)

MAR 23 2016

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Andrzej Krzeptowski v. Corrugated Supplies Company
15 WC 15720

Summary of Disputed Issues

Petitioner claims a traumatic right shoulder injury of September 27, 2014 as well as an overuse injury to his left shoulder. He seeks temporary total disability benefits and prospective care. Respondent disputes accident and causation and maintains Petitioner voluntarily removed himself from employment by failing to timely submit certain FMLA paperwork.

Arbitrator's Findings of Fact

Petitioner testified through an interpreter.

Petitioner testified he is not currently employed. T. 14.

Petitioner denied injuring either of his shoulders prior to his claimed September 27, 2014 work accident. T. 34. He also denied undergoing any shoulder surgery or formal therapy before that accident. T. 69. He testified to having shoulder pain before the accident but indicated the pain did not prevent him from working. T. 55. Petitioner identified Dr. Bhoopal as his primary care physician. T. 68. Dr. Bhoopal's certified pre-accident records (PX 4) relate to treatment of various health conditions, including atrial fibrillation, venous insufficiency and sleep apnea. They do not include any shoulder X-ray or MRI reports. The doctor's pre-accident office notes are handwritten and somewhat difficult to read but they do not appear to mention shoulder complaints.

Petitioner testified that, as of September 27, 2014, he had worked for Respondent for 7 years. T. 15. Respondent fabricates various sizes of corrugated cardboard according to its customers' specifications. T. 15-16. The largest size is "huge." The fabricated pieces come out of two large machines that have slightly different functions and capabilities. The machines convert rolls of conventional paper into corrugated sheets.

Petitioner testified he worked in Respondent's production area. His scheduled shift ran from 7 to 3, including a half hour lunch, but he sometimes worked as many as 10 or 12 hours in one day. T. 20.

Petitioner testified he performed three different jobs for Respondent during various periods before September 27, 2014. These jobs were called stacker, bander and "cap sheets." During his first two years of employment, he worked as a stacker, inspecting and measuring fabricated corrugated sheets, assembling the sheets into bundles, or "units," and aligning the sheets. T. 23. Petitioner testified he had to perform these tasks very quickly in order to keep up with the machines and production lines. He had to lift the bundles, which weighed between 30 and 60 pounds, by his estimate. He lifted some bundles on his own. Others had to be lifted by two people.

Petitioner testified he spent the next four years as a bander. Plastic bands have to be applied to the bundles to keep them intact. This is done both manually and mechanically. Mechanical banding is done by dialing control knobs. T. 20-21.

Petitioner testified he then began performing all three jobs. T. 24. During the period preceding the accident, he spent a lot of time doing "cap sheets." A "cap sheet" is a corrugated sheet that is used as a reinforcement and/or protective covering for other sheets. T. 21. One of the two machines produces "cap sheets." The "cap sheets" come out at the bottom of that machine (T. 23) and have to be lifted from the floor to wherever they are needed. In some instances, the workers applied the "cap sheets" manually. T. 21.

Petitioner testified he injured his right shoulder at about noon on September 27, 2014. Prior to the accident, one of the machines malfunctioned and spewed out "thousands" of sheets, which landed in various parts of the production area. T. 25. This had happened on prior occasions. Petitioner testified that, when this occurred, everyone had to pitch in to clean up the mess so that production could resume.

Petitioner testified he and Rob, his lead man, began lifting and stacking the sheets. At one point, they worked together to lift a stack of very large sheets from the ground to a height of about 4 feet. Each sheet in this stack was about 8 feet long and 1 to 1 1/2 feet wide. T. 25-26. Petitioner testified he turned while attempting to transfer the stack and twisted his right arm in the process. He felt a very sharp pain in his right arm. T. 26. He was not able to resume working. His supervisor, Rick, took him to Excel, an occupational clinic of Respondent's selection. T. 27-28.

The Excel Occupational Health Clinic records of September 27, 2014 include a lengthy handwritten history. That history reflects Petitioner reported injuring his right shoulder earlier that day after bending over and lifting a 20-pound stack of papers at work. The history also reflects Petitioner denied any previous right shoulder injuries but reported previously experiencing bilateral shoulder pain "with heavier lifting at work." Petitioner indicated he had seen his own physician for this pain, with that physician prescribing exercises.

The Excel records also reflect that Petitioner saw Dr. Marsiglia on September 27, 2014. In his lengthy letter of that date, Dr. Marsiglia indicated that a clinic employee named "Karolina" acted as an interpreter for Petitioner "for the entire visit."

Dr. Marsiglia described Petitioner's past medical history as significant for various conditions, including bilateral shoulder pain:

> "He does describe a history of pain to both shoulders. He has been having pain to the right shoulder for at least one year. His own physician told him to perform exercises for the pain. She [sic] has an appointment to follow up with

his physician in October for bilateral shoulder pain."

Dr. Marsiglia noted that Petitioner reported injuring his right shoulder at work earlier that day, after bending over to lift a 20-pound stack of paper and place that stack on another stack. The doctor indicated that Petitioner reported feeling his shoulder "pop," as if bone was rubbing on bone, at the time of the injury.

On shoulder examination, Dr. Marsiglia noted limited abduction and flexion bilaterally, positive "empty can" testing bilaterally, positive Neer's and Speed's testing in the right shoulder and 5/5 strength in both upper extremities.

Dr. Marsiglia ordered right shoulder X-rays. He interpreted the films as showing no dislocation, fracture or loose bodies.

Dr. Marsiglia diagnosed a right shoulder strain. He again noted a history of bilateral shoulder pain, noting that Petitioner "may have underlying rotator cuff tendinopathy/impingement."

Dr. Marsiglia prescribed Acetaminophen for pain, along with ice applications. He released Petitioner to full duty. He noted that Petitioner inquired about restrictions but "appears to have good strength and little pain unless his right extremity is raised over his chest." He directed Petitioner to return on October 2, 2014. PX 1, pp. 17-20, 168-171. RX 1.

Petitioner returned to Excel on October 3, 2014 and saw a different physician, Dr. Laluya. A handwritten note of that date reflects that Petitioner reported improvement yet complained of 5/10 right shoulder pain that was sometimes affecting his ability to work.

On right shoulder examination, Dr. Laluya noted no tenderness to palpation, positive "empty can," Neer's, Hawkins and apprehension testing and negative Speed's and O'Brien's testing. Dr. Laluya noted that Petitioner was scheduled to see his own physician. He also noted that "acutely, he is improving back to baseline." He recommended that Petitioner pursue physical therapy "for his chronic issues." He offered a cortisone injection and indicated Petitioner wanted time to think about this. He directed Petitioner to perform home exercises and return in one week. He released Petitioner to full duty. PX 1, pp. 214-216. RX 2.

On October 7, 2014, Petitioner saw Dr. Bhoopal, his personal care physician, with the doctor noting a 2-week history of bilateral shoulder pain, right greater than left. The doctor addressed etiology as follows: "No trauma. Works repetitive lifting 50 lbs. at wk." The doctor diagnosed rotator cuff tendinitis, along with other health conditions. With respect to the shoulders, it appears he recommended "PT/OT." PX 4, p. 7.

Petitioner returned to Excel on October 10, 2014 and saw yet another physician, Dr. Cronin, who addressed causation as follows:

> "I had the opportunity to re-evaluate [Petitioner] who was originally treated for right shoulder rotator cuff tendinopathy. The initial date of injury was September 27, 2014. The patient was continuing his regular work and he now has developed left shoulder pain. I believe this is secondary to overuse due to his injury to his right shoulder which he states has improved somewhat."

On right shoulder examination, Dr. Cronin noted positive Speed's testing and persistent tenderness in the bicipital groove. On left shoulder examination, he noted subjective pain, notable tenderness over the deltoid, negative Speed's and limited abduction.

Dr. Cronin recommended an injection but Petitioner again indicated he wanted time to think about it. Dr. Cronin recommended physical therapy for both shoulders three times weekly for two weeks. He again opined that Petitioner's bilateral shoulder pain was "connected to his work." He released Petitioner to full duty, noting Petitioner "wishes to continue doing his regular job." He directed Petitioner to return on October 24, 2014. PX 1, pp. 209-211.

Petitioner returned to Excel on October 27, 2014 and saw Dr. Pillar, the clinic's medical director. A handwritten history reflects that Petitioner was currently performing full duty but was "having difficulty with certain tasks due to heavy lifting and fast pace." The note also reflects that Petitioner described his left shoulder as worse than his right. Dr. Pillar prescribed therapy and imposed restrictions of no overhead work and no lifting over 10 pounds with either arm. PX 1, pp. 203-204.

Petitioner underwent an initial physical therapy evaluation at Excel on October 27, 2014. The note reflects that "Freddie, CMA" acted as a translator. The evaluating therapist noted that Petitioner reported having right shoulder pain for over a year, with that pain starting gradually and getting "worse and worse" until the lifting-related accident of September 27, 2014. The therapist also noted that Petitioner described his left shoulder as gradually starting to hurt also, with no specific injury. The therapist indicated that the left shoulder now hurt more than the right, with Petitioner indicating the left shoulder "has started to hurt more since he's been using it more due to his R shoulder pain." PX 1, pp. 155-157. RX 3.

The next therapy note, dated October 29, 2014, reflects that Petitioner reported he could only participate for thirty minutes due to having to go back to work. The therapist, Karolina Figus, PTA, noted minimal tenderness to palpation to the right anterior shoulder and moderate tenderness to palpation to the left anterior shoulder. She applied a patch to Petitioner's left anterior shoulder "for pain management." PX 1, p. 196.

A therapy note dated November 10, 2014 reflects that Petitioner complained of bilateral shoulder pain and "sometimes has to lift more than his 10 lb. restriction, which really bothers him." PX 1, p. 191.

Petitioner underwent a left shoulder injection on November 14, 2014. Dr. Pillar performed this injection. The doctor recommended additional therapy and continued the previous restrictions. PX 1, pp. 115-116.

At the recommendation of Dr. Pillar, Petitioner underwent a left shoulder MR arthrogram on December 23, 2014. The interpreting radiologist noted a complete rupture of the proximal long head of the biceps tendon, mild to moderate infraspinatus tendinopathy, mild supraspinatus tendinopathy without a tear, findings compatible with a superior glenoid SLAP tear and moderate degenerative changes at the acromioclavicular joint. PX 2, pp. 35-36. RX 4.

Petitioner returned to Excel on January 2, 2015 and saw Dr. Pillar. After examining Petitioner and reviewing the left shoulder MR arthrogram, the doctor indicated that the arthrogram showed "multiple abnormalities" but that he was "not certain that any of these are acute." He also noted that Petitioner "did not have any specific trauma or inciting event leading to his left shoulder pain, rather his pain complaints began with increased use of the left arm after his right shoulder injury and use of the right arm was limited." He found the MR results to be "the result of chronic degenerative changes." He recommended that Petitioner continue taking aspirin for pain and "resume therapy for the left shoulder." He continued the previous work restrictions. PX 1, pp. 56-57.

A therapy note dated January 9, 2015 reflects that Petitioner reported having "less pain over the holidays as it was slow at work and he wasn't doing as much lifting." PX 1, p. 133.

On January 16, 2015, Dr. Pillar of Excel recommended ongoing therapy for the left shoulder and referred Petitioner to Dr. Maday for an orthopedic consultation. PX 1, p. 49. He continued the previous work restrictions. PX 1, p. 52.

On January 20, 2015, Petitioner saw Dr. Maday. In his note of that date, Dr. Maday indicated that Petitioner reported originally injuring his right shoulder on September 27, 2014 and "shortly thereafter" also injuring his left shoulder, feeling a "pop."

Dr. Maday reviewed the left shoulder MR arthrogram and noted Petitioner denied improvement from the therapy and injection.

Dr. Maday noted several abnormal findings, including a biceps deformity, on shoulder examination. It appears he examined Petitioner's left shoulder although this is not entirely clear. He diagnosed a "biceps rupture with partial-thickness rotator cuff tear with SLAP tear." He did not view the SLAP tear as clinically significant, given the biceps rupture. He did not see a need for biceps tenodesis, since he believed the tendon "autotenodesed." With Petitioner's son and an employee acting as translators, he recommended an arthroscopic surgery with possible rotator cuff repair and SLAP tear debridement. He released Petitioner to work with no lifting over horizontal and no lifting over 5 pounds. PX 2, pp. 28-29.

On January 19, 2015, an Excel therapist noted that Petitioner reported left anterior shoulder pain, "worse after working." PX 1, p. 129.

An Excel therapy note dated January 28, 2015 reflects that Petitioner reported feeling better when he performed therapy before work versus after work. PX 1, p. 125.

On February 3, 2015, Dr. Maday noted that Petitioner remained symptomatic, especially at night and when lifting at work. The doctor noted that Petitioner wanted to try more therapy but that he would most likely need surgery in the future. He continued the previous restrictions and directed Petitioner to return in one month. PX 2, p. 13.

On February 25, 2015, Petitioner underwent a right shoulder MR arthrogram. This study demonstrated multifocal tearing of the glenoid labrum, mild glenohumeral joint osteoarthritis, a proximal rupture of the long head biceps tendon and possible low-grade partial-thickness interstitial tearing of the subscapularis tendon insertion. RX 5.

Petitioner returned to Dr. Maday on March 3, 2015. The doctor noted that Petitioner was still complaining of shoulder pain and was performing light duty. On left shoulder examination, he noted an essentially full range of motion, pain with isolation of the supraspinatus, strength of 3+ - 4/5 with abduction and external rotation and negative apprehension. He diagnosed a left shoulder rotator cuff tear. He noted that Petitioner was scheduled to undergo an IME later that month and had not received authorization for therapy. He again recommended therapy. He released Petitioner to light duty with "limited lifting involving the affected arm" and directed Petitioner to return in one month. PX 2, p. 19.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Biafora, a hand and upper extremity surgeon, on March 17, 2015. Dr. Biafora issued a report concerning this examination on March 25, 2015. RX 9. Biafora Dep Exh 2. In his report, the doctor indicated he relied on a Polish interpreter to obtain a history from Petitioner and conduct his examination.

Dr. Biafora noted that Petitioner reported injuring his right shoulder while lifting a 30-40 pound stack of cardboard at work on September 27, 2014. He also noted that Petitioner reported the onset of left shoulder pain approximately one month after the right shoulder injury.

Dr. Biafora indicated that Petitioner "denies any previous bilateral shoulder injuries or any previous right shoulder complaints prior to the above incident."

Dr. Biafora noted that Petitioner demonstrated certain work activities, including covering a stack of material with a type of paper and lifting sheets of cardboard anywhere from about chin to thigh level.

On shoulder examination, Dr. Biafora noted no atrophy, mild tenderness at the left AC joint, mild tenderness bilaterally at the lateral and anterior acromion and bicipital groove, no crepitus, pain with resisted forward flexion bilaterally, with mild associated weakness, left greater than right, positive Hawkins and no instability.

Dr. Biafora indicated he reviewed the MR arthrograms, a Form 45 dated October 1, 2014 [this document is not in evidence], records from Excel Occupational Clinic and records from Dr. Maday.

Dr. Biafora diagnosed bilateral shoulder proximal biceps tendon rupture; supraspinatus/infraspinatus tendinopathy with possible partial-thickness tears, glenohumeral and acromioclavicular arthritis; and superior/anterior labral tears, likely degenerative in nature.

Dr. Biafora addressed causation as follows:

> "In my opinion, [Petitioner's] current bilateral shoulder conditions are not related to his work activities or the alleged injury sustained to the right shoulder on September 27, 2014. [Petitioner] was not forthcoming with his history of previous bilateral shoulder pain. On three separate occasions, with the aid of a Polish interpreter, [Petitioner] denied pain to the left and right shoulder prior to the alleged work injury of September 27, 2014. The provided medical records indicated that [Petitioner] presented with a previous ongoing history of bilateral shoulder symptoms. These histories were noted to have been taken with the aid of Polish interpreters. There have been inconsistencies in [Petitioner's] history."

Dr. Biafora conceded "it is possible that [Petitioner] had an aggravation of his previous right shoulder condition at the time of picking an object up from the ground on September 27, 2014 [but] in my opinion, this mechanism would not have caused a permanent aggravation of his condition." Dr. Biafora also conceded that Petitioner's work tasks could have caused his "already degenerative left shoulder condition" to become more symptomatic.

Dr. Biafora stated that Petitioner's "objective findings support his subjective complaints." He found it reasonable for Petitioner to proceed with a left shoulder arthroscopy, to include an acromioplasty with distal clavicle resection and rotator cuff repair, if warranted. He did not link the need for this surgery to the work accident. He estimated that Petitioner would be able to resume full duty about five months after this surgery. He found it reasonable for Petitioner to continue taking pain medication. RX 9.

Petitioner saw Dr. Maday again on April 10, 2015, with the doctor noting Dr. Biafora's opinions and treatment recommendations. Dr. Maday addressed causation as follows:

> "I then had [a] discussion with [Petitioner] with Ms. Sandrzyk acting as a translator and we did determine that we agreed that he did have pain before his injury, however, his pain was a baseline level of pain which he did not consider significant. It was only after his injury that his pain became more significant. He feels that he may not have understood the exact nature of the question."

Dr. Maday diagnosed a "bilateral shoulder injury with supraspinatus/infraspinatus involvement with impingement and AC joint pain." He agreed with Dr. Biafora's surgical recommendation. He recommended that Petitioner continue light duty, with no overhead lifting and no lifting over 5 pounds. PX 2, p. 15.

On May 4, 2015, Petitioner saw Dr. Shah at Parkview Orthopaedic Group. Petitioner testified he chose Dr. Shah. T. 32. Dr. Shah described Petitioner as right-handed. He noted a complaint of bilateral shoulder pain. He indicated Petitioner reported initially injuring his right shoulder at work in September 2014 and "then, as he was doing some therapy, he injured the left shoulder as well." PX 3, pp. 5-8. He indicated Petitioner was currently off work.

Dr. Shah obtained X-rays only of the right shoulder, "because the referral was written only for the right shoulder." He interpreted the films as showing AC joint osteoarthritis.

After examining Petitioner and reviewing the MRIs, Dr. Shah recommended a right shoulder arthroscopy and possible rotator cuff repair. He indicated that Petitioner would need to be off all blood thinners for at least two weeks before the surgery. He could not rule out the need for a shoulder replacement in the future. PX 3, pp. 5-7.

On May 15, 2015, Rebecca Hill, Respondent's benefits administrator, sent Petitioner a letter indicating he was "currently absent without an approved leave of absence." Hill advised Petitioner that he would forfeit his seniority under the union contract if he did not submit documents to support his leave or return to work by Friday, May 22, 2015. RX 7.

On May 26, 2015, Rebecca Hill sent Petitioner another letter indicating his employment with Respondent was terminated effective May 26, 2015. Hill noted that Petitioner had been granted an extension to return leave-related FMLA paperwork by May 22nd but had failed to comply. RX 8.

On August 3, 2015, Dr. Shah issued a report to Petitioner's counsel recommending a left shoulder arthroscopy, possibly followed by a similar surgery on the right shoulder. Dr. Shah linked the need for this surgery to the work accident. He stated that, as of Petitioner's single visit, on May 4, 2015, he required the restrictions that Dr. Maday had previously imposed, i.e., no overhead lifting and no lifting over 5 pounds. PX 6.

On September 30, 2015, Dr. Shah testified by way of evidence deposition. Dr. Shah testified he is a board certified orthopedic surgeon. He focuses on shoulder, knee and elbow problems. PX 5 at 5-6. He has treated over 2,000 patients with shoulder injuries. PX 5 at 6. His CV shows he is fellowship-trained and has co-authored various articles. Shah Dep Exh 1.

Dr. Shah testified he saw Petitioner once, on May 4, 2015. PX 5 at 8. Petitioner's primary care physician referred Petitioner to him. PX 5 at 8. Petitioner reported originally injuring his right shoulder while lifting at work and later injuring his left shoulder during therapy. PX 5 at 9. He does not know how the therapy-related injury occurred. PX 5 at 9. Both MRIs showed small partial- versus full-thickness tears of the rotator cuff tendon. Such tears are sometimes consistent with traumatic injuries. PX 5 at 10. Petitioner's work accident either caused the tears or made them worse. PX 5 at 11. Petitioner told him he had minimal to no pain prior to the accident. He has to go by Petitioner's history. One of Petitioner's family members acted as a translator. PX 5 at 11.

Dr. Shah testified he was not able to give Petitioner work restrictions because another doctor referred Petitioner to him. There was something of a language barrier as to what Petitioner's job entailed but it sounded as if he performed repetitive lifting. He typically leaves it up to a patient to determine whether he can work or not. PX 5 at 12. At best, Petitioner could perform some kind of light duty, with no lifting over 5 to 10 pounds. PX 5 at 12. Since he has not seen Petitioner for five months, he cannot comment on Petitioner's current capacity to work. PX 5 at 12-13. He would recommend that Petitioner proceed with arthroscopic surgery "for whichever side is worse for him if he still has symptoms." PX 5 at 13. The accident brought about the need for this surgery. PX 5 at 13. He reviewed some records, including Dr. Maday's records and Dr. Biafora's report. PX 5 at 14. He disagrees with Dr. Biafora's causation opinion. Dr. Biafora found no causation because he viewed Petitioner as "not forthcoming" with respect to his pre-accident shoulder problems. Petitioner was forthcoming with him and/or Dr. Maday as to those problems. Plus, the accident Petitioner described was acute in nature. PX 5 at 16.

Under cross-examination, Dr. Shah testified he recalls Petitioner bringing some left shoulder X-rays to his office for him to review. PX 5 at 20. Petitioner has a Type 2 acromion, meaning it is curved or hooked. A Type 2 acromion can predispose a patient to impingement but not to a rotator cuff tear. PX 5 at 21. Impingement does not, over time, lead to a rotator cuff tear. PX 5 at 22. Acromioclavicular arthritis can cause pain but it does not render a person more susceptible to injury. PX 5 at 24. Degeneration of the labrum is not typically painful. PX 5 at 27. Impingement is acute but it can develop in the absence of trauma. PX 5 at 27. In Petitioner's case, the labral tears were degenerative. PX 5 at 28. Impingement can cause pain in a sedentary individual. PX 5 at 29. He looked at Petitioner's bilateral shoulder MRI images. PX 5 at 30. The MRI findings were consistent in both shoulders. PX 5 at 30. At some point, Petitioner's biceps tendons (in both shoulders) ruptured. The timing of the ruptures cannot be determined. PX 5 at 31. He believes that all three conditions, i.e., impingement, AC joint arthritis and rotator cuff tears, were pain generators for Petitioner. PX 5 at 33. Petitioner had the arthritis prior to the accident "but the work injury was impingement." PX 5 at 33. He does not believe Petitioner had rotator cuff tears before the accident. PX 5 at 34. Rotator cuff tears

can worsen over time, as can labral tears and arthritis. PX 5 at 36-37. Petitioner was born on April 30, 1953 and was thus in his 60s. The degenerative conditions were age-appropriate. PX 5 at 37. His causation opinion would not change if there were records showing Petitioner had chronic shoulder pain before the accident, assuming Petitioner stated his pain was worse after the accident. PX 5 at 38. A routine activity such as grabbing something off of a shelf can cause shoulder pain. He does not have an understanding as to exactly how Petitioner was moving when he lifted boxes at the time of the accident. PX 5 at 40. For purposes of causation, it does not necessarily matter whether Petitioner was working overhead or below chest level. PX 5 at 41. He cannot recall who translated for Petitioner but he believes he obtained an accurate history. PX 5 at 42. He does not know whether Petitioner suffered from venous insufficiency. PX 5 at 45. His notes contain no mention of pre-accident shoulder pain. PX 5 at 45. He is not aware that Petitioner saw his personal care physician for shoulder pain before the accident. PX 5 at 46. That would not cause him to change his causation opinion. PX 5 at 46.

On redirect, Dr. Shah opined that trauma can accelerate and aggravate underlying degenerative rotator cuff tears. This is what happened in Petitioner's case. PX 5 at 46.

On December 18, 2015, Dr. Biafora issued an addendum after reviewing Dr. Bhoopal's notes, Dr. Shah's note of May 4, 2015 and Dr. Shah's deposition testimony.

Dr. Biafora indicated it was difficult to read Dr. Bhoopal's handwritten notes but he was unable to detect any pre-accident complaints of shoulder pain. Nevertheless, based on the Excel records, he adhered to his previous causation opinion. He commented that degenerative shoulder tears "are not uncommon in [Petitioner's] age group and that the "natural history of symptomatic degenerative conditions is that routine daily activities may cause a temporary aggravation of the underlying condition." RX 10. Biafora Dep Exh 4.

Dr. Biafora testified by way of evidence deposition on February 3, 2016. Dr. Biafora testified he is board certified in orthopedic surgery and has additional certification in hand surgery. RX 11 at 5. He performs about six upper extremity surgeries per week. RX 11 at 5. He underwent fellowship training in hand and upper extremity surgery. RX 11 at 6.

Dr. Biafora went through his initial examination findings and conclusions. [See above for a summary of same.] In his opinion, the fact that Petitioner reported feeling a "pop" in his right shoulder on September 27, 2015 does not mean he sustained a traumatic event. RX 11 at 22. It is his understanding that Petitioner performed various activities at work, including lifting cardboard and placing a cover on a stack of cardboard sheets. RX 11 at 25.

Dr. Biafora reiterated the opinion set forth in his initial report, i.e., that he did not believe Petitioner's bilateral shoulder conditions stemmed from his work or the September 27, 2014 accident because Petitioner was "not forthcoming" with him as to his pre-accident shoulder complaints. At his examination, Petitioner denied having right shoulder complaints before the accident but the Excel records show Petitioner had a history of bilateral shoulder pain. RX 11 at 26-27. The MR arthrograms showed "almost identical findings" in both

shoulders. The joint changes were longstanding, as were the rotator cuff changes. The bilateral biceps ruptures "could also be degenerative in nature." RX 11 at 27. There is no way to determine the age of those ruptures. RX 11 at 28. Petitioner attributed his left shoulder complaints to overuse following the accident but the left shoulder findings were essentially the same as on the right. RX 11 at 30. In his opinion, Petitioner had a "chronic underlying condition that [was] going to progress with time." RX 11 at 30. Petitioner could have been lifting laundry at home and felt the same pain he was feeling at work. RX 11 at 32.

Dr. Biafora testified he believes surgery is reasonable. As of his examination, he felt Petitioner should undergo left-sided surgery first. RX 11 at 32.

Dr. Biafora opined that, typically, activities that contribute to most shoulder injuries or pathology are those performed at shoulder level or higher. RX 11 at 35. He would not expect that bending over to lift items off of the floor would cause any longstanding chronic issues. RX 11 at 36.

Dr. Biafora testified he reviewed additional information, including Dr. Shah's deposition testimony, before he prepared his addendum in December 2015. The additional information did not prompt him to change any of his previous opinions. RX 11 at 40. While it is possible that Petitioner felt pain while lifting something from the ground, this would not permanently aggravate his shoulder. RX 11 at 41. If you obtain shoulder MRIs of people in Petitioner's age group, those MRIs are "going to show a lot of changes." RX 11 at 43. Petitioner has "numerous issues with his shoulders that could be potential pain generators." RX 11 at 44.

Under cross-examination, Dr. Biafora testified that chronic degenerative conditions can flare but typically return to baseline. RX 11 at 47-48. The mechanism of injury Petitioner described involved a "minimal amount of energy." That mechanism would not result in a permanent aggravation. RX 11 at 51. The level of detail in the histories set forth in the Excel notes was convincing. He took those histories into account when he formulated his opinions. RX 11 at 54.

Dr. Biafora testified he performs about 150 IMEs per year. Between 75% and 90% of those are for respondents. RX 11 at 56.

On redirect, Dr. Biafora testified that Petitioner told him he lifted a stack of cardboard. RX 11 at 59. A temporary aggravation causes a flare-up of symptoms but no structural change in the body. RX 11 at 61.

Under re-cross, Dr. Biafora testified it is possible that Dr. Cronin, who connected Petitioner's shoulder problems to his work, did not have the benefit of the initial history obtained by Dr. Marsiglia. RX 11 at 63. Typically, a practitioner at a clinic would look back to check the prior history if he knew the patient had already been seen. RX 11 at 63-64.

Petitioner testified he has not undergone the recommended shoulder surgery because Respondent did not authorize it. He wants to undergo the surgery. He has not reinjured either shoulder since the accident. T. 34. He still has pain in both shoulders. At night, he wakes up hourly due to this pain. He feels the pain when he reaches for something, puts on a jacket or tries to vacuum. T. 34. He did not quit his job with Respondent. Respondent told him he was fired. T. 36.

Under cross-examination, Petitioner testified he was born on April 30, 1953. He will turn 63 in April 2016.

In response to a question asking whether Respondent was a "fully automated" operation, Petitioner said no, explaining that about half of the work was performed manually. He agreed that the machines automatically convert conventional paper into corrugated sheets. Technically, the machines are supposed to stack the corrugated sheets into bundles but, at times, the sheets get stuck inside the machine and are "spat out all over the place." If only one sheet is out of place, the stack has to be re-assembled manually. Most of the time, however, the stacks come out of the machine correctly. The production area has rollers built into the floor, to facilitate the movement of the stacks, but the stacks can fall, necessitating manual re-stacking.

Petitioner testified his job title as of the accident was "machine operator" but he was required to be familiar with all three jobs: stocker, bander and "cap sheets." If he worked at all three of these positions, he earned more money pursuant to the union contract. During the two to four years before the accident, he spent most of his time at the banding machine but all employees, regardless of job title, were required to help re-stack scattered sheets whenever a machine malfunctioned.

Petitioner testified that, at the time of the accident, he experienced terrible right shoulder pain while working with Rob to lift a stack of sheets. The sheets were not tied together. They had been scattered on the floor. The stack they lifted consisted of sheets that were 8 to 9 feet long and about 1 inch deep. It took two of them to lift the sheets due to the length of the sheets. Whenever a machine spewed out sheets onto the floor, he and other employees would work together, grabbing as many sheets as they could fit in their hands.

Petitioner did not recall seeing a physician named Dr. Marsiglia at Excel on September 27, 2014 but he would not disagree if the clinic records show he did. He does not recall giving a specific history to this doctor. He complained of right shoulder pain secondary to lifting. A woman named "Karolina" translated for him at this visit. She was a physical therapy assistant who worked at Excel. On another occasion, a Mexican person at Excel tried to interpret for him. He (Petitioner) is able to speak a little English. He acknowledges it is important to be truthful with a doctor and provide accurate information. He could not recall if he mentioned bilateral shoulder pain to the doctor on September 27, 2014. It is possible he told the doctor he had been experiencing right shoulder pain for at least a year. He does not specifically recall saying this. Before the accident, his own doctor told him to perform exercises if any body part

was bothering him. When he was subject to a lifting restriction, he overused his left arm to compensate for his right. His left arm pain started gradually. There was no sudden incident. During the time he treated at Excel, his right arm improved and his left arm worsened. At the beginning, physical therapy was helpful. Later, it started causing pain. He is not sure whether he underwent a left shoulder MRI before undergoing a right shoulder MRI. As far as he knows, the MRIs showed tears. He is not a doctor. When he attended therapy, Karolina translated for him. If the records show he reported having had shoulder pain for more than a year, that pain was "at a different level." The pain he had before the accident was the kind of typical pain everyone experiences due to physical work. The pain did not prevent him from working. The pain he experienced immediately after the accident was different.

On redirect, Petitioner testified he could have earned even more money if had worked five different jobs. T. 64. He worked three. T. 64. He performed all three of those jobs between the accident and October 10, 2014. T. 64. The rollers on the floors were problematic. Sometimes you had to step onto the rollers and you could lose your balance as a result. T. 65. He had to react quickly when a machine malfunctioned. T. 65-66. If a machine was broken, problems would occur more frequently. It only took one uneven sheet to create a problem. He never injured either shoulder before the accident. T. 67. If he had experienced shoulder complaints before the accident, he would have relayed them to his family physician, Dr. Bhoopal. Dr. Bhoopal is not a shoulder specialist. T. 67. He cannot recall whether Dr. Bhoopal prescribed any shoulder treatment before the accident. T. 68. He did not undergo any shoulder therapy or shoulder surgery before the accident. T. 69. He never felt any sharp pain in either shoulder before the accident. T. 69.

Respondent called three witnesses.

Thomas Kenworthy testified he has worked for Respondent for 16 ½ years. He started out on the production floor and worked his way up to supervisor and then production manager. T. 73. Early in his career, he worked the three jobs that Petitioner described. T. 73.

Kenworthy testified that Respondent acquires rolls of paper from outside suppliers and mechanically converts that paper into corrugated sheets that are cut to size depending on a customer's needs. T. 74. Respondent has two machines and three main production lines. T. 75. Once the sheets have been fabricated, they are shipped out in stacks, which are referred to as "units." T. 75.

Kenworthy testified that Respondent's production area is the size of three high school gymnasiums. T. 76. The two machines face one another. The finished products go into the production lines, which are in the middle, between the machines. T. 76. The machines perform similar functions but one is more specialized. One is as long as three tractor-trailers and the other is as long as two or two and a half tractor-trailers. T. 77.

Kenworthy testified that the finished corrugated sheets contain wavy, air-filled "flutes" and are not as heavy as conventional, thin cardboard. T. 79-80. Respondent is "fully

automated." The machines perform the corrugation. T. 80. A customer might order anywhere between 100 and 8,000 sheets. Once the sheets come out of the machine, they are bundled into "units" that are 48 inches high. T. 80. Each machine has a "stacker" at the end. The "stacker" part of the machine automatically creates stacks. The employees do not manually create stacks. The job title "stacker," as used by Petitioner, refers to the employee's position on the production floor, not the employee's function. T. 82. A "stacker" looks at a computer screen to verify that the machine is creating sheets of the correct width and length. No lifting is involved. T. 82. When the sheets come out of the machines, they come out individually. The banding machine is used to band them together into units. The banding machine performs a function similar to that performed by a person tying a ribbon around a present. It applies thin plastic strapping both width and lengthwise. T. 84, 86. After a unit is banded, it goes to the shipping department. There are rollers in the production room floor that are turned via a giant belt that is underneath. The belt is not visible. The rollers are equipped with "photo eyes." They stop and start on their own. The stacks move along the rollers. No one has to manually push or pull them. T. 86.

Kenworthy testified he is familiar with Petitioner. He refers to Petitioner as "Andy." Andy worked on the production floor between 2007 and September 2014. T. 87. During his first two years at Respondent, Andy worked as a stacker, checking the quality and size of the fabricated sheets. T. 88. Once a stacker verifies the quality and size, he creates a "tag" to let the shipper know where the sheets are to be sent and pushes a button to allow the stack to move along to the capping position. A capper applies a protective corrugated sheet to the top of each unit to make sure the unit is protected when it goes through the banding machine. T. 88. A "bander" operates a "sheet inserter" machine which creates sheets that are mechanically placed at the bottom of each unit, for protection. The "bander" then operates controls to start and complete the banding process. T. 89. Kenworthy acknowledged that the robot that puts the bottom sheets under a unit sometimes misfires. When this happens, a bander has to manually use a type of giant crowbar to lift the unit and "kick" the protective sheet underneath it. T. 90.

Kenworthy testified the corrugated sheets vary in weight, depending on their size. Some of the sheets are very wide and very long. The weights vary from a few ounces to a couple of pounds. The majority weigh between ounces and one pound. T. 91-92.

Kenworthy acknowledged that the machines malfunction at times. Paper can get skewed inside a machine. "There is no stopping the machine" so messes can occur. If a stacker acts quickly, he can grab the defective sheets as they come out of the machine, before they go into the bundle. If he can't grab them in time, the sheets can end up shooting out onto the floor. When this happens, Respondent expects the stackers and "cap sheet" workers to gather up the sheets and fix the units so that production can continue. Respondent wants to get any mess "fixed right away in case there's another mess down the road." T. 93-94. When a unit comes out, a stacker checks the top sheet for any defects. If he finds a defect, he might have to put that unit off to the side and go through it to see how far down the defect extends. If the defect is small, he might have to restack the unit, removing any defective sheets. T. 96.

Kenworthy testified there is "no exact science" as to how many "messes" occur per shift. On an average day, a stacker might have to restack fifteen different units. T. 97, 120. In most cases, a mess can be cleared up within five minutes, because multiple people are assisting. T. 97. Not all "messes" involve much lifting because only a few sheets might need to be pulled or rearranged.

Kenworthy testified that, after spending his first two years as a stacker, Petitioner moved on to the "cap sheet" area. After that, Petitioner "spent the majority of his time on the bander operator because that's where he was best at." T. 99. When Petitioner worked the first shift, he was primarily on the bander but he might have gone to the stacker to relieve another worker who was on break. Overall, after the first two years, Petitioner spent most of his time on the bander and "cap sheets." T. 100. This is not to say, however, that Petitioner never worked as a stacker during that time. T. 100-101. During the last few years, Petitioner might have worked as a stacker on rare occasions, when Respondent was shorthanded. T. 102, 104. Respondent rarely used the bander operators to perform restacking because it was "trying to keep the lines moving." The bander operators only got involved in restacking if there was a "huge mess" that had to be cleaned up "right away." T. 101-102. This would happen maybe once or twice a month. T. 102, 122. In an extreme situation, when a huge mess occurs, Respondent might shut down the machines until the problem is fixed. T. 122. Respondent tells its employees to grab only as many sheets as they can comfortably handle. T. 104.

[At this point in the hearing, the parties and Arbitrator viewed RX 14, a job video. At the beginning of the video, two stacks can be seen. The bigger stack, on the left, is one unit that was automatically stacked via machine, not by hand. The cap sheet on the top of this stack was placed there manually. The smaller stack, on the right, is another unit. Blue rollers can be seen at the bottom of the screen. A bander operator can be seen using a crowbar-type device to insert a bottom sheet. Banding can also be seen.] Kenworthy testified that the pace of the work shown in the video is the normal pace. T. 115. The pace can get more "frantic" when a lot of "4 out" orders are run. T. 115-116. Kenworthy also testified that the video shows two workers doing restacking after a unit fell over while it was coming down the line. Kenworthy testified that the restacking shown in the video is "not what [Petitioner] was describing where mess came out of the machine." T. 118.

Kenworthy testified that it is primarily stackers and cap sheet workers who perform restacking. A bander operator only helps this "when there is a bigger mess, when the supervisor needs extra guys to help." T. 121.

Kenworthy testified that the only Respondent worker who might have to perform repetitive lifting is the person based at the "wet end" who lifts rolls of paper. Petitioner never worked at this position. T. 123. Petitioner only performed the three positions shown on the job video. T. 123. None of those positions requires repetitive lifting. Respondent posts a 55-pound lifting restriction but he cannot think of an instance where a worker would lift 55 pounds. Some sheets are as large as 50 by 80 inches but it would not be possible for two

people to lift many of these sheets at one time because sheets of this size "bow in the middle." T. 124. On average, a worker performing restacking might lift 5 to 10 pounds at one time. T. 125.

Kenworthy testified he did not personally fire Petitioner. Petitioner, like Respondent's other employees, was a union member. Petitioner had the right to file a grievance if he thought his termination was wrongful but he did not file one. T. 125. Petitioner was fired because he failed to turn in FMLA disability forms. Petitioner had to file these forms because his workers' compensation claim was denied. This was explained to Petitioner, through a co-worker who speaks Polish, and Respondent sent paperwork to Petitioner's house on multiple occasions. T. 126.

Kenworthy testified Respondent tries to keep everything under 50 inches in height so that the workers do not have to lift too high. However, there are occasions where a worker might lift something to a height of 60 inches. The workers are not supposed to do this. T. 127. Banders, stackers and cap sheet workers would not have a need to work overhead. T. 128.

Under cross-examination, Kenworthy testified Respondent's goal is to keep both machines running and produce as much as possible. T. 130. The workers have an incentive to work as quickly as possible. That incentive is built into their union contract. They receive performance incentives. T. 130. It would be more efficient for a worker to grab a larger stack than to grab one sheet at a time. T. 133. It could happen that an employee helping another employee restack would have to lift more sheets at a time than he would typically lift on his own. T. 135. When Respondent runs a "1 out" rather than a "4 out," no cross banding is needed. T. 139. He disagrees with Petitioner's testimony that he spent equal amounts of time as a stacker. It has been years since Petitioner worked the stacker position. T. 141. He also disagrees with Petitioner's testimony that he lifted 20 to 50 pounds at a time when restacking. The 55-pound restriction comes into play when workers clean up on the weekend or move things around. T. 142. A worker would typically be lifting only 10 to 15 pounds while restacking. T. 143. He does not recall what schedule Petitioner worked between September 27 and October 10, 2014. T. 143-144.

On redirect, Kenworthy testified that the units travel along the rollers at a constant rate. That rate is shown on the video. A "4 out" requires cross-banding. T. 145. Cross-banding makes things "a little more hectic" because it slows down the process. T. 146. The process of cross-banding is done by machine, automatically. T. 147. The bander does not even have to touch the control knobs. He believes the workers operate the knobs out of boredom. T. 147. When a "huge mess" occurs, it generally takes five to eight minutes for four guys to gather up the sheets and restack them. The video does not show a "huge mess." T. 148-149. The workers who gather up the sheet grab "what they feel comfortable with." T. 150.

Under re-cross, Kenworthy admitted that the workers cleaning up a mess move as fast as they can. T. 150.

Cynthia Rega also testified on behalf of Respondent. Rega testified she is an industrial rehabilitation physical therapist with 30 years of ergonomic experience. She obtained a master's degree in health service administration and has taken 50 to 60 courses in industrial rehabilitation, prevention and ergonomics. T. 152-153. She is a "CEAS," or certified ergonomic assessment specialist. T. 153. She worked at Mercy and Ingalls Hospitals in the past. She currently works for Custom Case Management. T. 153-154.

Rega testified she visited Respondent's facility on February 1 and 5, 2016. While at the facility, she interviewed five employees, including Thomas Kenworthy and Rick Gilgerson, Petitioner's immediate supervisor. T. 155. Two of the people she interviewed work as bander operators. She also recorded a job video. T. 156.

Rega identified RX 13 as the report she drafted. The report refers to a "WISHA" checklist for muscular skeletal disorders. WISHA stands for Washington Department of Labor and Industrial Ergonomic Guidelines. T. 158. The checklist is used to determine whether a particular worker falls into a category of "caution," referring to "probable issues leading to muscular skeletal disorders." T. 158. Because Petitioner was alleging bilateral shoulder problems, she pulled only the criteria relating to the shoulders. WISHA, with reference to OSHA guidelines, identifies five risk factors for the development of shoulder disorders: awkward postures (meaning working with the hands above the head or the elbows above the shoulders for more than two hours per day), repetitive raising of the hands above the head or the elbows above the shoulders for more than two hours per day, repetitive motion, i.e., making the same motion with little variation every few minutes for more than two hours per day, and force, i.e., lifting an object weighing more than 75 pounds once a day or lifting an object weighing more than 55 pounds more than 10 times a day, or lifting objects weighing more than 10 pounds more than twice a minute for 2 hours a day, or lifting objects weighing more than 25 pounds above the shoulders or at arms' length more than 25 times per day. T. 161-162.

Rega testified she observed the bander operators perform their job for a period of time. She then took measurements and video footage. The video showed a combination of "outs" based on the workers' representations. T. 163-164. In her opinion, based on a reasonable degree of certainty, the bander operator job does not involve any of the enumerated risk factors in terms of positioning, loads or heights. She concluded that "the initial right shoulder complaints and subsequent left shoulder complaints did not arise from the performance of the banding operator job functions." She operated under the assumption that Petitioner worked as a bander operator the majority of the time. T. 165-166, 173. She also filmed restacking of different loads. The workers performed restacking six to ten times. She also observed the "capping" process. Each "cap sheet" weighed one pound. T. 168. Some workers grabbed one sheet at a time. Others grabbed two. Most of the caps were placed at a height between 41 and 48 inches off the ground. T. 169.

Under cross-examination, Rega testified that the risk factors she relied on are very specific and objective. Rega acknowledged that it is "feasible" for a worker to tear his rotator cuff or labrum by incorrectly lifting a weight. T. 173. It is her understanding Petitioner

continued performing full duty after the alleged accident. T. 174. Rebecca Hill told her this. T. 175. She believes Petitioner spent most of his time banding and would only rotate into the other two jobs if another worker was on break or at lunch. T. 174-175. She does not know how much restacking had to be performed between the alleged accident and October 10, 2014. T. 176. Petitioner did not begin restricted duty until later. T. 178.

Rega conceded her report contains no specifics as to the work Petitioner performed on a day to day basis. T. 179.

On redirect, Rega testified that it was not until October 27, 2014, after Petitioner's left arm became symptomatic, that Petitioner was placed on restrictions of no lifting over 10 pounds and no overhead use of either arm. T. 180. A person with a perfectly healthy shoulder should not develop problems as a result of the activities she observed. It would not be uncommon, however, for a person with severe, pre-existing shoulder degeneration to experience pain while engaged in those activities. T. 181. The following exchange then occurred:

> "Q: Just become someone experiences pain while [he is] engaged in activity does not necessarily mean that there's been a new injury or an aggravation. It just means that they have pain while performing the activity, is that fair to say?
>
> A: That's hard to say. I mean that's hard to say.
>
> Q: Would that be something you would defer to a doctor [on], then?
>
> A: Correct."

T. 183.

Rebecca Hill also testified on behalf of Respondent. Hill testified she has worked for Respondent for 12 years. She is the benefits administrator. T. 183. She is familiar with Petitioner. On September 27, 2014, Petitioner reported feeling pain in his right shoulder. He did not complain of left shoulder pain at that time. T. 186. When Petitioner later complained of his left shoulder, in late October 2014, he was sent to Excel, where Respondent sends employees claiming work injuries. At Excel, the doctor "said [Petitioner] had overuse syndrome." It was not until that visit, maybe on October 27th, that the doctors at Excel imposed restrictions. T. 188. In March 2014, Respondent obtained a Section 12 examination by a shoulder specialist, Dr. Biafora, who opined that Petitioner's condition was not work-related. At that point, Respondent was not able to accommodate Petitioner's restrictions. T. 189. Respondent is bound by the terms of the union contract. That contract states that a worker cannot be given light duty if the need for light duty is not work-related. T. 189. At that point, Petitioner was given FMLA and disability paperwork. Another union member, who speaks

Polish, was present and interpreted for Petitioner when she and Kenworthy met with Petitioner to explain why he was being offered FMLA and disability. RX 6, the FMLA paperwork, reflects that this meeting took place on April 16, 2015. T. 191. Petitioner was given a 15-day deadline for turning in the paperwork. The deadline came and went. She then sent Petitioner a letter giving him an extension to May 22, 2015. RX 7. Petitioner failed to respond by that date. T. 193. At that time, she sent Petitioner a letter indicating he was now on an unauthorized absence and was terminated. RX 8. Petitioner never provided the paperwork. She received a call from his attorney's office asking her to hold off on sending the final letter (RX 8), which she did, but Petitioner still failed to respond. T. 194. Had Petitioner turned in the paperwork, he would have continued to have group coverage and could have obtained short-term disability benefits. T. 195.

Under cross-examination, Hill acknowledged receiving records from Excel via facsimile. She did not, however, recall seeing an Excel note dated November 10, 2014 in which a doctor stated that Petitioner's bilateral shoulder pain was connected to his work. T. 198.

On redirect, Hill testified she may have seen a report from Dr. Pillar of Excel indicating that Petitioner's condition was chronically degenerative. T. 201.

Arbitrator's Credibility Assessment

The Arbitrator finds credible Petitioner's testimony concerning the mechanism of his claimed September 27, 2014 right shoulder injury. Petitioner testified he was working with his lead man, Rob, at the time of this injury. Petitioner also testified that his supervisor, Rick, sent him to the Excel clinic shortly after the injury. Neither Rob nor Rick testified at the hearing.

The Arbitrator also finds credible Petitioner's testimony concerning the extent of his pre-accident shoulder complaints. Petitioner admitted to having some shoulder pain before the accident but denied undergoing any formal therapy or surgery. The records of Dr. Bhoopal, Petitioner's primary care physician, while difficult to read, appear to focus primarily on Petitioner's cardiac and vein problems. There is no evidence indicating Petitioner underwent shoulder X-rays, let alone MRI scanning, before the accident.

Respondent's examiner, Dr. Biafora, described Petitioner as "not forthcoming" concerning his pre-accident shoulder condition. The Arbitrator disagrees with this description. When Petitioner first went to Excel, on the day of the right shoulder injury, he disclosed a history of bilateral shoulder pain, with the right shoulder pain dating back at least one year. Despite that disclosure, the Excel physician, who was of Respondent's selection, diagnosed a right shoulder strain based on Petitioner's history of the lifting-related injury.

The Arbitrator acknowledges that the various histories in Petitioner's post-accident records do not "mesh" 100%, especially with respect to the onset of the left shoulder complaints. The Arbitrator notes that different individuals translated for Petitioner along the way. This could account for some of the variances.

Arbitrator's Conclusions of Law

Did Petitioner sustain a right shoulder injury on September 27, 2014 arising out of and in the course of his employment? Did Petitioner sustain an overuse injury to his left shoulder thereafter? Did Petitioner establish causation as to a right shoulder specific trauma and a left shoulder overuse injury?

The Arbitrator finds that Petitioner injured his right shoulder while performing lifting at work on September 27, 2014. In so finding, the Arbitrator relies in part on Petitioner's credible account of the injury. Petitioner testified he experienced an abrupt onset of right shoulder pain when he turned while he and his lead man, Rob, were lifting sheets of cardboard that were 8 feet long. Three witnesses testified for Respondent but Rob was not among them. Nor did Respondent call Rick, the supervisor who sent Petitioner to Excel shortly after the accident. The Arbitrator finds this significant. Thomas Kenworthy, Respondent's production manager, took issue with Petitioner's estimate of the weight of the sheets he was carrying but admitted it can be difficult to carry very long sheets because they "bow," or droop, in the middle. Kenworthy also admitted that a "huge mess," such as the one Petitioner was cleaning up at the time of the injury, is not shown on the job video and that Respondent employees are required to work as fast as possible when rectifying a mess so as to avoid a slowdown in production. The Arbitrator finds it very plausible that Petitioner could have injured his right shoulder when he turned while helping his lead man lift 8-foot long sheets onto a stack.

The Arbitrator acknowledges there is evidence that Petitioner had right shoulder pain for at least one year before the accident. However, there is no evidence that any physician recommended testing or formal care for that pain. Nor is there any evidence indicating that the pain prevented Petitioner from performing his regular duties. It has long been held that an employer in Illinois takes an employee as it finds him. It is also axiomatic that "even though an employee has a pre-existing condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003). Dr. Shah, who testified on Petitioner's behalf, acknowledged that Petitioner had degenerative arthritis before the accident but viewed the accident as causing rotator cuff tearing based on Petitioner's history of an abrupt onset of increased right shoulder pain immediately after the lifting episode. Respondent's examiner, Dr. Biafora, found no causal relationship but based that finding primarily on perceived inconsistencies in Petitioner's history. As noted earlier, the Arbitrator disagrees with Dr. Biafora's conclusion that Petitioner was "not forthcoming." If Petitioner had wanted to hide his prior shoulder pain, would he have mentioned it at the company clinic on the day of the accident? Moreover, Dr. Biafora conceded that Petitioner could have aggravated his previous right shoulder condition when he lifted the sheets from the ground. He also conceded that Petitioner's work tasks could have caused his underlying left shoulder condition to become symptomatic. While the Arbitrator believes that neither Dr. Shah nor Dr. Biafora had all of the relevant information, in the sense that neither seemed to know

Petitioner was lifting 8-foot long sheets or that he turned while lifting, the Arbitrator views Dr. Shah as more persuasive overall.

The Arbitrator further finds that overuse was one factor in the post-accident worsening of Petitioner's left shoulder pain. While the Excel records show Petitioner continued to perform full duty for several weeks after the accident, that would not have precluded an overuse situation. On October 10, 2014, Dr. Cronin of Excel specifically diagnosed "overuse syndrome" with respect to the left shoulder. Dr. Cronin was a physician of Respondent's selection. Petitioner had earlier disclosed to another Excel physician that he had experienced bilateral shoulder pain before the accident, with the right shoulder pain dating back at least one year. Respondent's examiner, Dr. Biafora, testified it would be typical for a physician associated with a clinic to refer back to a history obtained at an earlier visit.

The Arbitrator views causation vis-à-vis both shoulders as multi-factorial, with pre-existing degeneration and the September 27, 2014 injury contributing. The Arbitrator further concludes that exercises performed during Excel-prescribed therapy also played a role in the worsening of Petitioner's left shoulder pain. The Arbitrator notes that Petitioner continued to work while undergoing therapy. While Respondent's ergonomic specialist, Cynthia Rega, declined to comment on whether pain experienced during work (or, in Petitioner's case, work and work activities simulated in therapy) can constitute an accident or aggravation, the Illinois courts have not been so reticent. In Peoria County Belwood Nursing Home v. Industrial Commission, 138 Ill.App.3d 880, 885, the Court noted that the word "accidental," as used in the Act, "is a comprehensive term almost without boundaries in meaning as related to some untoward event," citing Ervin v. Industrial Commission, 364 Ill. 56, 60 (1936). The Court went on to find that the claimant established an accident via her testimony that she experienced extreme difficulty gripping washer doors due to her upper extremity symptoms.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from April 18, 2015 through the hearing of February 23, 2016. Respondent disputes this claim, based on its accident and causation defenses and its contention that Petitioner removed himself from employment. Arb Exh 1.

The Arbitrator has already found in Petitioner's favor on the issues of accident and causation. It is not entirely clear to the Arbitrator when Petitioner last worked at Respondent. Rebecca Hill testified that Respondent stopped providing light duty at some point after Dr. Biafora's first examination, which took place on March 17, 2015. The doctor did not issue his report until March 25, 2015. On April 10, 2015, Dr. Maday indicated he agreed with Dr. Biafora's surgical recommendation and continued restrictions of no lifting over 5 pounds and no overhead lifting. PX 2, p. 15. When Petitioner saw Dr. Shah, on May 4, 2015, he reported being off work. Dr. Shah, like Drs. Biafora and Maday, recommended shoulder surgery.

Based on this timeline, the Arbitrator finds that Petitioner was temporarily totally disabled from May 4, 2015 through February 23, 2016. The Arbitrator views Petitioner's bilateral shoulder condition as unstable, based on the surgical recommendations. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). Surger was first contemplated by Dr. Maday, a referral from the company clinic, in January 2015, well before Respondent obtained a Section 12 examination and stopped accommodating Petitioner. There is no evidence indicating that Respondent re-offered Petitioner light duty at any point after May 4, 2015. Respondent's examiner agrees that Petitioner is a surgical candidate.

Is Petitioner entitled to prospective care?

The Arbitrator awards prospective care in the form of a return visit to Dr. Shah, so that the doctor can address which shoulder should be operated on first, along with that surgery.

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. Cooley,

Petitioner,

vs. NO: 15WC 2890

GSI Group, LLC,

Respondent.

17IWCC0723

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, 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 4, 2017, is hereby affirmed and adopted.

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

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

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: NOV 16 2017
TJT:yl
o 11/7/17
51

Michael J. Brennan

Kevin W. Lamborn

DISSENT

I believe the Arbitrator applied an unreasonably high burden of proof in this case, and that the facts show Petitioner proved by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent.

In her decision, the Arbitrator noted that "[i]n a repetitive trauma case, such as here, the issues of causation and 'arising out of' require expert medical opinion. [No citation provided]. Petitioner has failed to meet his burden of proof." (Arb.Dec.[Addendum], p.9). The Arbitrator went on to state, again without supporting citation, that "[i]t is axiomatic that in a repetitive trauma case expert opinion is needed to establish causation." (Id.). I submit that this is not the proper standard.

In fact, the case law dictates that an employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a Petitioner alleging a single, definable accident. *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (1989); citing *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 510 N.E.2d 502 (1987). Along these lines, I know of no requirement that a claimant alleging a single, definable accident has to present expert medical opinion in order to prove his or her case. Indeed, it has been held that testimony of the employee, if not impeached or rebutted, is sufficient to support an award. *Pheoll Manufacturing Co. v. Industrial Commission*, 54 Ill.2d 119, 295 N.E.2d 469 (1973); *Sahara Coal Co. v. Industrial Commission*, 66 Ill.2d 353, 362 N.E.2d 343, 5 Ill.Dec. 872 (1977).

Furthermore, it has been held that "[a] chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC (Opinion filed May 31, 2017); citing *Shafer v. Illinois Workers' Compensation Commission*, 976 N.E.2d 1, 364 Ill.Dec. 1 (4th Dist. 2011); quoting *International Harvester v. Industrial Commission*, 93 Ill.2d 59, 63-64 (1982). Interesting enough, the court in *Schroeder* called the chain of events principle "... nothing but a common-sense, factual inference." (Id.).

Thus, I do not believe that a claimant is required to provide expert medical opinion in order to prevail, even in a repetitive-trauma case. And I also believe that the chain of events and preponderance of the evidence would support a finding of accident and causation under the facts of this case.

However, even applying the standard urged by the Arbitrator, Petitioner did in fact provide a medical opinion in support of his claim in the form of Dr. Ma, the board certified orthopedic hand surgeon who performed the right and left carpal tunnel releases on Mr. Cooley. Unfortunately, the Arbitrator chose to strike Dr. Ma's causation opinion based on alleged "erroneous facts" in the hypothetical posed to him at the time of his deposition. I would suggest that the Arbitrator abused her discretion in striking this testimony, and that the facts she cites as being "erroneous" – namely, the activities Petitioner claimed he performed as part of his job -- would more fairly be characterized as "disputed", and thus subject to interpretation. Regardless, striking Dr. Ma's

testimony on this critical issue was entirely unnecessary, given that the Arbitrator could have simply accorded his opinion little or no weight if she was so inclined.

Furthermore, I believe that Dr. Ma's testimony on the issue of causation was anything but "equivocal", as the Arbitrator described it (Arb.Dec.[Addendum], p.10), given that Dr. Ma clearly was of the opinion, as noted in his stricken testimony, that Mr. Cooley's bilateral carpal tunnel syndrome "... would be aggravated from what you're describing with repeated wrist flexion and twisting. Because when you flex the wrist, you flex the tendon, and with the wrist flexion [it] will keep the wrist – the pressure inside the carpal tunnel will be increased. Over time it definitely will aggravate the problem." (PX1, p.23). And while Dr. Ma agreed that diabetes can make people more vulnerable to carpal tunnel syndrome, he could not say that diabetes causes same. (PX1, p.12-13). Furthermore, he testified that there could be more than one cause or contributing factor in the development of carpal tunnel syndrome. (Id., p.13). Indeed, Dr. Ma noted that the positive EMG findings were consistent with Petitioner's subjective complaints of numbness and tingling "[b]ecause my understanding [is] he works as a machine operator. That's what I know. He works as a machine operator. He's doing repetitive motion on a daily basis." (PX1, p.9). Thus, it would appear that Dr. Ma was very clear in his belief that Petitioner's job activities aggravated his condition.

The Arbitrator also questioned the credibility of both the Petitioner and Dr. Ma based on what she termed "missing information" in the initial short-term disability and group claim forms – namely, the failure of both Petitioner and Dr. Ma to designate on these forms that the injury was work related. Along these lines, it should be noted that indicating on a form or application for group health insurance benefits that an injury is not work related does not necessarily mean that compensation will be denied. *Thrall Car Manufacturing Co. v. Industrial Commission*, 64 Ill.2d 459, 356 N.E.2d 516, 1 Ill.Dec. 328 (1976); *Rockford Clutch Division, Borg-Warner Corp. v. Industrial Commission*, 37 Ill.2d 62, 224 N.E.2d 830 (1967). Thus, I would not place as much weight on this factor as the Arbitrator seems to do.

Finally, and probably most importantly, I disagree with the decision of the Arbitrator based on the simple facts of the case. Petitioner had worked as a machine operator for Respondent for more than seven (7) years, having started with the company in May of 2007. He had no history of problems with his hands or arms, much less been diagnosed with bilateral carpal tunnel syndrome, prior to his employment with Respondent. During his tenure as a machine operator for Respondent he worked eight (8) to twelve (12) hour shifts, five (5) days a week, working on a machine that bends and punches holes in steel plates. This required him to continuously reach with his hands and arms to flip and manipulate the steel into and out of the machine, with some of these parts weighing as much as 50 pounds. He indicated that on average he would have to handle about 600 parts per day, depending on the thickness and weight, and that for the lighter parts he could do over 1,000 pieces during the course of a given shift. Petitioner eventually started noticing numbness and tingling in his hands in approximately 2014, although he may have experienced some of these symptoms a year or two prior to that. However, the record clearly shows that Petitioner did not seek any treatment for these symptoms until he finally visited Dr. Fortin and underwent an EMG on 9/17/14, at which time he was diagnosed with bilateral carpal tunnel syndrome.

17IWCC0723

Based on the above, and the record taken as a whole, I would find that Petitioner proved by a preponderance of the credible evidence that he sustained accidental repetitive-trauma type injuries arising out of and in the course of his employment, with a manifestation date of 9/17/14, and that Petitioner's current condition of ill-being is causally related to said accident. As a result, I would reverse the Arbitrator and award compensation. For that reason, I respectively dissent from the majority opinion.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COOLEY, JAMES D
Employee/Petitioner

Case# **15WC002890**

GSI GROUP LLC
Employer/Respondent

17IWCC0723

On 5/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2427 KANOSKI BRESNEY
THOMAS R EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0771 FEATHERSTUN GAUMER ET AL
DANIEL L GAUMER
225 N WATER ST SUITE 200
DECATUR, IL 62523

STATE OF ILLINOIS 17IWCC0723
)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

James D. Cooley
Employee/Petitioner

v.

GSI Group, LLC
Employer/Respondent

Case # 15 WC 02890

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 28, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/17/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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 **$33,197.84**; the average weekly wage was **$638.42**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$4,200.07** for non-occupational indemnity disability benefits, for a total credit of **$4,200.07**.

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 for medical bills it has paid.

ORDER

Petitioner failed to prove he sustained an accident on September 17, 2014 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being in his hands/wrists is causally related to the injury or his employment duties with Respondent. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Signature of Arbitrator

April 28, 2017
Date

MAY 4 - 2017

FINDINGS OF FACT and CONCLUSIONS OF LAW

Petitioner has filed an Application for Adjustment of Claim, alleging he sustained injuries to his left and right hands on September 17, 2014 due to repetitive trauma while working for Respondent. (AX 2)

The Arbitrator finds:

According to medical records, on January 7, 2013, Petitioner completed a GSI Group, Inc, short-term disability claim form for low back pain, indicating it was not work-related, and that he had missed work from February 3, 2013 to February 8, 2013. He treated for low back pain with Dr. Milicevic on February 4 and 13, 2013. At the February 13, 2013 visit Petitioner was accompanied by his wife who was noted to be on disability for a low back injury. He needed paperwork completed so that he could be given sick leave and be paid. (RX 2)

He also completed a short-term disability claim form for low back pain on April 4, 2014, indicating it was not work-related and that he had missed work from April 1, 2014 to April 8, 2014. Petitioner was noted to have poorly controlled diabetes. (RX 2)

On August 21, 2014 Petitioner returned to Dr. Milicevic's office accompanied by his wife. Petitioner reported bilateral wrist and hand pain. Dr. Milicevic noted that Petitioner was left-handed and worked manual labor at a factory. Petitioner's wife reported that Petitioner "would forget about the tingling and numbness in the dorsal side of his hand, both hands. She thinks that he got carpal tunnel syndrome." (RX 2) Petitioner's pain was described as shooting from his wrist down to his fingers and almost his elbow. Petitioner was described as a "very noncompliant diabetic." He had not been taking his Metform or checking his blood sugar but had lost some weight. He refused blood work due to high co-pays and bills coming from other places. Petitioner was referred to Dr. Fortin for a nerve conduction study.

On September 17, 2014, Dr. Claude Fortin performed EMG/NCV studies on Petitioner's left and right hands. According to the report, Petitioner's symptoms included bilateral hand numbness and discomfort aggravated by activity and present upon awakening in the morning. The findings were consistent with bilateral median neuropathies at the wrists (severe on the left and moderate on the right) both neuropractic in nature and without evidence of axonal loss. (PX 3; PX 2, p. 23)

Thereafter, on October 21, 2014, Petitioner was again seen by his family physician, Dr. Milicevic. Petitioner reported that he worked as a manual worker at a factory and "he wants to know if it is job related or if it is related to his constitution or diabetes that he was told in Decatur Memorial Hospital. He has probably, his factory designated physician in Decatur Memorial Hospital." Dr. Milicevic noted that they had a long discussion with Petitioner about the etiology of carpal tunnel syndrome, which can vary, and "[Petitioner] understood very well." The doctor suggested that Petitioner see an orthopedic hand surgeon to discuss his options. In the interim, he was to buy a soft brace and try to work with it on and at night, especially on the left hand. Dr. Milicevic recorded Petitioner had gained some weight but his blood sugar was running well per

his home readings. Petitioner further mentioned that he needed "papers" indicating that he had been diagnosed with carpal tunnel syndrome for insurance purposes because he was going to have some reimbursement regarding it. The doctor indicated that he would note that Petitioner had been diagnosed with bilateral carpal tunnel syndrome and it was worse in the left hand. (PX 2, pp. 21-22)

On October 24, 2014, Petitioner presented to Dr. Ma, an orthopedic surgeon at Springfield Clinic. (PX 2, p. 19) He completed a Patient Intake form. On that form, he indicated having symptoms in his hands with any activity, which started 6 months prior. He marked a gradual onset of symptoms and noted raking and lifting were bothered by his symptoms. He marked "no" in response to whether he was involved in a legal action and whether he had sustained an injury. In response to the question which asked if the problems interfered with or was aggravated by his job, Petitioner wrote: "Yes[,] when lifting on parts or twisting of wrist." Petitioner left blank the question which asked if it was a work-related problem/injury. (PX 2, p. 62)

At the top of Dr. Ma's October 24, 2014 note under "chief complaint" it was recorded that Petitioner was employed as a machine operator. For work-related, the note states "no." This answer is also given in the post-surgery notes of Dr. Ma on December 2, 2014 and January 9, 2015. (PX 2, pp. 6, 8, 19) Under the "subjective" portion, it was recorded that Petitioner developed numbness and tingling in both hands "several years ago" but stated his symptoms had progressed over the past several months. He reported symptoms in his thumb, index, middle and ring fingers. Petitioner had been wearing a brace, which was not providing significant relief. Examination of both hands showed decreased sensation in the median nerve distribution. Petitioner had a positive Tinel's sign at the carpal tunnel, Durkan's test and "tennis test." After discussing the clinical and electrophysiological findings, Dr. Ma recommended surgery. (PX 2, pp. 19-20)

Included in Petitioner's Exhibit No. 2 is the GSI Group, Inc. Short-term Disability Claim Form completed by Petitioner and Dr. Ma on November 3, 2014 regarding Petitioner's bilateral carpal tunnel syndrome. Petitioner indicated he first became disabled on November 3, 2014 and circled "non-work-related." In the next section on the same page, Dr. Ma marked "no" in response to the question which asked if the disability arose out of the patient's employment. (PX 2, pp. 56-57; RX 1)

On November 3, 2014, Petitioner underwent a pre-surgical anesthesia exam. (RX 5; PX 2) Thereafter, Dr. Ma performed a left carpal tunnel release. His post-surgical diagnosis was left carpal tunnel syndrome. (PX 4; PX 2, pp. 15-16) On November 17, 2014, Dr. Ma operated on Petitioner's right hand, performing a right carpal tunnel release. His post-operative diagnosis was right carpal tunnel syndrome. (PX 5; PX 2, p. 11)

Petitioner was seen by Dr. Ma in post-surgical follow up on December 2, 2014. He was accompanied by his family. Petitioner's bilateral numbness and tingling was improved. Petitioner did report numbness and tingling in his left ring finger and small finger. Petitioner was noted to have slight decreased sensation in his left ulnar nerve distribution for which the doctor recommended non-surgical measures and avoidance of positions placing the elbow in a flexed position. (PX 2, pp. 8-9)

Petitioner signed his Application for Adjustment of Claim herein on December 26, 2014. (AX 2)

Petitioner's last office visit with Dr. Ma was on January 9, 2015. Petitioner, who was accompanied by his family, reported the numbness and tingling of both hands was improved, except for some continued numbness and tingling in his left ring finger and small finger. Dr. Ma recommended continued non-surgical measures for his left cubital tunnel syndrome. Petitioner was told he could work with the home exercise program for range of motion exercises and stretching. He was to return in 4-5 weeks for re-evaluation. (PX 2, pp. 6-7)

Respondent introduced into evidence the Health Insurance Claim Forms of Springfield Clinic, including Dr. Ma, Dr. Milicevic, Dr. Fortin, and Dr. Kakarala and Dr. Ryan. The last two doctors are the anesthesiologists who did the pre-anesthetic evaluations for Petitioner's surgeries. These forms all have the "no" box checked for whether the patient's condition is related to employment. (RX 1; RX 2)

Dr. Jianjun Ma testified by evidence deposition taken on September 27, 2016. (PX 1) Following graduation from medical school and completion of his residency, Dr. Ma completed an upper extremity/hand fellowship at Duke University. He is board certified by the American Academy of Orthopedic Surgeons and the American Society of Hand Surgeons. (PX 1, pp. 1 – 7)

Dr. Ma testified that he first saw Petitioner on October 24, 2014 at which time Petitioner was complaining of bilateral numbness and tingling. He noted that Petitioner's EMG showed severe left carpal tunnel syndrome and moderate right-sided carpal tunnel syndrome. Dr. Ma was asked whether the findings of Dr. Fortin were consistent with Petitioner's subjective complaints to which the doctor replied "Yes." When asked, "How so?," he replied "Because my understanding he works as a machine operator. That what I know. He works as a machine operator. He's doing repetitive motion on a daily basis." (PX 1, p. 9) Dr. Ma further testified that Petitioner's physical examination demonstrated symptoms consistent with "classic" carpal tunnel syndrome as the Durkan's, Tinel's and Phalen's tests were all positive. (PX 1, pp. 7 – 12)

Dr. Ma testified that diabetes, which Petitioner had a history of, could make the median nerve more susceptible to compression. He further testified that diabetic patients are more vulnerable to carpal tunnel syndrome but he could not say that diabetes would cause carpal tunnel syndrome. He also agreed that carpal tunnel syndrome can have more than one cause or contributing factors. (PX 1, pp. 12 -14) The following exchange then occurred:

> Q. Could a person have multiple contributing factors such as diabetes and workplace exposures? [objection]
>
> A. I – with a certain medical degree I cannot- I think from what I saw and especially this patient with repeated motion most likely the change – more chance to develop carpal tunnel syndrome compared to diabetes. He has diabetes. We know this. But diabetes can make him more vulnerable… ..to developing it. (PX 1, p. 13)

Dr. Ma testified that his carpal tunnel surgeries involved making a half-inch incision on the radial aspect of the ring finger to expose the nerve to release the transverse carpal ligament and the carpal tunnel. During the surgeries, he observed compression of the median nerve. He released Petitioner from his care for the carpal tunnel syndrome in early February of 2015, although Petitioner later saw him for issues with his elbow. He further testified that given Petitioner's work it would have been reasonable to keep him off work for several weeks as he was a machine operator and his job required a certain amount of strength of his hands. At the time of his release from care for the carpal tunnel syndrome, Petitioner had good strength and significantly improved in the recovery process but did have some numbness and tingling. He has continued to treat Petitioner since then but it has been for elbow complaints only and his hands were doing well. (PX 1, pp. 14-19)

Dr. Ma was posed a hypothetical and asked to assume that in 2007 Petitioner started working as a machine operator for Respondent and maintained that title through his EMG on September 17, 2014, working eight-hour days, or 40-hour weeks, but from May to August would work 48 to 60-hour weeks. He was also told to assume that Petitioner from time to time used a hand grinder and utility knife but mainly operated various machines, especially a brake press. The brake press required him to pick up sheets of metal, which ranged in size and width, and place the sheets of metal into a brake press, press a pedal down, which would cause the press to come down, and he would then use his wrists or hands to bend the metal but the machine would also bend it. Dr. Ma was told that after the metal would bend, Petitioner would take it out, flip it with his wrists, put it back in, bend it again, and this might go on several times throughout the course of a day. He was told some brake presses would require that Petitioner use a crank for 10 to 20 seconds at the beginning. He was told that putting the pieces of metal in and out of the machine would require Petitioner to twist his wrists and the wrists would be in somewhat of awkward and flexed positions. Dr. Ma testified that he could not make the statement that Petitioner's carpal tunnel syndrome was caused by his job, but he believed the job aggravated Petitioner's conditions based on the repeated wrist flexion and twisting. Dr. Ma reasoned that when the wrist is flexed, the pressure inside the carpal tunnel is increased and over time, it definitely will aggravate the problem. There is no set number of wrist flexions as everyone is different. Petitioner, however, might be more vulnerable because of his diabetes. Dr. Ma testified his treatment, including surgeries, was reasonable and necessary. (PX 1, pp. 20-24)

Dr. Ma testified that the majority of facts that he knew about Petitioner's job were given to him at the time of his deposition. He noted that on Petitioner's intake form, he marked yes in response to a question which asked if the problem interfered with or was aggravated by his job, and further noted twisting of his wrist. (PX 1, pp. 24-25)

On cross-examination, Dr. Ma noted that when he examines a patient with carpal tunnel syndrome, he cannot independently determine whether it is due to an injury at work or outside of work. In the majority of cases, carpal tunnel syndrome is related to repeated motion. He disagreed that there must be forceful gripping or flexed/extended hands along with repetition, noting both repeated motion and extreme flexion will increase the pressure, and increased pressure can cause carpal tunnel syndrome. Repetition alone could also aggravate the problem.

Such aggravation could be temporary or permanent. (PX 1, pp. 28-32) Dr. Ma stated that diabetes can make a person more vulnerable to developing carpal tunnel syndrome. Dr. Ma felt it was questionable whether smoking was a factor and he acknowledged that some studies suggest obesity may be a factor. Dr. Ma agreed that Petitioner is obese. (PX 1, pp. 34-36)

Dr. Ma further testified that he couldn't say Petitioner's numbness and tingling went away but it substantially improved. He believed Petitioner's strength was back to normal. He would also expect Petitioner's range of motion to return to normal and that Petitioner would recover essentially full use and function of his hands with no significant disability or impairment as a result. (PX 1, pp. 37 – 39)

Dr. Ma agreed that he is an advocate for his patients. He has not scheduled any further appointments for Petitioner with regard to his hands and he told him to return to see him if he had any problems. He further agreed that the fact that Petitioner hasn't returned to see him for his hands leads him to the conclusion that he's probably doing well with his hands. He also agreed that Petitioner was released with no restrictions. (PX 1, pp. 39 -41)

On further cross-examination, Dr. Ma discussed the chief complaint portion of his notes, which indicates "no" in response to whether Petitioner's condition is work-related. He testified that it was marked "no" because Petitioner had indicated no. Dr. Ma further testified that it is his practice to ask the patient if he/she thinks his/her condition is workers' comp, and if the patient says no, the "no" box is marked. Dr. Ma was also asked about the health insurance claim forms, which have a box marked "no" for whether the treatment is for a condition related to employment. He explained that if a patient has filed a workers' compensation case, Springfield Clinic marks work-related, but if a case is not filed, it marks not work-related. The form is for insurance purposes. When asked if he was representing to the insurance company that, in his view, Petitioner's injury was not work-related, the doctor replied," Well, basically the patient – if they did not file workmen's comp, we say this is not work related." He went on to explain that when the form is completed stating it is not work-related, that is done solely because the patient hasn't filed a workers' compensation claim. If he does indicate the condition is work-related, the insurance company won't pay the bill. (PX 1, pp. 41-48)

Dr. Ma acknowledged that he has never seen Petitioner's job nor does he know the position of Petitioner's hands at work, the amount of force or repetition involved, variation in activities, or the amount of downtime involved in his job. He also did not investigate Petitioner's non-occupational activities to see if any of them involved strenuous or vigorous use of his hands. (PX 1, pp. 50-51)

Dr. Ma testified on re-direct examination that since Petitioner had not filed a workers' compensation case when he started treating with Dr. Ma, Springfield Clinic's practice was to mark not work-related on the billing forms. (PX 1, pp. 43-54)

Petitioner's case proceeded to arbitration on February 28, 2017. At the time of hearing, issues in dispute were accident, causation, medical bills, temporary total disability (TTD), and the nature and extent of any injuries. (AX 1) Respondent's representative at the hearing was ShaeLynn Woods. Witnesses included Petitioner, Ms. Woods, and Brent Becker.

Petitioner, 39 years old, testified that he works for Respondent, a manufacturer of grain bins, including the steps and outer and inner parts thereof. He started working for Respondent full-time on August 20, 2007, as a machine operator, a position he still holds. Prior to working for Respondent, he never had any problems with his hands or arms. He mainly works 8-hour shifts, but during the summer (May to August) it can vary from 8 to 12-hour shifts. It can also be busy as early as February (and through August). Usually, he works 5 days per week, but sometimes, he is required to work overtime on Saturdays. Overtime Saturdays are worked during the summer months. He gets two 10-minute breaks and one 30-minute lunch.

Petitioner testified that, as a machine operator, he uses a press brake, an Amada brake, and a fin brake. These are all machines used for braking and forming parts (sheets of metal/steel). Additionally, he has to use a protractor, a ruler, and, occasionally, a hand grinder. He identified Petitioner's Exhibit No. 6, entitled "GSI Group, LLC Job Description," as an accurate job description for a machine operator. (PX 6) He further testified that he only worked with another employee if the item or part weighed over 50 pounds. In 2014, he worked with another employee about every day because he was running parts that weighed 50 to 150 pounds. Petitioner testified that, recently, he has been working alone.

Petitioner testified that the process for using the press brake, Amada brake, and fin brake is basically the same. He would go get parts (the sheets of metal or steel) which are on a table. He then pulls the table over next to his machine. It could have up to 50 to 100 pieces of metal on it. He would put dies into the brake press and program the machine, using his fingers to program it. The dies weight 1 – 4 lbs. Programming the machine could take 1 to 10 minutes. Then he would pick up a sheet of metal, run it, and check it with a protractor and ruler. After he measured the first part, he would process his order. He would stick each piece into the machine and press a pedal that was on the floor. While pressing the pedal, he would hold the piece of metal with both hands, usually with his palms facing up. Depending on the thickness of the steel, his grip pressure would vary. On a scale of 1 to 10, the grip pressure would be 3 to 4 for a light piece and 6 to 10 for the thickest pieces. When his foot presses the pedal, the machine comes down and makes the bend. The Amada brake and fin brakes make bends in the metal, while the press brake forms the metal. After the machine bends or forms the part, he removes the part. If only one "hit" was required, he would place it into a cart or a tub. If more than one "hit" was required, he would remove it, flip it, and place it back into the machine for another "hit." He demonstrated how he would flip the parts using his wrists and fingers. Petitioner estimated that 20 to 60 percent of the parts require more than one "hit." Petitioner would use a hand grinder about 3 or 4 times a week to smooth a part before it is put into a machine and, according to Petitioner, the grinder vibrates. Petitioner testified that he holds the grinder with his right hand.

Petitioner further testified that prior to September 17, 2014, he processed an average of 600 parts per shift, but it depended on the weight and thickness. If he was working with heavier or thicker parts, he would process fewer parts per shift, but if he was working with lighter parts, he processed more parts. If working with heavier parts, he would do between 200 and 400 parts per shift. If working with lighter parts, he would process over 1,000 parts. Petitioner noted that Petitioner's Exhibit No. 7, while not him, fairly accurately depicts a brake press and how he would put the sheets of metal into the machine and then pull them out.

Petitioner testified that in 2014 he started having numbness and tingling in his hands, and the more work he did, he would start having pain in his wrists. He noticed the symptoms even if he wasn't working. When trying to sleep his hands would start becoming numb and tingly. Petitioner testified that after an EMG was performed he completed an accident report. When he saw Dr. Ma at Springfield Clinic on October 24, 2014, he completed a Patient Intake form. He explained that he marked "no" when asked if he was involved in a legal action for his problem and he also indicated in the form that the problem interfered with lifting and twisting his wrists. Petitioner testified that his reference to "twisting his wrists," referred to running steel. Petitioner further testified that at this point, he had not hired an attorney or filed an Application for Adjustment of Claim with the Commission. Petitioner testified that in response to a question on the same form which asked if the problem or injury was related to work, he left it blank explaining that at that point in time he didn't know whether his problem was work-related or not.

Petitioner testified that on November 3, 2014, Dr. Ma operated on his left wrist. That same day, he completed a GSI Group, Inc. short-term disability application and circled non-work- related. Petitioner testified that he was afraid that if he marked work-related, his short-term disability would be denied. On November 17, 2014, Dr. Ma operated on his right wrist. Dr. Ma returned him to full duty work on January 23, 2015.

Petitioner testified that his hands and fingers improved after surgeries. The numbness and tingling have resolved. He does not currently notice anything about his hands or wrists at work where he is still a machine operator. Currently, he notices a little weakness with grip strength while doing certain things around the house, such as opening a jar of canned goods and using a screwdriver or hammer. Using a leaf blower also causes a little weakness so he switches it back and forth between both hands. Petitioner testified that mowing the lawn is not problematic for him. Petitioner denied any loss of future earning capacity due to his injury.

On cross-examination, Petitioner testified that he has no hobbies. He acknowledged being a diabetic for a number of years prior to 2014 and while it was originally poorly controlled, he got it under control. He disagreed his diabetes was poorly controlled in 2013 and 2014. He testified that he told both Dr. Milicevic and Dr. Ma that he felt his carpal tunnel problems were due to his job. He didn't recall telling Dr. Ryan or Dr. Kakarlala that he had a work-related carpal tunnel problem.

Petitioner agreed that the machine, and not the worker, actually bends the metal/steel sheets/parts. During a shift, he might run 12 or more different sizes and shapes of parts. They can weigh 5 to 50 pounds. If it weighs over 50 pounds, he works with another employee. He testified that he was worried about not getting paid short-term non-occupational disability so he marked non-work-related on the short-term disability claim form. Petitioner testified that his symptoms began around September 17, 2014 and that surgery significantly improved his symptoms.

On re-direct examination, Petitioner testified that after he filled out an accident report following his EMG, his worker's compensation claim was denied by Respondent. It was denied by the time he presented to Dr. Ma on October 24, 2014. At this point, he did not know whether or not his condition was work related.

ShaeLynn Woods, Respondent's workers' compensation and benefits specialist, testified on behalf of Respondent. Ms. Woods testified that if Petitioner had completed Respondent's short-term disability form and left the question about whether his condition was work-related blank but the doctor marked yes, she would have contacted Petitioner to ask him to have the questions match or be filled out. Since Petitioner marked non-work-related and the doctor marked not work-related, she just processed it, and Petitioner received non-occupational disability benefits. If he marked the condition was work- related, he would not have been eligible for non-occupational disability benefits unless she got a denial from the work comp carrier. On cross-examination, Ms. Woods acknowledged she never explained any of this to Petitioner.

Respondent also subpoenaed Brent Becker, its production manager, as a witness. Mr. Becker testified to his familiarity with the operation of the press machines. He testified that Petitioner would have only used a hand grinder once or twice a week for one or two minutes each time. The press, not the operator, bends the parts. He testified it's about 50/50 as far as parts that just need one hit compared to parts that need multiple hits requiring them to be taken out and flipped. While the part is in the machine, the worker is usually either watching or has his hands up next to the part. When asked if the workers are ordinarily required to put their hands in awkward positions or just have their hands straight up, Petitioner replied that basically one's hands are straight out in front to hold the part up into the machine. Typically, a worker does 1 to 25 pieces per job and then switches over to other jobs. When a part is put into a machine, it takes about 20 to 50 seconds for an individual part to be bent into shape. He characterized the pace as moderate, and he noted the goal is to run 63 pieces per hour. The pieces of metal/sheet are pushed over to the machine via table or, on occasion, a forklift.

Mr. Becker also testified about a hand wheel used to set the depth of the machine. He explained that it has a handle or a knob that turns like a dial and it is very easy to spin. He testified one can spin it with one finger and there is not a lot of force involved.

On cross-examination, Mr. Becker stated the heavier the part, the more grip pressure is required. When asked if agreed that the employee has to use both hands to put the piece of metal into the machine, Mr. Becker replied that it all depends upon how big the piece is as one can sometimes just use one hand. When asked if the employee has to take the piece of metal/sheet out and flip it to the other side for another "hit" Mr. Becker responded that it all depends and that for some you do and some you do not. He also agreed that when placing a piece of metal into the machine one must apply some amount of grip pressure as one has to pick it up and the heavier the metal the more grip pressure. Lastly, Mr. Becker testified that he considers Petitioner to be a good and honest worker.

Petitioner's medical bills are set forth in Petitioner's Exhibit No. 8.

The Arbitrator Concludes:

With respect to Issue (C), Did an accident occur on September 17, 2014 that arose out of and in the course of Petitioner's employment by Respondent, and Issue (F), Is Petitioner's current condition of ill-being causally related to the injury:

Petitioner failed to prove he sustained an accident on September 17, 2014 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being is causally related to his injury.

Petitioner has the burden of proving accident and causal connection by the preponderance of the evidence. In a repetitive trauma case, such as here, the issues of causation and "arising out of" require expert medical opinion. Petitioner has failed to meet his burden of proof.

As an initial matter, some aspects of Petitioner's testimony were troubling. Petitioner testified that his symptoms in his hands began in 2014. However, according to Dr. Ma's office note of October 24, 2014 Petitioner gave a history of experiencing numbness and tingling in both hands several years earlier with progression over the past several months. This appears to be inconsistent with Petitioner's trial testimony and he provided no explanation for it.

There is also missing information from the record. According to Dr. Milicevic's October 21, 2014 note Petitioner was inquiring as to whether his condition was work-related or not. Again, this is somewhat contrary to what he testified to since he had already undergone the EMG and presumably filled out an accident report. Additionally, Dr. Milicevic references a visit at Decatur Memorial Hospital and Petitioner being told his carpal tunnel syndrome was due to diabetes. No records from Decatur Memorial Hospital were included in the record and Petitioner did not address this matter in his testimony.

Finally, the Arbitrator notes Petitioner's testimony about his diabetes. While he acknowledged it was out of control at some point he testified that he had it under control in 2013 and 2014. Dr. Milicevic's note of August 21, 2014 indicates otherwise as he was described as a "noncompliant diabetic" and no testimony from the doctor was obtained to clarify the status of Petitioner's diabetes at that time.

More significantly, the Arbitrator did not find the causation opinion of Dr. Ma to be persuasive. It is axiomatic that in a repetitive trauma case expert opinion testimony is needed to establish causation. It is also axiomatic that a causation opinion, and especially one based upon a hypothetical set of facts as set forth herein, is only as strong and good as the facts upon which it is based. Dr. Ma acknowledged that what he knew about Petitioner's job was essentially information provided to him at the time of the deposition. However, Dr. Ma was not furnished with complete and accurate information concerning Petitioner's job duties. He was under the assumption that Petitioner and the machine would bend the pieces of metal. He was under the assumption that Petitioner periodically used a knife. Dr. Ma was asked to assume that some of the brake presses required Petitioner to use a hand crank for 10 to 20 seconds. Most importantly, the doctor was asked to assume in the hypothetical that Petitioner "may use his wrists or hands to bend the metal" and that Petitioner placed his wrists in awkward and flexed positions and twist his wrists when inserting and removing the metal sheets form the press. None of the foregoing was corroborated by testimony at the hearing. Respondent made a timely objection to the hypothetical asking that the question and answer be stricken if the facts assumed in the hypothetical question were not proven. (Pet. Ex. 1, pp. 22-23) In answer to the question, the doctor indicated that the alleged work duties may have aggravated Petitioner's carpal tunnel problems. (Pet. Ex. 1, p. 23)

In viewing Dr. Ma's deposition, the Arbitrator notes that the doctor's testimony is equivocal. First of all, the doctor was asked to assume in the hypothetical that Petitioner himself did part of the bending of the metal parts using his own hands. That assumption in the hypothetical is obviously inconsistent with the evidence produced at arbitration. Both Petitioner and Respondent's witness, Brent Becker, agreed that the machine and not Petitioner did the bending of the metal parts. There is no evidence in the record to indicate that Petitioner had to physically bend the parts himself. In that respect, Dr. Ma assumed facts in the hypothetical which were not proven. Likewise, his assumption that Petitioner used utility knives was not proven. Dr. Ma's understanding of the amount of time used in turning the hand crank was also wrong.

It has long been a law in Illinois that facts assumed in a hypothetical question must be proven by the evidence in the record or else the hypothetical question and the answer to the question are subject to being stricken. (See *Leonardi v. Loyola University*, 168 Ill.2d 83 (1995).) Under *Leonardi*, it was established that evidence admitted upon assurance that it will later be connected up should be excluded upon failure to establish the condition. (168 Ill.2d at 96) Here, Dr. Ma based his opinion on erroneous facts not proven by Petitioner. For that reason, the objection to the hypothetical question and the doctor's answer thereto was stricken. *Leonardi v. Loyola University*, 168 Ill.2d at 96. It is axiomatic that medical opinions based upon erroneous facts may be given or little no weight. *Horath v. Industrial Commission*, 96 Ill.2d 349 (1983); *Sorenson v. Industrial Commission*, 281 Ill.App.3d 373 (1st Dist., 1996); *Lambert v. Bridgestone/Firestone*, 97 IIC 196. (1997). Here, Dr. Ma's opinions, to the extent that they support Petitioner are entitled to little if any weight since they are based on erroneous facts.

As indicated above, Dr. Ma was incorrectly informed that Petitioner's job duties included the bending of metal sheets/parts. While one might argue that, despite the foregoing error, an overall reading of his deposition testimony suggests that he based his causation opinion on the repetitive nature of Petitioner's job as he felt it required repeated wrist flexion and twisting Dr. Ma never identified which activities Petitioner performed involved the repeated wrist flexion and twisting – ie., he never specifically addressed whether the placing of sheets of metal in and out of the machines while gripping and/or the flipping of the metal sheets for additional "hits" could aggravate Petitioner's bilateral carpal tunnel syndrome. No information was provided to him regarding the number of times per hour or shift Petitioner would engage in any wrist flexion and twisting. At most, Dr. Ma was told Petitioner might flip the metal and bend it "several times" throughout the day. First, "several times" is a far cry from "repeatedly." Second, and most importantly, Petitioner and Mr. Becker agreed that he did not bend the metal sheets. The machine did it. At most, Petitioner had to grip the metal sheets to put them in/out of the machine and he agreed that he did so with the metal in his hands palm sides up. He also testified that if additional "hits" were necessary on a piece of metal the piece would need to be flipped. Based upon Petitioner's testimony the only time he flipped pieces of metal sheets was when additional "hits" were necessary. Dr. Ma was not asked about whether the flipping of the metal sheets (or the gripping of the sheets) could aggravate carpal tunnel syndrome. Dr. Ma wasn't shown PX #7 nor did he consider the written job description in rendering his opinion.

According to Dr. Ma's records Petitioner also has left cubital tunnel syndrome. It does not appear that Petitioner is claiming that condition is work-related. Dr. Ma provided no causation opinion regarding it.

The Arbitrator has carefully considered all of the written evidence as well as the testimony of Petitioner and the Respondent's two witnesses. Based upon review of all of the evidence, the Arbitrator concludes that Petitioner has failed to prove he sustained an accidental injury on September 17, 2014 that arose out of and in the course of his employment with Respondent. Petitioner has further failed to prove that his condition of ill-being in his hands and wrists is causally related to his alleged accident or his employment duties.

Petitioner's claim for compensation is denied. No benefits are awarded. All remaining issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KENISHA CLEMENTS,

Petitioner,

17IWCC0724

vs. NO: 14 WC 19288

TRI-COUNTY MANAGEMENT OF ILLINOIS,

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, notice, medical expenses and prospective medical, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission, after considering the entire record, reverses the Decision of the Arbitrator finding that Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent on June 4, 2014, thus rendering all other issues moot.

Findings of Fact and Conclusions of Law

The Commission affirms and adopts the Arbitrator's Findings of Fact, however, the Commission disagrees with the Conclusions of Law drawn by the Arbitrator. The Commission takes special note of the Arbitrator's finding that the Petitioner did not complete any accident report with respect to her hands/wrists and that Petitioner is not claiming that her bilateral elbow conditions are related to her worked for Respondent.

The Petitioner alleged a manifestation date of a bilateral repetitive trauma injury on

April 16, 2014, the last date Petitioner worked for Respondent as a Sterile Processing Aide at OSF St. Francis Hospital. The Petitioner testified she gave a "To Whom it May Concern" note to the Respondent's representative, Jackie, on March 19, 2014 advising Respondent that she was leaving on April 16, 2014. (T, pp. 50-51) The Petitioner testified twice that she took a leave of absence because Respondent could not modify her work. (T, pp. 15, 16, 48). On cross-examination, Petitioner admitted the note she gave Respondent on March 12, 2014 advising she was leaving in April said nothing about work restrictions. Petitioner read the note aloud which stated "Leave absence going to school." (T, p. 49, Rx11). In fact, the Commission finds the Petitioner had no assigned medical work restrictions at the time she left Respondent's employ. The Commission finds Petitioner left employment with Respondent to go to school, not because her wrists or hands hurt. Petitioner did not report wrist or hand pain or seek medical attention at that time she left April 16, 2014. In fact, the Arbitrator found no activity that occurred on April 16, 2014 that would constitute a "manifestation date." The Commission agrees.

Sua sponte, the Arbitrator changed the alleged date of accident to June 4, 2014, the date Petitioner presented herself to Dr. Rhode. The Arbitrator noted that June 4, 2014 is the date Petitioner is "first informed by a physician that her condition is work related," however, the Commission does not agree. Petitioner testified that she went to the emergency room of Methodist Hospital and that a doctor told her that she may have carpal tunnel. (T, pp. 32, 33) Petitioner also testified she reported her complaints to Anna, her boss at OSF St. Francis (St. Francis). While the Commission finds there is nothing in the medical records to corroborate that she discussed carpal tunnel with medical personnel at the August 26, 2013 Methodist ER, the Methodist Hospital (Methodist) report references treatment to the left arm she had at OSF St. Francis on August 23, 2013 and Petitioner reported her arm "was fine" and "was better the next day." (Rx3)

Aside from the medical treatment Petitioner sought on August 23, 2013 at the ER at St. Francis and August 26, 2013 at Methodist, Petitioner went to St. Francis on 9/7/13 and 10/31/13, while in Respondent's employ and voiced no hand or wrist complaints. Petitioner went to St. Francis again on March 11, 2014 at OSF St. Francis for asthma and complained of left hand tingling and numbness and inquired whether this could be related to vitamin B12 deficiency and/or anemia. She reported numbness of the thenar eminence of her hand, sometimes extending into the fingers and she reported she did a lot work with her hands. (R x5, p. 93) The Commission finds the Petitioner had then consulted medical personnel regarding her left-hand complaints while she was working for Respondent, however, there is no indication Petitioner suffered from a repetitive trauma type injury. Petitioner testified she has had a history of left hand injuries and a ganglion cyst, however, Petitioner does not have left hand CTS. The Commission presumes a typographical error in the August 23, 2013 OSF St Francis record and finds Petitioner did not complain of right hand symptoms at any of these visits.

In addition, the Commission notes that the while the Arbitrator found Respondent's receipt of the Application for Adjustment of Claim supports a finding that timely notice of the accident was given to Respondent, the Commission notes the Application for Adjustment of Claim (AAC) alleged an accident date on April 16, 2014 and proof of service on the AAC was dated May 29,

2014, days before the Petitioner consulted Dr. Rhode, thus confirming the Petitioner alleged a repetitive trauma claim before she saw Dr. Rhode.

A careful reading of Dr. Rhode's records reveals that on June 4, 2014 under the category "Subjective" the chief complaint, first history states: "Ms. Clemons is a 36-year-old female who presents for consultation of bilateral elbow pain and wrist pain. Symptoms are secondary to an injury while at work." The history of present illness (HPI) states the "patient presents as a self-choice for evaluation of a work-related bilateral wrist and elbow injury." (Px7). The Commission notes the absence of an intake form in Dr. Rhode's records to confirm the exact nature of the Petitioner's pain complaints, a referral or how Dr. Rhode's conclusions were drawn. In fact, the EMG/NCV taken several months later concludes Petitioner did not have left hand CTS or bilateral cubital tunnel syndrome. Therefore, given the fact that the Petitioner had not worked for Respondent for two months prior to Dr. Rhode's first visit on June 4, 2014 visit, and the lack of evidence regarding Petitioner's right wrist or hand pain during her employment, the Commission does not agree with the conclusion drawn by the Arbitrator or that June 4, 2014 should be the accident date for the subject claim.

Given that the Application for Adjustment of claim alleged a repetitive trauma claim before the Petitioner sought a consult with Dr. Rhode, the Commission finds that June 4, 2014 is not a manifestation date. As enunciated in *Durand v. Indus. Comm'n* (RLI Ins. Co.), 224 Ill. 2d 53, 72, 862 N.E.2d 918, 929, 308 Ill. Dec. 715, 726, pain and inability to perform one's job and also the medical treatment are factors which can establish the date of injury, significantly when a reasonable person would have plainly recognized the injury and its relation to work:

> In short, courts considering various factors have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. See *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 138 Ill. App. 3d 880, 887, 487 N.E.2d 356, 93 Ill. Dec. 689 (1985), *aff'd*, 115 Ill. 2d 524, 505 N.E.2d 1026, 106 Ill. Dec. 235 (1987) (holding that determining the [***29] manifestation date is a question of fact and that "the onset of pain and the inability to perform one's job, are among the facts which may be introduced to establish the date of injury"). A formal diagnosis, of course, is not required. The manifestation date is not the date on which the injury and its causal link to work became plainly apparent to a reasonable physician, but the date on which it became plainly apparent to a reasonable employee. See *General Electric Co. v. Industrial Comm'n*, 190 Ill. App. 3d 847, 857, 546 N.E.2d 987, 137 Ill. Dec. 874 (1989). However, because repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work. See *Oscar Mayer*, 176 Ill. App. 3d at 610. *Durand v. Indus. Comm'n* (RLI Ins. Co.), 224 Ill. 2d 53, 72, 862 N.E.2d 918, 929, 308 Ill. Dec. 715, 726

In this case, there is no indication Petitioner's pain interfered with her ability to perform her job. Furthermore, at one of her many medical consults during her tenure with Respondent, a reasonable person would have plainly recognized the injury and its relation to work if the trauma and pain existed at that time. The Commission further finds Petitioner's inconsistent testimony diminishes the credibility of her claim. Petitioner's testimony is inconsistent regarding the extent of pain in each of her hands and which hand hurt when she was working for Respondent. The Petitioner testified "This hand is messed up real bad, like I use this (right) hand to not use this hand much where I have a cyst on this (left) hand." (T, p. 40) The Petitioner also testified she was just having tingling and pain in her right hand and "one day at work I am like my hand is bothering me. I had to go to the ER." (T, p. 30) During cross examination the Petitioner testified when she first started feeling these symptoms she went to the hospital, "I think like October or something was my first time; could have been like October." When asked if she would disagree if the medical records showed she went to the emergency room on August 23, 2013, Petitioner responded "It could have probably been. I can't remember." The Arbitrator confirmed the treatment was at OSF St. Francis Medical. Petitioner also testified she had no reason to disagree if the (ER) record references left wrist pain because her left "one is bad, too, but it is not as bad as my right because I use my right more." (T, p. 43)

The Petitioner testified that she did not seek any medical treatment between the time she resigned her employment with Respondent until she saw Dr. Rhode. The Commission finds there is no medical evidence that Petitioner had pain in her right hand or wrist while employed for Respondent. Petitioner testified that she reported her complaints to Anna, an employee of OSF, St. Francis, after she was at the ER of Methodist. There is nothing in the medical records to corroborate that she discussed carpal tunnel with medical personnel at the August 26, 2013 Methodist ER visit. The Methodist hospital report references treatment to the left arm she had at OSF St. Francis on August 23, 2013 and Petitioner reported her arm "was fine" and "was better the next day." (Rx3) Thus the Petitioner's testimony is not credible.

On September 16, 2014, Petitioner presented to the emergency department at Unity Point with complaints of left sided hand and wrist pain. She reported no issues with the right hand despite the fact that Dr. Rhode's records in June, and on July 16, 2014, July 30, 2014, August 13, 2014, August 27, 2014 and on September 10, 2014 document bilateral wrist pain and elbow pain. At each of these office visits and on September 10, 2014, Dr. Rhode's office prescribed Norco. On September 16, 2014, Petitioner reported to the emergency room at Unity Point that she had a job that involved constant use of her left hand, especially the left wrist and despite this she reported no issues with her right hand at that time. The Commission notes Petitioner is right hand dominant and she testified she uses her right hand more.

One month later, and six months after last working for Respondent, on October 14, 2014, an EMG confirmed Petitioner did not have left handed CTS, and only evidence of mild right median neuropathy at the carpal tunnel. The EMG also concluded there was no evidence of bilateral cubital tunnel syndrome yet at the very next visit on October 22, 2014, Dr. Rhode's records document Petitioner's EMG demonstrated evidence of right carpal tunnel syndrome and

bilateral cubital tunnel syndrome. Dr. Rhode's office notes are thus equally unreliable. The notation of bilateral cubital condition is noted for months before and after the EMG despite the negative EMG result. Dr. Rhode testified the bilateral cubital condition was a "typo" that continued on in the electronic medical records. (T, p. 34)

On December 15, 2014, Petitioner reported to the P.A.at Dr. Rhode's office that her left dorsal wrist mass was quite painful in addition to her other complaints. The P.A. noted the ganglion measured approximately 5 mm. On January 28, 2015, Petitioner reported she was working with a new employer.

Dr. Rhode testified the reason Petitioner's BMI of 35.2, was in bold type in his office note was because it was abnormal. Dr. Rhode testified BMI greater than 30 has been associated with a higher incidence of compressive neuropathies. (DepT, p. 29) Dr. Rhode testified "we don't understand the pathophysiology of obesity and why there's a higher incidence of CTS." (DepT, p. 30) Petitioner testified she was 5 foot, 4 (inches) and weighs "like 240." (T, p. 40) Dr. Rhode also testified, the Petitioner did not have risk factors for development of CTS outside of a BMI greater than 30. (DepT, p. 17) Dr. Rhode admitted Tinel's and Phalen's testing relied upon subjective response by the examinee and could result in false positives and false negative. (DepT, pp. 32, 33) Dr. Rhode testified that electrodiagnostically on October 14 Petitioner was negative for cubital tunnel syndrome but later had subjective complaints. (DepT. p. 34)

Dr. Rhode testified his office did not test Petitioner to see if she was using the medication he prescribed, Norco, 60 tablets biweekly although he was familiar with recent CDC guidelines for prescribing opioids for chronic pain medication. In answer to whether he was following those guidelines, he testified this is not a chronic situation, but a patient that lacks access to medical care. When asked if she had other medical insurance, Dr. Rhode replied, "I don't know." (DepT, pp. 35, 36) He also testified the previously diagnosed ganglion cyst of the left wrist was not noted on the MRI. Dr. Rhode thought there was documentation of a wrist mass, but he did not think that required any treatment. (DepT, pp. 37, 38) Dr. Rhode testified the ganglion cyst was not due to her job exposure. (T, p. 40)

Dr. Michael Vender performed a Section 12 evaluation of Petitioner at the request of Respondent on March 4, 2015. Petitioner reported she developed symptoms in her right hand in October 2013. Dr. Vender is an orthopedic surgeon with added qualifications in surgery of the hand and his sole practice area is hand and upper extremity surgery. He testified as a surgeon, he was familiar with the job duties of a sterilizer for operating rooms. On physical examination, range of motion of both Petitioner's wrists were normal and essentially symmetric. Motor strength was normal and two-point discrimination was normal. Petitioner had a nonorganic finding when placing the right arm or right elbow through range of motion. Dr. Vender testified the Tinel's and Phalen's signs are unreliable; there are too many false positives and too many false negatives based upon how the doctor performs the test and how the patient subjectively reports the test. Dr. Vender cited a study performed by a group of doctors from NIOSH, that demonstrated the studies were unreliable and misleading. Therefore, Dr. Vender does not rely upon these subjective tests. (DepT,

pp. 13-15) Dr. Vender acknowledged a concern about possible carpal tunnel syndrome on the right side based upon Petitioner's initial EMG, however he suggested a repeat EMG for verification. If anything, Petitioner might have had right CTS but she did not have left CTS.

Dr. Vender opined the activities Petitioner performed at her job are what would be considered "normal and routine use of the hands and upper extremities." There were no unusual forceful activities. If and when Petitioner performed limited forceful activities, they were not on a repeated basis. So, there's no indication of any forceful exertional activities on a persistent basis that would be considered repetitive trauma. Dr. Vender also notes that Petitioner performed different types of activities and thus there was no repetitiveness of one activity. He did not believe she was a surgical candidate. (DepT, pp. 16-17)

The Commission finds Dr. Vender's opinion regarding no need for treatment of Petitioner's left wrist for CTS to be credible in this case based upon the results of the EMG/NCV test. The Commission also finds Dr. Vender's opinion regarding carpal tunnel causation to be credible. In this case, Petitioner has comorbidities including gender, age and the fact that she is significantly obese. Dr. Vender opined increased body mass index is probably one of the four major risk factors for development of CTS, then diabetes, thyroid or smoking, presumably based on a metabolic problem rather than actual physical or mechanical problem. (DepT, pp. 21-24)

The Commission finds Dr. Rhode's opinion that a BMI greater than 30 has been associated with a higher incidence of compressive neuropathies comports with Dr. Vender's opinion. The Commission finds Petitioner left her position and subsequently, two months after she was no longer working, her right-hand symptoms are documented for the first time at her visit to Dr. Rhode despite multiple visits to the emergency room while she was working for Respondent. In fact, bilateral hand, wrist and elbow complaints are documented in Dr. Rhode's records for multiple visits beginning with the first visit on June 4, 2014 and continuing for multiple visits throughout that summer even though she was no longer working for Respondent, yet on September 16, 2014 she reported at Unity ER she had no problems with her right hand at that time.

After a review of the entire, record Petitioner's inconsistent testimony and inconsistent histories, e.g. testimony she left Respondent's employ because of restrictions when the note stated she took leave to go to school (plus she had no restrictions); she denied prior hospital-type pain until she worked at Respondent, but on cross-examination admitted to a different kind of previous left hand pain; and nonorganic findings at her visit to Dr. Vender, the Commission finds Petitioner is not credible.

Finally, the Commission finds Dr. Vender credibly testified that Petitioner is not a surgical candidate. The Commission finds Dr. Vender to be more credible than Dr. Rhode given that Dr. Vender's sole practice is devoted solely to hand and upper extremities and Dr. Rhode testified he spends only 10% of his practice on carpal, cubital tunnel and other nerve entrapment issues of the upper extremities. Dr. Rhode admitted prescribing 60 tablets of Norco every two weeks for Petitioner's subjective pain complaints when by his own admission the only diagnosis confirmed

was right CTS. He also opined "I do not believe the patient had any outside interests that would be associated with CTS." (DepT, p. 16)

Petitioner testified from August 2011 to the date of her job application and currently at the time of the arbitration hearing she worked for DORS, Department of Rehabilitation Services, as a personal assistant for her mother. Although her job duties in that capacity were never detailed. Petitioner testified her "mom... had a little disability." (T, p. 31) The Commission also notes Petitioner testified she has seven children, four of them living with her. Petitioner also testified she needs to go back to her "regular life" to play baseball and go bowling with her son.

Therefore, on page 13 of the Arbitrator's Decision, the Commission strikes the last sentence. The Commission finds the interim manager asked for an additional person because the Petitioner was not doing her work, not because there was more equipment on Petitioner's shift than the staff could handle.

The Commission also strikes the last paragraph on page 15 and substitutes "Based on a review of the credible evidence, Petitioner's testimony, and the entire record, the Petitioner failed to prove by a preponderance of the credible evidence that she sustained accidental injuries to her bilateral hands, wrists or elbows that arose out of and in the course of her employment by Respondent rendering all other issues moot."

The Commission strikes pages 16 through 19 in their entirety. Even if Petitioner had proven she sustained a right hand repetitive trauma injury, the Commission does not find that the Petitioner's current condition requires surgery.

As a result of the Commission's findings herein, the Arbitrator's award of past and prospective medical expenses is hereby vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 8, 2017 is hereby modified, the award of accident is reversed for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of past and future medical expenses is hereby vacated.

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

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

Based upon the denial of compensation herein, no bond is set by the Commission. *820 ILCS 305/19(f)(2)*. 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: NOV 16 2017
KWL/bsd
O: 9/18/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

17IWCC0724

CLEMENTS, KANISHA
Employee/Petitioner

Case# **14WC019288**

TMI TIME MANAGEMENT
Employer/Respondent

On 3/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
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PEORIA, IL 61603

2461 NYHAN BAMBRICK KINZIE & LOWRY
JAMES P TOOMEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

17IWCC0724

KANISHA CLEMENTS,
Employee/Petitioner

v.

TRI-COUNTY MANAGEMENT OF ILLINOIS,
Employer/Respondent

Case # 14 WC 19288

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 **Peoria**, on **2/10/16**. 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, **6/4/14**, 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 $**16,054.99**; the average weekly wage was $**344.53**.

On the date of accident, Petitioner was **36** 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 $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services listed below, as provided in Sections 8(a) and 8.2 of the Act:

1. The MRI of the left wrist on 8/31/15;
2. The emergency room visits on 9/16/14 and 2/9/15 at Unity Point;
3. The visit to OSF St. Francis on 10/16/14;
4. The EMG performed 10/14/14;
5. The treatment petitioner received from Dr. Rhode on 6/4/14, 10/27/14, 11/6/14, 11/9/14, 5/20/15, 9/3/15, 11/4/15, 8/24/16, and 10/6/16, and physical therapy petitioner received at Dr. Rhode's office from 10/7/15 through 11/4/15;
6. One additional visit with Dr. Rhode every 2 months from 6/4/14 through the date of trial for medication disbursement; and,
7. All remaining treatment, not provided by Dr. Rhode, that petitioner received for her bilateral hands from 6/4/14 through 2/10/17.

Respondent shall pay all reasonable and necessary medical expenses, as provided in Sections 8(a) and 8.2 of the Act for the right carpal tunnel release recommended by Dr. Rhode.

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

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

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

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

Signature of Arbitrator

3/5/17
Date

ICArbDec19(b)

MAR 8 - 2017

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 36 year old, right hand dominant, Sterile Processing Aide, alleges she sustained an accidental injury to her bilateral hands that arose out of and in the course of her employment by respondent that manifested itself on 4/16/14. Petitioner worked for respondent from May 2013 through 4/16/14, at OSF St. Francis Hospital. Petitioner denied any problems with her hands before she went to OSF in August of 2013. Petitioner did not complete any accident report with respect to her hands/wrists.

Prior to working for respondent, petitioner worked for Vonachen Services until December of 2009 performing housekeeping activities. She did garbage removal. light vacuuming. and cleaning bathrooms 4 hours a day. She also worked for Adeco doing laundry, and as a cafeteria worker for School District 150. In 2011 petitioner began working as a personal assistant for her mom. She testified that she is still a personal assistant for her mom.

On petitioner's Job Application for respondent, Clinic Notes were included that stated that on 8/23/13 petitioner came to pick up her check and was complaining that her left wrist hurt. When asked if it happened at work she stated that she woke up with it hurting. Petitioner was told that she needed to leave work and have it checked and then bring back a doctor note.

On 8/23/13 petitioner presented to the emergency room at OSF St. Francis with complaints of left wrist pain. Petitioner reported that the pain started the day before while at work and then she woke up today with wrist pain. She stated that the pain feels like a tight band on her fingers and wrist. She stated that she works in the sterile processing department pushing and pulling large carts. She denied any injury. She rated her pain a 6/10. Petitioner was examined and assessed with left wrist pain. She was placed in a cock-up wrist splint. Petitioner told respondent she could not work without restrictions until 8/26/13. Jacqueline Hattan, her supervisor testified that petitioner told her that it hurt to pull carts at work.

On 11/26/13 petitioner was given a written reprimand for calling off on 6/11/13, 6/13/13, 7/4/13, 7/30/13, 8/26/13 and 8/27/13. She was also instructed not to be involved in any "drama" or "micromanage" any other employee. She was told she could not be late or call off for the next 6 months. Both petitioner and her supervisor signed the reprimand.

On 3/12/14 petitioner received another written reprimand. She was told her job performance was poor. Petitioner was told she must do the job as described, and if she violates any policy or procedure she would be terminated immediately. An email was attached to the reprimand that stated that on the 2nd

shift, after petitioner, there is excessive amount of equipment left on the shift for cleaning. Kiley Simmers reportedly stated that she had over 400 pieces of equipment to clean on her weekend shift and on Monday 3/10. Simmers also noted that on one nursing unit she had 49 pieces of equipment left in the soiled utility room for decontamination at the beginning of her shift. The Interim Manager also asked for an additional person on the 2nd shift to accommodate the increased volume of equipment on 2nd shift, since the volume of discharges is greater later in the afternoon. Petitioner denied ever seeing this reprimand or signing this reprimand.

On 3/19/14 at 10:50 am petitioner drafted a note stating "whom I [sic] may concern, I'm Kanisha Clements is putting in writing, my leave of absence as of April 16, 2014 at 3:00 pm. I would like too [sic] thank S.P.D for giving me the opportunity and experiment (illegible) Sterlilise [sic] Process Dept." She also noted that her leave of absence was to go to school. Petitioner signed this letter.

Petitioner testified that while working for respondent she would go to dirty rooms and pick up and clean IV supplies including IV poles, PCL pumps, heaters, filters, machine for leg pumps, etc. Petitioner would unscrew the PCL pumps and take them off the IV poles, clean the filters of the heaters, clean the cords of the sequential machines, wrap ties around the IV poles, clean carts, clean rooms, and wipe down knobs on the IV posts. She would wipe each one down with a bleach wipe and then let it sit for 2 minutes. After 2 minutes she would wipe it down again. Petitioner would then take the equipment down to the cleaning supply room , or take the equipment to the supply room downstairs using the elevator. Petitioner would put the items on a cart and tie the IV poles together.

Petitioner testified that she has to clean and remove equipment from 16-20 rooms a day, at least twice a day. Petitioner would clean down everything in the room. She stated that she may have to take equipment off of 5-6 IV poles by turning the knobs of the equipment. She would then take the equipment to the elevator and then take the equipment down. Petitioner also stacked the IV poles on top of each other and tied them together.

Petitioner offered into evidence a Description of Employee's Job Duties for her job of Sterile Processing Aide. The job description was drafted by respondent. Under "hand use", it notes that petitioner repetitively used her hands, and performed simple grasping with her hands constantly, or 4-6 hours a day; she would perform power grasping with both hands, reaching over and below shoulder level with both hands, and fine manipulation with both hands occasionally, or up to 3 hours a day; and she would push and pull with both hands frequently, or 3-6 hours a day. Petitioner worked 8 hours a day, 40

hours a week. Lifting was identified as constantly, or 6-8 hours a day for 0-10 pounds; frequently, or 3-6 hours for 11-25 pounds; and occasionally, or up to 3 hours for 28-50 pounds.

The duties of the Sterile Processing Aide as identified on the Description of Employee's Job Duties included making assigned rounds for pick up of dirty equipment of supplies; cleans, disinfects and assembles patient care equipment, supplies and instruments according to established policies and procedures; performs general clerical duties including answering the phone; providing fill orders from requisitions; stocks and stores supplies and equipment; and uses computers daily. The essential job functions included making rounds of all areas for dirty equipment and supplies, restocking necessary items and returning overstock; cleaning and disinfecting a variety of patient care equipment and instruments using antiseptic solutions and detergents; diluting concentrated disinfectants per manufacturer's instructions; maintaining a clean and orderly work area by cleaning and disinfecting; and delivering supplies and equipment to specialty units.

On 6/4/14 petitioner presented to Dr. Blair Rhode for consultation of bilateral elbow pain and wrist pain. Petitioner is not claiming that her bilateral elbow conditions are related to her work for respondent. Petitioner states that she works at OSF as a temp. She stated that she worked as a tech assistant from March 2013 to April 2014. She stated that her symptomatology started in November of 2013, and she took temporary leave of absence on 4/16/14 with slight improvement in her symptoms. She described her duties as a tech assistant to include pushing a cart and carrying IV poles. She stated that she was required to clean the IV poles and break them down. She described these duties to include a significant amount of forward roll with both hands. She complained of bilateral palmar wrist pain with numbness and tingling to the thumb index and long finger. She also complained of medial elbow pain, not related to this claim. Following an examination, Dr. Rhode assessed wrist pain and carpal tunnel syndrome. He prescribed Norco and Mobic. Dr. Rhode was of the opinion that petitioner's job exposure as described, was highly repetitive with the petitioner describing the forward roll maneuver as a significant causative mechanism. He noted that her exposure was 8 months until symptom onset. He was of the opinion that her total exposure was one year and one month. Her MBI was greater than 30. He continued conservative treatment. He ordered an EMG, and took petitioner off duty. He gave petitioner wrist splints.

On 6/6/14 petitioner's Application for Adjustment of Claim with respect to this claim was filed with the Illinois Workers' Compensation Commission. She alleged a repetitive trauma injury to her bilateral hands that manifested itself on 4/16/14.

On 7/16/14, 7/30/14, 8/13/14, 8/27/14, 9/10/14, 9/24/14 and 10/8/14 petitioner followed up with Dr. Rhode while awaiting the EMG. Petitioner's examination and assessment were unchanged. No treatment was documented on any of these office visits. On 9/24/14 Dr. Rhode released petitioner to light duty.

On 9/16/14 petitioner presented to the emergency department at Unity Point with complaints of left sided hand and wrist pain. She reported that her pain was worse with movement. She reported that she had a job that involved constant use of her left hand, especially the left wrist. She described a tingling sensation that moves from her left wrist to her medial fingers. She denied any recent injury. She reported no issues with the right hand. She stated that the pain was burning and tingling, and severe. She stated that it had been fluctuating since the incident. Following an examination she was assessed with carpal tunnel syndrome. She was told to follow-up with her primary care physician.

On 10/14/14 petitioner underwent electrodiagnostic testing for her chief complaint of numbness/tingling/pain affecting both hands intermittently for the past year. The results revealed evidence of right median neuropathy at the carpal tunnel. There was no evidence of left median neuropathy, right or left sided ulnar neuropathy, peripheral polyneuropathy, nor right upper limb radiculopathy.

On 10/16/14 petitioner presented to OSF St. Francis Medical Center with complaints of numbness and tingling in both the right and left hands.

On 10/27/14 petitioner returned to Dr. Rhode. He relayed to petitioner the results of the EMG. Her examination remained unchanged. Dr. Rhode assessed wrist pain, elbow pain, carpal tunnel syndrome and cubital tunnel syndrome. Dr. Rhode recommended a steroid injection and took petitioner off work. On 11/6/14 petitioner returned to Dr. Rhode and was given a new right cockup wrist splint. Her condition remained unchanged. On 11/9/14 Dr. Rhode performed an arthrocentesis injection. He released petitioner to light duty work. On 12/3/14 petitioner's complaints remained unchanged and she noted a left dorsal wrist mass. On 12/15/14 petitioner reported that her left dorsal wrist mass was quite painful in addition to her other complaints. She also reported that her numbness was increasing on the ulnar side of her right ring finger. On 12/30/14 petitioner's condition remained unchanged. No treatment was rendered awaiting authorization. On 1/12/15 petitioner complained of pain in her left hand worsening with more cramping and weakness. No treatment was rendered. On 1/28/15 petitioner reported that her symptoms were unchanged and she was working light duty at a new employer. No treatment was rendered.

On 2/9/15 petitioner presented to the emergency room at Unity Point with wrist pain. She stated that it was a chronic problem (history of carpal tunnel) . She stated that the problem occurs constantly and had been getting gradually worse. She reported that her pain was in the left wrist. She reported moderate pain, with limited range of motion, stiffness and tingling. Petitioner was examined and assessed with left wrist pain. Petitioner denied any injury.

On 3/4/15 petitioner underwent a Section 12 examination performed by Dr. Michael Vender. Petitioner reported that she developed symptoms in her right hand in October of 2013 that involved a tingling sensation in her hand along with a throbbing sensation. She reported symptoms in her left hand a couple weeks later, that involved a throbbing or heartbeat sensation. Later, these symptoms became more painful. She described activities such as lifting IV poles. She stated that she had a right carpal tunnel injection. Nonetheless, she has continued with symptoms in both hands, right worse than left. Dr. Vender performed an examination and reviewed x-rays. Since petitioner reported limited symptoms related to the left upper extremity he did not believe she had any significant pathology related to the left upper extremity. He was of the opinion that petitioner's symptoms on the right side were consistent with a compressive neuropathy such as carpal tunnel syndrome. Dr. Vender noted that the EMG demonstrated evidence of right carpal tunnel and bilateral cubital tunnel. He found no evidence of significant cubital tunnel syndrome. Dr. Vender was of the opinion that petitioner's current condition of ill-being is not related to the 4/6/14 accident. Dr. Vender did not review a formal job description. He based his opinion on petitioner's history of her job duties. Based on these he did not believe these types of activities would represent unusual stresses across the elbow with regard to hyperflexion against resistance on a persistent basis. Based on petitioner's description of her job duties Dr. Vender was of the opinion that there did not appear to be exposures to persistent, forceful use involving her hands. He did not recommended any surgery.

From 2/26/15 to 5/6/15 petitioner followed up at Dr. Rhode's office on 6 different occasions, approximately every other week. Her examination remained unchanged. No treatment was rendered and petitioner was continued on light duty.

On 5/13/15 Dr. Vender drafted a letter to respondent's attorney regarding the results of the EMG performed 10/14/14. He noted that the results did not show findings of any ulnar neuropathy, and findings were normal on the left side, which was consistent with petitioner's minimal complaints on the left. He noted that the EMG demonstrated right carpal tunnel syndrome, which was consistent with her subjective complaints. He was of the opinion that consideration could be given to performing a right

carpal tunnel release. He also reviewed the job information for "Sterile Processing Aide". He was of the opinion that the nature of activities petitioner provided would be consistent with this document. Dr. Vender again reiterated that he did not believe these activities would be contributory to carpal tunnel syndrome, or ulnar neuropathy at the level of the elbow.

On 5/20/15 Dr. Rhode performed an injection. Petitioner's complaints remained the same. She was continued on light duty. Dr. Rhode was of the opinion that petitioner's history was consistent with the respondent's job description. He noted that all job activities petitioner described and most in the job description required use of the upper extremities. Dr. Rhode noted that petitioner was negative for diabetes, thyroid, tobacco exposure, or recent pregnancy. Dr. Rhode testified that his conservative course of treatment of a compressive neuropathy is splinting, oral medications, steroid injections, home stretching and activity modification. He was of the opinion that conservative treatment did not help petitioner. He stated that they were awaiting authorization for a right carpal tunnel release, which is reasonable and necessary treatment for her condition. Dr. Rhode opined that the job activities described by petitioner and noted in respondent's job description for petitioner could be causative to the conditions that he diagnosed and treated with respect to petitioner. He was of the opinion that petitioner had significant exposure to repetition, and forceful repetition, with altered wrist position. He noted that petitioner's symptoms improved during her leave of absence. He noted that her BMI was greater than 30.

On cross examination Dr. Rhode stated that less than 10% of his practice deals with treatment of carpal, cubital tunnel, and other nerve entrapment issues of the upper extremities. Dr. Rhode stated that he had not seen any medical records from OSF other than the MRI, and had not seen any records from her primary care physician. He recommended a right carpal tunnel release on the right followed by the left. Dr. Rhode did not know how many IV poles petitioner broke down daily. Dr Rhode testified that he prescribed 60 tablets of Norco every 2 weeks. Dr. Rhode did not think petitioner's wrist mass required any treatment. Dr. Rhode does not know what petitioner's job duties were after she left respondent's employ.

From 6/17/15 to 8/30/15 petitioner followed up at Dr. Rhode's office on 4 different occasions. Her examination remained unchanged. No treatment was rendered and petitioner was continued on light duty.

On 8/31/15 petitioner underwent an MRI of the left wrist. The results revealed mild synovitis of the wrist and of the extensor digitorum, flexor pollicis longus tendons and of the distal radial ulnar joint; partial tear of the dorsal component of the scapholunate ligament; subtle chondromalacia of the intercarpal joints; and short segment Grade I tendinosis of the extensor carpi ulnaris tendon.

On 9/3/15 petitioner reviewed the results of the MRI with Dr. Rhode. He was of the opinion that the MRI did not show a ganglion cyst, but did show extensor synovitis and S-L ligament tear, and was of the opinion that both could be causing the dorsal swelling. He believed most of her lack of motion was coming from the S-L tear. He recommended an injection but petitioner declined because she was driving herself that day. Petitioner was continued on light duty.

On 10/7/15 petitioner followed up at Dr. Rhode's office. Her examination remained unchanged. No treatment was rendered and petitioner was continued on light duty. That same day petitioner began physical therapy. She gave a history of originally injuring her elbows and wrists on or around October of 2013 while stacking IV poles at work. Her chief complaint was left wrist pain.

From 10/7/15 through 11/4/15 petitioner underwent 4 physical therapy sessions in Dr. Rhode's office. Petitioner reported compliance with her home exercise program and stated that it helped a lot. She reported feeling 90% better overall. She rated her pain at a 3/10. She stated that the exercises and medications helped decrease her pain. She reported that her left wrist/hand motion was improved. On 11/4/15 petitioner was discharged from therapy.

On 10/21/15 and 11/4/15 petitioner followed up with Dr. Rhode. Her examination remained unchanged. No treatment was rendered and petitioner was continued on light duty.

On 10/30/15 the evidence deposition of Dr. Vender was taken on behalf of the respondent. Dr. Vender has also practiced hand and upper extremity surgery. Dr. Vender was of the opinion that when petitioner performed her job it would be considered normal and routine use of the hands and upper extremities. He was of the opinion that she performed no unusual forceful activities. He was of the opinion that when she performed limited forceful activities they were not on a repeated basis. He opined there is no indication of any forceful exertional activities on a persistent basis that would be considered repetitive trauma. Dr. Vender opined that petitioner was capable of performing her normal work activities. Dr. Vender was of the opinion that the job description demonstrates performing different types of activities, so he precluded the concept of repetitiveness when different things are being done, some of which are either visual, or of a sedentary nature. He also opined that the job description showed a lack of forceful activities were performed. Dr Vender identified petitioner's comorbidities for the development of carpal tunnel syndrome to include being female and significantly obese.

On cross-examination Dr. Vender opined that people with more comorbidities for the development of carpal tunnel syndrome are more likely that someone with less comorbidities to develop carpal tunnel syndrome.

On 11/23/15, 12/7/15, 12/17/15, 1/13/15, 1/25/15, 2/4/15, 2/24/15, 3/10/16, 3/23/16, and 4/6/16 petitioner presented to Dr. Rhode's office. No treatment was rendered. Written prescriptions were given. Petitioner was continued on light duty.

On 5/5/16 the evidence deposition of Dr. Rhode was taken on behalf of the petitioner.

On 6/15/16, 6/30/16, and 7/21/16 although work status forms were issued for light duty, no treatment records were provided.

On 8/8/16 petitioner presented to Dr. Rhode's office. No treatment was rendered. Written prescriptions were given. Petitioner was continued on light duty. On 8/24/16 Dr. Rhode released petitioner to medium-heavy work, 50-60 pounds. He continued to await surgical authorization.

On 9/21/16 petitioner presented to Dr. Rhode's office. No treatment was rendered. On 10/6/16 petitioner returned to Dr. Rhode's office. His physician's assistant released petitioner to medium light work with maximum lifting floor to waist of 50 pounds. No treatment was rendered. On 10/20/16 and 11/3/16 petitioner presented to Dr. Rhode's office. No treatment was rendered. Petitioner's restrictions remained unchanged.

Petitioner testified that she has seen Dr. Rhode every other week since June of 2014 to the present time. She stated that she got some shots and medication for inflammation and pain. She testified that she did not always see Dr. Rhode. Sometimes she would be seen by Lori Welkes, Dr. Rhodes physician's assistant. She stated that her appointments with Welkes were 10 minutes and those with Dr. Rhode were 10-15 minutes. Petitioner testified that she only took 1/2 Norco pill in the morning and then again at night. She stated that she has extra Norco left.

Petitioner testified that she left her employment with respondent because they would not accommodate her restrictions. She also stated that she took a leave of absence to go to Central Illinois College and got her CNA and nursing assistant degree. Thereafter, she got a job in assisted living within the permanent restrictions she received. Currently petitioner works at OSF as a Patient Care Tech sitting with people who have attempted suicide. She testified that OSF is accommodating her restrictions.

Prior medical records of petitioner's show that on 7/5/89 she was hit by an automobile as a pedestrian. Among her multiple complaints were left hand pain, and pain in the 2nd and 3rd digits. Petitioner sustained among other injuries, a fractured pelvic. An x-ray of her left hand/wrist was normal. On 10/12/90 petitioner underwent another x-ray of her left hand/wrist that was unchanged from the x-ray performed on 7/5/89. On 8/11/91 petitioner sustained a left wrist laceration and base of the thumb.

Jacqueline Hattan, Manager for respondent, testified on behalf of respondent. Hatten testified that she handles all work comp issues. She stated that petitioner was her employee. Hattan agreed that petitioner's job duties require repetitive use of her hands 8 hours a day. She agreed that the job description accurately reflects petitioner's job duties. Hattan testified that on 3/12/14 petitioner made no complaints of hand pain or problems with her job. She stated that at no time before petitioner went on her leave of absence did petitioner complain to her of pain in her hands or arms and did not report any work accidents with respect to her hand or arms. Hattan testified that first learned of petitioner's alleged injury to her hands when she received the paperwork in the mail. Hattan did not have daily oversight over petitioner's duties. Her only interaction was when petitioner came to her for employment issues.

Hattan testified that after petitioner gave her leave of absence she wanted her job back because she was not going to start school until August. Hattan told her that her job had been filled. Hattan testified that she treated petitioner's leave of absence as termination because she was going to school.

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

Petitioner is alleging injuries to her bilateral hands due to repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 4/16/14.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case … where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming injuries to her bilateral hands, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

The arbitrator first notes that 4/16/14 is not a date on which petitioner first sought medical attention for the condition; the date the petitioner was first informed by a physician that her condition was work related; the date the petitioner was first unable to work as a result of her condition; the date when her symptoms became more acute at work; or the date on which the petitioner first noticed the symptoms of her condition.

Prior to 4/16/14 petitioner sought treatment for left wrist pain on 8/23/13. She stated that the pain started at work the day before while at work, and then she woke up with wrist pain. Petitioner denied any injury, but did state that she pushes and pulls large carts. She was given a cock-up wrist splint. Hattan testified that at this time petitioner reported to her that it hurt for her to pull carts. Petitioner continued working.

On 11/26/13 petitioner was given a written reprimand for calling off and being involved in "drama" and "micromanaging" other employees. On 3/12/14 she received another written reprimand regarding her poor performance. She was told she must do the job as described, or she would be terminated. Although it was noted that there was an excessive amount of equipment left on the shift for cleaning, the Interim Manager also asked for an additional person on the 2nd shift to accommodate the increased volume of equipment on the 2nd shift. The arbitrator finds this supports a finding that there was far more equipment on the petitioner's shift than the staff on that shift could handle.

On 3/19/14 petitioner put in a request for a leave of absence beginning on 4/16/14 because she was going to go to school. However, when she found out she could not start school until August of 2014, she contacted respondent to see if she could get her job back until she started school. Hattan testified that by then the petitioner's job had been filled.

Petitioner's first medical treatment after 8/23/13 was not until 6/4/14. On that date she presented to Dr. Rhode for consultation of bilateral elbow pain and wrist pain. Petitioner claims that her bilateral elbow pain is unrelated to this alleged injury. She described her duties as a tech assistant to include pushing a cart and carrying IV poles. She stated that she was required to clean the IV poles including breaking them down. She described these duties to include a significant amount of forward roll with both hands. She complained of bilateral palmar wrist pain with numbness and tingling to the thumb, index and long finger. Following an examination, Dr. Rhode assessed wrist pain and carpal tunnel syndrome.

Following this visit to Dr. Rhode, petitioner's Application for Adjustment of Claim was filed two days later on 6/6/14. Petitioner alleged a repetitive trauma injury to her bilateral hands that manifested itself on 4/16/14.

When alleging a repetitive trauma claim it is imperative that the petitioner place into evidence specific and detailed information concerning her work activities, including the frequency, duration, manner of performing, etc. In the case at bar, the petitioner testified about her job duties as a Sterile Processing Aid for respondent. In addition to her testimony she offered into evidence a Description of Employee's Job Duties for her job of Sterile Processing Aide, which was drafted by the respondent.

Petitioner testified that she would go into 16-20 dirty rooms, twice a day, and pick up and clean IV supplies including IV poles, PCL pumps, heaters, filters, machines for leg pumps, etc. Petitioner would unscrew the PCL pumps and take them off up to 5 IV poles, clean the filters of the heaters, clean the cords of the sequential machines, wrap ties around the IV poles, clean carts, clean rooms, and wipe down knobs on the IV posts. Petitioner would wipe each one down with a bleach wipe and then let it sit for 2 minutes, before wiping it down again. Petitioner would then take the equipment down to the cleaning supply room. Petitioner would carry the items on a cart, and pull the IV poles after they were stacked together and tied together.

On the Job Description for Sterile Processing Aide under "hand use" it is noted that those employees who perform the job of Sterile Processing Aide perform repetitively used their hands, and perform simple grasping with their hands constantly, or 4-6 hours a day. These employees also perform

power grasping with both hands, and reaching over and below shoulder level with both hands, and fine manipulation with both hands occasionally, or up to 3 hours a day. They also push and pull with both hands frequently, or 3-6 hours a day. These employees also lift 0-10 pounds constantly, or 6-8 hours a day; lift 11-25 pounds frequently, or 3-6 hours a day; and lift 28-50 pounds occasionally, or up to 3 hours a day.

The Job Description for the Sterile Processing Aide further corroborates petitioner's testimony regarding her job duties in that it shows that petitioner made assigned rounds for pick up of dirty equipment of supplies, as well as cleaning, disinfecting and assembling patient care equipment, supplies and instruments. In this position petitioner also performed general clerical duties including answering the phone, providing fill orders from requisitions, stocking and storing supplies and equipment, and using computers daily. The essential job functions of a Sterile Processing Aide also include making rounds of all areas for dirty equipment and supplies; restocking necessary items and returning overstock; cleaning and disinfecting a variety of patient care equipment and instruments using antiseptic solutions and detergents; diluting concentrated disinfectants; maintaining clean and orderly work area by cleaning and disinfecting; and delivering supplies and equipment to specialty units.

In addition to petitioner's testimony regarding her repetitive job duties, and the Job Description that supports her claims regarding the repetitive use of her hands for respondent, the arbitrator also finds the testimony of Jacqueline Hattan, Manager for respondent, very significant. Hattan herself corroborated petitioner's testimony and the Job Description of Sterile Processing Aide with respect to repetitive work activities, when she testified that petitioner's repetitive job duties require repetitive use of her hands 8 hours a day. Hattan also testified that the Job Description for Sterile Processing Aide accurately reflects the job duties petitioner performed.

Based on the above, as well as the credible evidence, the arbitrator sua sponte finds the petitioner has proven by a preponderance of the credible evidence that she sustained accidental injuries to her bilateral hands that arose out of and in the course of her employment by respondent, and manifested itself on 6/4/14, the date she presented to Dr. Rhode, rather than on 4/16/14, the day petitioner took her leave of absence. The arbitrator finds it significant that after petitioner took a leave of absence from respondent on 4/16/14 so she could go to school, she had some relief of her symptoms. Given that the arbitrator sees no activity that occurred on 4/16/14 that would constitute a "manifestation date", the arbitrator sua sponte finds 6/4/14 the "manifestation date", given that this is the date the petitioner is first informed by a physician, Dr. Rhode, that her condition is work related.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

Respondent noted that it first received notice of petitioner's alleged injury to her bilateral hands after petitioner's Application for Adjustment of Claim was filed on 6/6/14. The arbitrator finds receipt of this Application for Adjustment of Claim supports a finding that timely notice of the accident was given to respondent, given the fact that the respondent did not state this notice was not received within 45 days of the filing date.

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

Having found the petitioner has proven by a preponderance of the credible evidence that she sustained accidental injuries to her bilateral hands due to repetitive work activities that arose out of and in the course of her employment by respondent, and manifested itself on 6/4/14, the next question is whether or not petitioner's current condition of ill-being as it relates to her bilateral hands is causally related to the injury that manifested itself on 6/4/14.

Dr. Rhode was of the opinion that petitioner's job exposure as described, was highly repetitive with the petitioner describing the forward roll maneuver as a significant causative mechanism. Dr. Rhode assessed carpal tunnel syndrome. Dr. Rhode opined that the job activities described by petitioner and noted in her job description could be causative to the conditions he diagnosed and treated.

On 3/4/15 Dr. Vender examined petitioner. She gave a history of experiencing symptoms in her right hand in October of 2013, and symptoms in her left hand a couple weeks later. She stated that her symptoms worsened with her job duties. However, after leaving petitioner's employ, petitioner had some improvement in her symptoms. Dr. Vender did not find any significant symptoms on the left, but did find evidence of right carpal tunnel.

Dr. Vender did not believe petitioner's current condition of ill-being was causally related to her work duties. He based this on petitioner's history of her job duties as well as his review of the Sterile Processing Aide job description, which he found consistent.

Dr. Vender opined that petitioner's use of her hands at work would be considered normal and routine use of the hands and upper extremities. He opined that she did not perform any unusual forceful activities, and when she performed limited forceful activities, they were not on a repetitive basis. The arbitrator finds this opinion inconsistent with the Job Description for the Sterile Processing Aide. Dr. Vender also opined that there was no indication of any forceful exertional activities on a persistent basis that would be considered repetitive.

Dr. Vender was of the opinion that the petitioner's job description showed she performed different types of activities, so there was no repetitiveness of one activity. Dr. Vender was of the opinion that petitioner had comorbidities for the development of carpal tunnel syndrome that included being female and significantly obese.

Based on the above, as well as the credible evidence, the arbitrator finds Dr. Rhode's opinion, coupled with the Job Description for the Sterile Processing Aide, to be more persuasive than those of Dr. Vender. The arbitrator finds the constant repetitive use of the Sterile Processing Aides hands, the constant simple grasping of the hands, as well the frequent power grasping with both hands, frequent reaching over and below shoulder level with both hands, frequent fine manipulation with both hands, frequent pushing and pulling with both hands up to 6 hours a day, and constant lifting of 0-10 pounds per day, to be consistent with repetitive use of the hands. Additionally, the arbitrator found it significant that even her supervisor, Hattan, testified that petitioner's job duties required repetitive use of her hands 8 hours a day.

The arbitrator finds the petitioner has proven by a preponderance of the credible evidence that her current condition of ill-being as it relates to her bilateral hands, is causally related to the injury on 6/4/14.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found accident and causal connection as it relates to petitioner's bilateral hands, the arbitrator next looks to the issue of the reasonableness and necessity of petitioner's medical services.

Petitioner began treating with Dr. Rhode on 6/4/14 for her bilateral wrists. The arbitrator finds this visit was reasonable and necessary to cure or relieve petitioner from the effects of her injury to her bilateral hands. The other visits with Dr. Rhode the arbitrator finds reasonable and necessary were the visit on 10/27/14 to review the results of the EMG; the visit on 11/6/14 where Dr. Rhode gave petitioner a new right cockup wrist splint; the visit on 11/9/14 where Dr. Rhode performed an injection to petitioner's wrist; the visit on 5/20/15 where Dr. Rhode performed another injection; the follow-up visit with Dr. Rhode on 9/3/15 following the MRI; the physical therapy from 10/7/15 through 11/4/15; the visit on 11/4/15, following petitioner's discharge from therapy; the visit on 8/24/16 where Dr. Rhode changed petitioner's restrictions; and the visit on 10/6/16 where petitioner's restrictions were changed again.

Other than the periodic visits for prescription refills based on petitioner's actual use that she testified to at trial, the arbitrator finds all of the remaining visits to Dr. Rhode were not reasonable and necessary to cure or relieve petitioner from the effects of her injury. The remainder of these visits indicate that petitioner's condition was unchanged and no treatment was rendered. Additionally, there are some work status slips for which no

office notes were in Dr. Rhode's records. The arbitrator notes that during all these remaining visits Dr. Rhode was simply noting that he was waiting for authorization of a diagnostic test or surgery. Additionally, the petitioner testified that her appointments were usually no more than 10 minutes, and that when she would get 60 pills they would last for two months because she only took 1/2 pill in the morning and the other 1/2 at night.

The arbitrator finds the MRI of the left wrist on 8/31/15 was reasonable and necessary to cure or relieve petitioner from the effects of her injury.

The arbitrator finds the emergency room visits on 9/16/14 and 2/9/15 at Unity Point, and the visit to OSF St. Francis on 10/16/14 were reasonable and necessary to cure or relieve petitioner from the effects of her injury. The arbitrator also finds the EMG performed 10/14/14 was reasonable and necessary.

Based on the above, as well as the credible record, the arbitrator finds the treatment petitioner received from Dr. Rhode on 6/4/14, 10/27/14, 11/6/14, 11/9/14, 5/20/15, 9/3/15, and 10/6/16, and the physical therapy from 10/7/15 through 11/4/15 at Dr. Rhode's office was reasonable and necessary to cure or relieve petitioner from the effects of her injury. Additionally, the arbitrator finds one additional visit every 2 months from 6/4/14 through the date of trial or medication disbursement is also reasonable and necessary to cure or relieve petitioner from the effects of her injury, based on petitioner's testimony regarding here use of only one Norco per day. The arbitrator finds all remaining visits to Dr. Rhode's office, where no treatment was rendered, were not reasonable and necessary given the fact that on these visits petitioner's condition remained unchanged and no treatment was rendered.

The arbitrator finds all remaining treatment, not provided by Dr. Rhode, that petitioner received for her bilateral hands from 6/4/14 through 2/10/17, was reasonable and necessary to cure or relieve petitioner from the effects of her injury to her bilateral hands that manifested itself on 6/4/16.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Given the fact that the EMG of 10/14/14 showed evidence of right median neuropathy at the carpal tunnel, but no evidence of any left median neuropathy, the arbitrator finds the right carpal tunnel release recommended by Dr. Rhode is reasonable and necessary to cure or relieve petitioner from the effects of her injury. Dr. Vender also opined that a right carpal tunnel release is reasonable and necessary, albeit not causally related. However, since the EMG did not show any evidence of left median nerve neuropathy, the arbitrator finds the left carpal tunnel release recommended by Dr. Rhode is not reasonable and necessary to cure or relieve petitioner from the effects of her injury.

Based on the above, as well as the credible record, the arbitrator finds the respondent shall only pay all reasonable and necessary medical expenses associated with the right carpal tunnel release recommended by Dr. Rhode, pursuant to Sections 8(a) and 8.2 of the Act. The respondent shall not pay for a left carpal tunnel release since the diagnostic tests did not show any evidence of a left median neuropathy, and petitioner reported feeling over 90% better after completing physical therapy on 11/4/15. Petitioner reported compliance with her home exercise program and stated that it helped a lot. She rated her pain at a 3/10. She reported that her left wrist/hand motion was improved.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN ALYINOVICH,

Petitioner,

17IWCC0725

vs.

NO: 13 WC 35422

BANNER WHOLESALE GROCERS,

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, choice of physicians, evidentiary rulings, medical expenses both current and prospective, and the nature and extent of Petitioner's permanent disability and being advised of the facts and law, reverses the Decision of the Arbitrator, finds that Petitioner did not sustain his burden of proving his work-related accident on September 24, 2013 caused a condition of ill-being of his spine, and denies compensation.

Prior to testimony, Petitioner's lawyer made a *Ghere* objection to the deposition testimony of Dr. Butler. She asserted that she was first given a copy of his November 20, 2013 report minutes before she walked into his deposition despite her demand and subpoena. Apparently, she currently had the Section 12 report from Dr. Butler dated November 20, 2013 but she did not have a treatment note from Dr. Butler dated December 12, 2013. Respondent's lawyer asked for a continuance to retake Dr. Butler's deposition. The Arbitrator sustained Petitioner's *Ghere* objection because she did not receive the Section 12 report timely and excluded Dr. Butler's report and deposition testimony. He later allowed Respondent to call Dr. Butler to testify live. However, he limited the content of his testimony to conversations Dr. Butler had with Petitioner and precluded testimony on his diagnosis or findings in his report.

Findings of Fact & Conclusions of Law

1. Petitioner testified he received a GED, which was his highest level of education. On September 24, 2013, he had been employed by Respondent for 45&1/2 years. On that date, he worked as an order filler, but he was doing most of the purchasing for the area he worked in. He was the only order filler for Respondent. He worked "40 hours, and then two hours a day overtime, Monday through Thursday, and four hours on Saturday." He earned $26.57 an hour.

2. On that date, he had just gotten back from a vacation and was "swamped." "Nobody had put anything away for three weeks" and he had to make room for the new orders. He was taking boxes back to stock. He forgot "somebody had blocked the aisle" and he tripped over a double pallet. When he went under it his feet locked and he was jolted forward. He fell forward on his knee and thumb, and broke his fall with his right arm. He was "more or less in shock." He tore all the skin off his knee; it hurt and his thumb was throbbing. He told the supervisor that he would try to continue to work because he did not want to leave them short-handed. After about an hour he told the supervisor "this thing is starting to tighten up. [His] back is tightening up. [His] back is feeling crazy" and he thought he should go to the clinic. The supervisor accompanied Petitioner to human resources where Cindy Lopez gave him paperwork and sent him to Concentra.

3. He went to Concentra that day and saw Dr. Eliason. She diagnosed cervical/lumbar strain, hand sprain, and right knee contusion and recommended pain medication, and put Petitioner on light duty. He returned to Dr. Eliason the next day at which time he complained of numbness down his left arm. Dr. Eliason now included left radiculopathy in her diagnosis, prescribed physical therapy, and continued light duty.

4. The next day Petitioner presented to Dr. Charuk. He diagnosed lumbar/cervical strain status post fall, ordered physical therapy, and took Petitioner off work. Petitioner returned to Dr. Eliason who ceded treatment to Dr. Charuk. When he returned to Dr. Charuk he had the same symptoms; Dr. Charuk ordered an MRI, more physical therapy, and more pain medication.

5. Petitioner continued to treat with Dr. Charuk and continued physical therapy. By December 3, 2013, Dr. Charuk recommended surgery, but wanted to try epidural steroid injections first. A cervical injection actually made the condition worse. On May 14, 2014, he got a second opinion from Dr. Singh. He recommended fusion of C2-7, a laminectomy at L4-5, and took him off work. Surgery was scheduled for June 3, 2014, but it was denied; it was denied three times. He still has not had the recommended surgery. He had three or four block injections which had helped the pain.

6. Petitioner also testified he was working full duty prior to the accident. Before the injury, he did not have any pain in his neck, but was getting injections in his back. Those injections relieved his pain prior to the instant injury. Currently, he had pain in his neck, back, legs, and ankles.

7. The injury affects his daily life; he "can't do anything." He can't walk or stand for extended period or pick up anything. He must be pushed in a wheelchair when going places. He had two prior workers' compensation claims; one after he tripped over a pallet and hit his left rotator cuff, and one when he "ripped" his "hand open with a cord." He never filed a previous claim for his neck or back.

8. On cross examination, Petitioner testified he understood the importance of reporting incidents to his supervisor immediately and then to Cindy Lopez, the human recourses person. He knew that there was video surveillance at Respondent's facility but was unaware that the incident was recorded. He was informed about the recording about an hour after the accident, but did not view it.

9. The video (Respondent's exhibit 5) was then shown at the hearing. Petitioner identified doors on the right of the screen as doors to the sales room. He also identified the "staging area" which the Arbitrator noted seemed to have shelves and there was an aisle to the left. Petitioner noted he was adjacent to the door right near the shelves. He took down two boxes from a shelf about head-high and carried the two boxes at about waist level. The banter between lawyer and witness is confusing, but it appears Petitioner was also moving boxes on the shelves. Petitioner made a point to note that "at the end of those selves there are pallets that are inset."

10. Petitioner acknowledged the video showed he hit his leg. Petitioner responded that the video does not show his foot hooked under something about one foot high. Petitioner is seen going forward extending both his arms. Petitioner is then seen rubbing his right leg/shin area. Petitioner agreed he was falling forward and not backward, he did not strike his back or neck, and the only body parts impacted were his right leg and hands.

11. Petitioner agreed that he treated with Bone & Joint Physicians (Dr. Charuk's practice group) since April 15, 2008 for back pain radiating into his right leg. He was also limping and had weakness. At that time, he reported falling at work a few years earlier.

12. When Petitioner returned to Dr. Charuk after the instant accident he reported he had a violent fall. He did not recall telling Dr. Charuk that he hit his "right knee and fell back." If his records so indicated, they would be incorrect. Petitioner also denied he treated with Dr. Miz at Bone & Joint Physicians. He then responded that he thought he saw Dr. Miz once on December 29, 2009, but he was not treating with him. He did not recall Dr. Miz prescribing lumbar surgery at L2-5. Such an entry would also be incorrect.

13. Petitioner agreed that he treated from April 2008 through December 2012 for his back with numbness radiating down his legs into his feet, and weakness. He denied he had problems standing; he "was doing everything fine." He also denied that Dr. Miz ever prescribed surgery. Petitioner agreed that on November 20, 2013, Respondent sent him for a Section 12 examination with Dr. Butler. Petitioner returned to Dr. Butler and asked him to treat him, and to perform surgeries if necessary. After seeing Dr. Butler, he decided to see Dr. Singh.

14. Petitioner was originally represented by another lawyer, who filed the instant claim. Petitioner signed the Application on October 15, 2013. It only alleged injuries to the right knee and right thumb. Petitioner denied he sustained any injuries during his vacation immediately prior to his return to work and his accident.

15. On redirect examination, Petitioner testified Dr. Butler was very courteous to him during the IME; "he went over everything." He told Petitioner his "injuries were serious and they were work related." He indicated he would contact Respondent's lawyer and try to expedite his treatment. At that time, he wanted Dr. Butler to perform the surgeries.

16. Cindy Lopez was called to testify by Respondent for which she worked as Human Resources manager from July 19, 2004 to March 6, 2015. She was no longer employed by Respondent and appeared pursuant to subpoena. In her job, she dealt with benefits, health insurance, and workers' compensation claims. It is Respondent's policy that employees report injuries to their supervisors and the supervisor or employee would report to her. She then sends employees who need treatment to Concentra. Respondent pays 100% of health insurance costs of union members.

17. On September 24, 2013, Petitioner came to see her at about 1:00 or 1:30; "at the end of his shift." He reported he fell and hurt his knee. His pants were torn and there was some blood there. She asked him whether anything else hurt, and Petitioner indicated just his knee. Petitioner did not complain about his neck, back, or shoulders. Ms. Lopez sent him to Concentra. Petitioner returned after 4:00 with paperwork from Concentra. Ms. Lopez would not allow him to work the next day because the Concentra note took him off work until a certain date. Petitioner was "a little upset" at not being able to work. When she asked how he was, he indicated his right knee/shin were still sore. He did not mention any other body parts. Petitioner then indicated he was going to be off on September 26th because he had a doctor appointment for his back. He had requested that day off weeks earlier.

18. On cross examination, Ms. Lopez testified she believed Petitioner was able to perform his duties prior to the incident; "he was always there." She did not know the doctor with whom Petitioner's September 26, 2013 appointment was. She reviewed the video of the accident and she, supervisors, and the owner had access to these videos. They are stored on a hard drive and accessed through log-in on the website. Videos are not destroyed; they are stored for two weeks and then generally recorded over. Nobody edits the videos. An information technology consultant puts the recordings on a disc weekly.

19. Dr. Jesse Butler testified he is an orthopedic spine surgeon, board-certified since 2000. About 50% of his practice involves treating patients and 50% involves Section 12 examinations. He recognized Petitioner, whom he first met when he performed an IME on November 20, 2013. He reviewed records back to 2008, through treatment by Dr. Charuk. Petitioner returned to him on December 12, 2013, and asked for him to be his treater. Dr. Butler agreed and examined Petitioner on that day as his treating doctor.

20. Dr. Butler testified that he had a conversation with Petitioner about an hour after his initial Section 12 examination. The conversation was primarily about treatment. Dr. Butler indicated he believed Petitioner needed surgery on both the cervical and lumbar spine. Based only on Petitioner's history, "it seemed as if there would be a causal relationship between" the accident and his condition. Subsequently, Dr. Butler reviewed the video and performed another examination on December 12, 2013. At that time, he informed Petitioner that after viewing the video he no longer felt "there was any injury to cervical or lumbar spine." There was a discrepancy of Petitioner's reports to him and other doctors and what was depicted in the video. "The mechanism as it was described [by Petitioner] was just not accurate." Dr. Butler informed Petitioner that he still believed he needed surgery, but he did not believe it would be paid under workers' compensation. He would perform the surgery if he got workers' compensation approval or if it were put through group insurance. He put it through workers' compensation even though he knew that it was going to be denied.

21. Dr. Butler also explained to Petitioner that the findings in the physical exam of muscle atrophy would not be something one would expect that soon after an injury. In addition, the extent of the severity of the cord compression in his neck and stenosis in his lumbar spine was bad enough that normal activities of normal living could cause symptoms and dysfunction.

22. The video was shown again. Dr. Butler noted that Petitioner was prone, lying forward supporting his weight on extended arms. His back and neck were in a neutral position, almost like "doing a push-up on a wall." The video does not accurately reflect the history Petitioner gave to him. Petitioner described a fall. "The only axial load to the lower back was when he sat down, not when he fell down. The fall is braced by his upper extremities and his neck and lower back are maintained in a neutral position. There's no twist. There's no torsion, and there's no axial load." Dr. Butler told Petitioner he did not believe there was causal connection when he became his treating doctor.

23. On cross examination, Dr. Butler agreed that at the time of the Section 12 examination, Petitioner reported a work injury and reported neck, back, shoulder, knee, and thumb pain all of which he attributed to the work accident. He recommended surgery on Petitioner's neck and back, which at that time, he attributed to the accident.

24. On redirect examination, Dr. Butler testified he had a subsequent conversation with Petitioner on December 12, 2013, at which time he informed Petitioner that he did not believe there was a causal connection because of the video and the severity of his condition.

25. On examination by the Arbitrator, Dr. Butler testified that it is a complicated situation when he acts both as a Section 12 examiner and a treating doctor. He forms an initial impression based on what he has available which can change upon receipt of additional information. He has had many similar situations in his practice. He simply tries to be honest with everyone.

26. Petitioner testified in rebuttal that at the Section 12 examination, he provided Dr. Butler as accurate a history as he could recall, including his existing problems and his accident. After the examination, Dr. Butler pulled up his medical records and reviewed them with him. Dr. Butler told Petitioner "this is just what happens with an aging work force," that he needed surgery, and he would try to expedite it. Dr. Butler told him to call back for an appointment and to come back with his wife for a consultation about the prospective surgery. Dr. Butler did not tell him anything about causation but indicated his condition was related to his work accident.

27. At that appointment on December 12, 2013, Dr. Butler "said that after reviewing the video that there was some concern there might be some issues that maybe the insurance company could see where it wasn't work related." He was still willing to do the surgery and asked whether he would do it under group insurance. Petitioner responded "under no circumstances" because it was a workers' compensation matter. He thought he was going to have the surgery on January 20, 2014 and it was going to be paid for by workers' compensation.

28. On cross examination, Petitioner denied that on December 12, 2013, Dr. Butler advised him that workers' compensation was not going to authorize surgery, nor that he should proceed through group insurance. Dr. Butler brought up that option, but Petitioner said no. When he first saw Dr. Butler, he informed him that he was treating for his back since 2008. He did not tell him that surgery was prescribed in 2009 or 2010 "because it wasn't prescribed." He did not recall telling Dr. Butler that he had numbness/tingling in his legs since 2008 or currently. He told Dr. Butler about his injections.

29. On April 1, 2015, Dr. Singh testified by deposition that he is a board-certified orthopedic surgeon specializing in spine surgery. He performs about 400 to 500 spinal surgeries a year. He first saw Petitioner on May 12, 2014. Petitioner reported falling forward after tripping over pallets on September 24, 2013. He reported he had immediate complaints of neck and low back pain with numbness/tingling in the extremities. He exhibited significant weakness in his arms and legs.

30. Dr. Singh reviewed a cervical MRI, which showed "severe and critical" spinal stenosis most severe at C3-C4, C4-5, and C5-6. He rarely sees patients with critical stenosis, which is sufficient stenosis to cause weakness. The lumbar MRI showed severe stenosis L3-S1. He diagnosed cervical spondylosis with myelopathy. Spondylosis is typically asymptomatic and "can be rendered symptomatic from a traumatic event." Dr. Singh believed the condition became symptomatic because of the fall on September 24, 2013. Stenosis can also be accelerated by trauma. Petitioner clearly had preexisting spondylosis of his neck and back, but Petitioner related that it had not been symptomatic, "at least in the immediate proximity to his injury."

31. Dr. Singh recommended a cervical laminoplasty over fusion to maintain better range of motion. A four-level fusion would impair his ability to work at all. Dr. Singh did not note any instability in the lumbar spine. Therefore, he recommended minimally invasive multilevel laminectomy L3-S1.

32. The cervical surgery had to be performed first because of the critical nature of that condition. He opined that these surgeries, as well as other related postoperative treatment, were reasonable and necessary, and causally related to the work accident.

33. On cross examination, Dr. Singh explained that Petitioner's critical spinal stenosis put him "at risk for any particular event causing him to be symptomatic;" "it's kind of like the fragile egg or Humpty Dumpty syndrome." Therefore, the very mechanics of falling forward or tripping could be a plausible mechanism. He did not have treatment for his back/neck for several months prior to the accident. He personally viewed the MRI films. He agreed that it was fair to say that almost any normal daily activity could cause aggravation of critical cervical stenosis. He was aware that Petitioner had lumbar injections at least twice; in 2010 and 2012. He also had cervical injections. He agreed Petitioner had severe problems since at least 2010. Spinal stenosis occurs over time and the accident did not cause Petitioner's stenosis or spondylosis. The MRI findings are chronic in nature.

34. Dr. Singh was aware Petitioner had a previous MRI because Petitioner mentioned it. However, he did not review it. He did not think seeing that MRI was critical because "the spondylosis is a progression of his underlying degeneration." Comparing the MRIs "would just probably show that there is progression." Petitioner's condition was age-related, but not necessarily age-appropriate because most people would not have cord compression and weakness. The "egg-shell" analogy applies to both Petitioner's cervical and lumbar condition.

35. Dr. Singh explained that radiculopathy is nerve root compression and myelopathy is spinal cord compression with associated weakness. In arriving at his causation opinion, Dr. Singh did not presume that Petitioner fell to the ground, only that he tripped on pallets. Dr. Singh did not mention in his report that Petitioner fell to the ground. However, simply the act of falling forward or bending could be a competent mechanism. Dr. Singh opined that most patients with critical stenosis would naturally become symptomatic. In myelopathy cases about 85 of patients will become symptomatic. Petitioner was referred to him by his lawyer.

36. Dr. Charuk testified by deposition on June 30, 2015 that he is board-certified in physical medicine & rehabilitation. He sees about 1,500 patients a year. He first saw Petitioner on September 26, 2013. He reported that several days previously, he tripped over pallets, hit his right shin and knee, and fell on his back. He worked for about an hour but developed increasing back pain and was sent to Concentra. He woke up with neck pain shooting into the left arm. His pain diagram confirmed pain in the neck, low back, and down the left arm.

37. On examination, Petitioner had 50% reduced cervical ROM and evidence of nerve root impingement. He also had reduced lumbar ROM and a loss of lumbar lordosis, which signifies "an acute injury."

38. Dr. Charuk diagnosed lumbar/cervical strain post fall, history or L3-5 central spinal stenosis, and history of polyneuropathy in the legs. Dr. Charuk began physical therapy, took Petitioner off work for three weeks, and would consider an MRI if he did not improve. The MRI was ordered and showed multilevel degenerative disc disease with severe stenosis at C4-C7. A lumbar MRI showed marked spinal stenosis L2-L4, "which had not significantly changed" and worsening at L1-2. Petitioner's history of injury was consistent with his symptoms and objective findings.

39. Dr. Charuk also testified that he initially began treating Petitioner in 2008 on referral from Dr. Miz. At that time, he diagnosed "L3-4 and L4-5 neuroforaminal stenosis secondary to facet arthropathy, congenital and acquired stenosis." When he saw Petitioner on October 4, 2012, he complained of pain across his low back. Between 2008 and 2012, Petitioner had multiple lumbar injections, physical therapy, and medications. During that time, Petitioner did not have any cervical complaints, as far as Dr. Charuk knew.

40. The treatment provided was successful and he released Petitioner to full duty in 2012 and from treatment at maximum medical improvement. There was never any recommendation for surgery. He did not see Petitioner after that release until September 26, 2013.

41. Dr. Charuk explained that several things can cause stenosis and it can become more symptomatic with trauma. Petitioner did not have spondylolisthesis, a shifting of a vertebra over another, but he did have spondylosis, which is simply spinal arthritis. Dr. Charuk opined that Petitioner's cervical injury was the result of the instant accident. He also opined that Petitioner's lumbar condition was caused by that accident.

42. Dr. Charuk treated Petitioner for his current complaints with cervical/lumbar injections and medications. In his opinion, Petitioner has exhausted conservative treatment. He would defer to Dr. Singh about what cervical surgical intervention would be appropriate. When he last Petitioner on September 24, 2014, he continued to complain of low back pain. However, Petitioner never followed up. At that time, he really had no additional treatment for Petitioner's neck, but he was not at maximum medical improvement and still needed treatment. He noted that Petitioner should follow up with Dr. Singh or Dr. Miz for evaluation.

43. On cross examination, Dr. Charuk testified he is a DO which is different than an MD. However, they both go through the same residency program. DOs are traditionally associated with a more holistic approach and are taught manipulation. However, now the holistic approach and manipulation are taught at Allopathic medical schools.

44. Dr. Charuk also testified that when he first saw Petitioner on April 24, 2008 he complained of low back pain, had a limp, and had right leg weakness. Dr. Charuk did not have an MRI from March 21, 2008, in his charts. He was shown the report. It indicated Petitioner had congenital spinal stenosis and severe spondylitic changes L2-5.

45. In his treatment note from September 24, 2013, Dr. Charuk noted that Petitioner fell on his back; it did not indicate what part of his back, "but usually when somebody falls backwards, the entire spine is affected." He doesn't "know of any other kind of fall than traumatic." Dr. Charuk used the term "violent" because that was what Petitioner related to him. If Petitioner did not actually fall on his back, that would not necessarily change his causation opinion. He agreed that aspects of his 2008 lumbar diagnoses were essentially the same as his 2013 diagnosis. A note from December 29, 2009 indicating a discussion with Petitioner about surgery, was not his note but Dr. Miz'. Dr. Miz is a spinal surgeon in Dr. Charuk's practice.

46. Dr. Charuk agreed that the MRIs in themselves do not indicate a traumatic injury; in that "there's no evidence of fracture." He disagreed with Dr. Singh that Petitioner had "critical stenosis." Petitioner never had critical stenosis while he treated him, Dr. Charuk did not interpret the MRIs as showing critical stenosis, and noted that Petitioner did not have bowel/bladder incontinence.

47. Dr. Charuk did not know how to interpret Dr. Singh's reference to "Humpty-Dumpty" syndrome, *etc.* He agreed that Petitioner was at greater risk for "aggravating his back" in 2013 because of his degenerated condition. Prior to 2013, he administered six lumbar injections. The injections were administered for pain and he was not aware of any work injuries associated with those injections. He would not comment on the amount of force needed to cause an aggravation. He again noted Petitioner's report of a violent fall.

48. Dr. Charuk noted that an EMG/NCV of the legs taken on May 9, 2008 was abnormal and showed "mixed sensory motor polyneuropathy." On December 13, 2012, Dr. Charuk also diagnosed bilateral neuropathy in his legs bilaterally, central stenosis at L3-5, and balance dysfunction.

49. On redirect examination, Dr. Charuk testified that the surgery Dr. Miz was discussing was L2-5 compression. He was not aware of any recommendation for cervical surgery prior to that of Dr. Singh. Trauma does not have to be violent to accelerate spondylosis; slight movements can accelerate it.

50. On re-cross examination, Dr. Charuk testified that slight movements can aggravate stenosis, depending on the severity of the stenosis and the type of movement. He again could not say how much force or weight was needed to aggravate spinal stenosis.

51. Some records from Dr. Charuk's practice, both prior to and after the accident, were admitted into evidence. A lumbar MRI taken on March 21, 2008, showed congenital spinal stenosis, severe spondylitic changes with substantial acquired central stenosis from L2-5, and bilateral neural foraminal stenosis.

52. A lumbar MRI taken on March 21, 2008, showed congenital spinal stenosis, severe spondylitic changes with substantial acquired central stenosis from L2-5, and bilateral neural foraminal stenosis.

53. A treatment note from Dr. Miz dated April 15, 2008, indicated that Petitioner presented for back & right leg pain. He noticed somewhat of a gait abnormality, with some right leg weakness after a fall at work a few years earlier. However, this did not cause a lot of pain. He had some chronic mechanical backache, but that did not interfere with activities. He had radicular pain in the right leg for 2 & ½ months. He had an MRI but no treatment yet. Dr. Miz recommended a trial of ESI injections and an EMG.

54. On April 24, 2008, the EMG was taken on referral from Dr. Miz to rule out peripheral neuropathy versus radiculitis. It was abnormal in the legs and showed evidence of mixed sensori-motor polyneuropathy with acute lumbar axonal degeneration. It was noted that Petitioner responded well to an epidural steroid injection, and had started physical therapy, which he was encouraged to continue.

55. Petitioner treated on two more occasions with Dr. Charuk in 2008. He had responded well to the steroid injections. On July 8, 2008, Petitioner reported he was doing well and doing his home exercise program. He had no pain and Dr. Charuk released him on a per needed basis

56. On February 19, 2009, Petitioner returned to Dr. Charuk with pain radiating down his legs, left worse than right, which gradually returned over the past six weeks. He was still in his home exercise program. He had negative straight leg raises and "slump sign." Because of good relief from a previous injection they would repeat the injection. Petitioner returned to Dr. Charuk and he had three lumbar epidural lumbar injections between March 16, 2009 and November 16, 2009.

57. On December 29, 2009, Petitioner presented back to Dr. Miz for a surgical consultation, on referral from Dr. Charuk. He had an EMG that showed peripheral neuropathy and had injections which worked reasonably well to allow him to continue to work without much functional deficit. They discussed treatment options including conservative and operative management.

58. Dr. Miz noted that "operative management at this point would likely consist of an L2 to L5 decompression although we would need to confirm lack of segmental instability" with an updated MRI.

59. On August 2, 2010 and November 18, 2012, Petitioner had more lumbar epidural steroid injections for left radiculitis. On December 13, 2012, Petitioner reported 60% improvement after epidural steroid injection on November 28th. He now reported 0-1/10 pain. Dr. Charuk again released from treatment on a per needed basis.

60. On September 26, 2013, Petitioner presented to Dr. Charuk for a "new injury." Dr. Charuk "had seen him previously, but this is a work comp injury." He reported he fell at work several days earlier. "He hit his knee and fell on his back." That day he developed increasing low back pain and woke up with neck pain shooting into his left arm. "This was new pain."

61. Petitioner rated lumbar pain as 9-10/10 and cervical pain at 7/10. Dr. Charuk diagnosed lumbar/cervical strain post fall, history or L3-5 central spinal stenosis, and history of polyneuropathy in the legs. Dr. Charuk began physical therapy, took Petitioner off work for three weeks, and would consider an MRI if he did not improve.

62. A lumbar MRI taken on November 6, 2013 showed multilevel degenerative disc disease with evidence of active Schmorl's nodes and marked canal stenosis at L2-3 & L4-5 with obliteration of the CSF signal. "The spinal canal stenosis at the L2-L3 level and L3-L4 level have not significantly changed" (presumably from an MRI in 2008). There was also moderated neural foraminal narrowing most notably at L2-3. A cervical MRI taken the same day showed multilevel degenerative disc disease with severe stenosis at C4-7, several levels of cord deformity, but without cord signal abnormality to suggest cord edema, and severe multilevel neural foraminal stenosis.

63. On November 12, 2013, Petitioner reported his condition was about the same and physical therapy had still not been approved. After the MRIs Dr. Charuk included specific pathology regarding his lumbar diagnosis, and added cervical retrolisthesis/anterolisthesis to the diagnosis. Dr. Charuk noted that he had previously treated Petitioner's back, but he did not believe this was an exacerbation of a prior back condition. He thought Petitioner "had a new injury after he fell over the pallet that caused him to have this increased pain in his back and new onset neck pain."

In looking at the entire record before us, the Commission concludes that Petitioner has not sustained his burden of proving his work accident caused his current condition of ill-being of his cervical/lumbar spine. We base that conclusion on Petitioner's extensive preexisting spinal condition for which surgery was contemplated since 2009. The MRI taken after the accident did not appear to show any structural change in Petitioner's spine since an MRI taken in 2008. In addition, both Dr. Singh and Dr. Butler testified that at the time of the accident Petitioner's spinal condition was so severe that basically any activity of everyday life, such as bending, could be a competent mechanism of aggravating his condition.

Finally, the Commission is persuaded by the video showing the accident. The video shows Petitioner walking holding two boxes. He trips on an object on the floor and leans forward with arms extended apparently to the pallet. He turns and sits on the pallet. He is in some apparent pain and rubs his knee. The fall is certainly not violent, his back is not struck, and there is no obvious bending, twisting, or torquing of the spine. As noted by Dr. Butler, the accident looks extremely benign. Dr. Butler noted that the video does not accurately reflect the history Petitioner gave to him and other doctors. He explained that "the only axial load to the lower back was when he sat down, not when he fell down. The fall is braced by his upper extremities and his neck and lower back are maintained in a neutral position. There's no twist. There's no torsion, and there's no axial load." While Dr. Charuk and Dr. Singh opined that the accident caused Petitioner's current condition, there was no indication that they actually saw the video; they accepted Petitioner's account of the "violent" nature of the accident. In addition, they acknowledged that Petitioner was at greater risk for developing a debilitating spinal condition as a result of any activity because of the severity of his preexisting condition.

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Therefore, the Commission concludes that at the very most, if Petitioner suffered any injury to his spine in the work accident it constituted a temporary exacerbation of his preexisting condition. The accident did not cause any structural change in his condition and his current condition represents the natural progression of his underlying degenerative disc disease for which surgery was contemplated four years previously. Accordingly, the Commission finds that Petitioner did not prove his current condition of ill-being was caused by his work accident and denies compensation. Because the Commission finds that Petitioner did not prove causation, the Commission does not address the other issues which become moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 1, 2017 is hereby reversed and compensation is denied.

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

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: NOV 17 2017

Deborah L. Simpson

Deborah L. Simpson

Stephen J. Mathis

Stephen J. Mathis

DLS/dw
O-9/28/17
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DISSENT

I respectfully dissent from the majority decision and would affirm the Arbitrator's well reasoned decision in its entirety. The majority bases its decision on Petitioners preexisting spinal condition as well as the video of the accident at issue. Petitioner did have a preexisting spinal condition for which surgery was contemplated in 2009. However, Petitioner was able to work without restrictions with that condition up until the date of accident. There is no question that Petitioner suffered an accident after which his condition significantly worsened rendering him unable to work.

With respect to the video of the accident, the video clearly shows Petitioner tripping while carrying two boxes. Respondent's Section 12 examiner, Dr. Butler, originally opined a causal connection between the accident and Petitioner's condition of ill being. Although video of the accident does not depict a violent fall, contrary to Dr. Butler's assertions, it is consistent with the description of the accident Petitioner gave to the medical providers (with the exception of one notation in Dr. Charuk's records). Regardless of the nature of the accident, there is no question that Petitioner suffered an accident after which his condition significantly worsened. The chain of events as well as the causal connection opinions of Drs. Charuk, and Singh support the Arbitrator's findings. Accordingly, I would affirm the decision of the Arbitrator in its entirety.

David L. Gore

David L. Gore

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

Julia Rodriguez,
Petitioner,
vs.

NO: 12WC 1491

Illinois Department of Corrections/
Vienna Correctional Center,
Respondent,

17IWCC0726

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, notice, temporary total disability, medical, causal connection, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

DATED: NOV 17 2017

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CJD/rlc
049

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RODRIGUEZ, JULIA
Employee/Petitioner

Case# **12WC001491**

12WC013522
14WC032555

ILLINOIS DEPT OF CORRECTIONS/VIENNA CORRECTIONAL CENTER
Employer/Respondent

17IWCC0726

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:

4377 MICHAEL MILES
AATORNEY AT LAW
PO BOX 907
CARBONDALE, IL 62903

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

0558 ASSISTANT ATTORNEY GENERAL
AARON WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 306/14

JUN 29 2016

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

17IWCC0726

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

Julia Rodriquez
Employee/Petitioner

v.

Illinois Department of Corrections/
Vienna Correctional Center
Employer/Respondent

Case # **12** WC **1491**

Consolidated cases: **12 WC 13522,**
14 WC 32555

An *Application for Adjustment 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 **May 11, 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 _____

17IWCC0726

FINDINGS

On **February 1, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$54,055.00**; the average weekly wage was **$1,039.52**.

On the date of accident, Petitioner was **50** years of age, *single* with **0** dependent children.

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

ORDER

Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent, and that her current condition of ill-being is casually related to her alleged accident. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent is entitled to a credit for **all amounts paid under group health plan** under Section 8(j) of the Act.

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

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

Melinda M. Price Sullivan

Signature of Arbitrator

6/23/16

Date

ICArbDec p 2

JUN 29 2016

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Julia Rodriguez
Employee/Petitioner

Case # 12 WC 1491

v.

Consolidated cases: 12 WC 13522, 14 WC 32555

State of Illinois Department of Corrections/
Vienna Correctional Center
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that she lives in Golconda and works part-time at a chocolate factory. She testified that she retired from the Department of Corrections. She testified that back in 2009 through 2011, she was employed at Vienna Correctional Center as a Correctional Counselor II. She testified that she had daily, weekly and monthly assignments, which included review of intake files and reviewing inmates for work camp, work release, good time, restoration of good conduct credits and time that had been taken away for discipline. She testified that she had been working in that capacity since January of 2007.

Petitioner testified that she reported injuries to her right arm. When shown Respondent's Exhibit 1, she testified that the report indicated that the claim was reported on March 10, 2009, that upon doctor's advice the claim was suspended on March 11, 2009 and that the symptoms subsided and then began to return on approximately August 15, 2011 and had worsened since that time. She testified that the report was not signed by her supervisor, but that she completed the form on November 15, 2011. She further testified that she believed that she reported the incident to her supervisor on November 14, 2011.

Petitioner testified that she sought medical attention following her filling out the report and that she sought treatment with Dr. Tobin on or about November 22, 2011. She testified that she described her job duties in a similar manner to Dr. Tobin as compared to that as contained in Respondent's Exhibit 1. She testified that she was familiar with the Repetitive Activity Description Sheet, that it was something that she completed to provide further details as to her work activities and that it expanded on the summaries she provided in the incident report and those as reported to Dr. Tobin.

Petitioner testified that Dr. Tobin diagnosed right cubital tunnel syndrome and performed surgery on her right elbow on March 1, 2013, which was about a year and a half after she reported the accident. When asked why she waited so long, she responded that the doctor suggested she take some Ibuprofen and sleep with her arms in a straight position, and that if it was bothering her, she should stop what she was doing and do something else for a while. She testified that the symptoms went away for a while, but with her continued work duties, the symptoms came back and did not go away.

Petitioner testified that when she first reported the accident on March 10, 2009 and withdrew it, she reported the claim to the IDOC injury hotline, which was what she was required to do when she reported a work-related injury.

Petitioner testified that after surgery, she was off work from the date of surgery to April 25, 2013, which was when Dr. Tobin released her back to work. She testified that she returned to her normal work activities at that time, and that she retired on June 30, 2015.

Petitioner testified that she still has occasional tingling in her little and ring fingers on her right hand and aching in her right elbow. She testified that she has numbness and tingling as well as an aching in her left elbow and forearm that occurs when she uses it excessively. She testified that since she retired she has been working part-time at a chocolate factory, and that she is doing fairly well. She testified that they serve a lot of ice cream and that as she is right-handed, sometimes her arm aches while scooping the ice cream.

Petitioner testified that on March 31, 2015, she was evaluated by Dr. Sudekum for a Section 12 examination. She testified that she reviewed Dr. Sudekum's report that he submitted following the examination, and that she disagreed with some of the findings. She testified that she has never been diagnosed with diabetes or peripheral vascular disease, and that based on her height and weight she would probably be classified as obese but that she exercised frequently. She also denied being diagnosed with hypothyroidism. She testified that her impression of Dr. Sudekum was that she felt at times like he was calling her a liar.

Petitioner testified that in the work setting, there were job duties that had to be done in a timely manner. She testified that there were times when a supervisor was standing over her shoulder, and that she did not have the luxury of stopping what she was doing and letting her arm rest and then going back to finish her work. She testified that almost everything they did included handwriting and that she would have to make computer entries as well. She testified that not all of her activities were performed in an office setting, and that they would have to make housing unit visits. She testified that there was not a counselor's office or a computer in the housing unit, so she would have to stand there with a notepad and radio in her left hand and write down all the information, questions, etc. from the inmates with her right hand for that entire period of time. She testified that she would then go back to her office and type out a written answer, send that back to the inmate and then enter that information into the inmate's case notes so there would be record of the meeting. She also testified that she also served as a historian at the correctional center, which meant that if there was a drill or an actual emergency, she had to write down everything that happened, what was said, etc. during that period of time. She testified that after it was over, she had pages of handwritten notes that had to be typed and given to the warden for his file. She testified, however, that she was a historian before the incidents at issue.

Petitioner testified that Dan Field was her supervisor at the time, and that she believed his signature appeared on the CMS Supervisor's Report of Injury.

On cross examination when questioned regarding the contents of the IME report of Dr. Sudekum, Petitioner agreed that the paragraphs that she objected to actually used language such as "patients" and "clients" and that those paragraphs may not have been about her but rather the worker's compensation system as a total. She agreed that she testified that she was still having symptoms with regard to her right elbow and that she had surgery in 2013. She agreed that she testified that she did not have the symptoms every day, but she did have them on the day of arbitration. She testified that she has not seen a physician for her right elbow since she was released by Dr. Tobin in 2013. She testified that she retired on June 30, 2015 and has continued to have the symptoms from the time of her surgery to her retirement in 2015, and that she has had the symptoms post-retirement as well.

On cross examination, Petitioner agreed that she had prior claims both for her left cubital tunnel syndrome and right and left carpal tunnel syndrome. She testified that for the left cubital tunnel syndrome, it completely resolved and was not an issue. She denied that Dr. Tobin conducted any diagnostic testing on the right side prior to her having surgery. She denied having undergone an EMG and testified that to her knowledge, she had never had an EMG conducted on the right elbow.

On cross examination, Petitioner testified that she currently takes Ibuprofen occasionally for her right elbow pain. She testified that she is right-hand dominant. She agreed that she initially reported the claim in March of 2009 and that she called it into the hotline. She agreed that at that time she had a pending carpal tunnel syndrome and left cubital tunnel syndrome claim with a different attorney and that the case settled. When asked if she also informed her attorney at that time that she had this problem, Petitioner responded that she believed that they spoke about it. She denied that her attorney ever filed a claim for her condition in the right elbow.

On cross examination, Petitioner testified that she recalled back in 2009 discussing complaints to the right elbow with Dr. Tobin and agreed that if the records reflected that she did, they would be correct. She denied that in 2009 Dr. Tobin ever sent her for any electrodiagnostic testing with reference to her right elbow and agreed that he never had that conducted at any time. She denied that there was anything about her job duties that changed between March of 2009 and November of 2011, but testified that there sometimes were fluctuations in her case load if someone was on a leave from work.

On redirect examination, Petitioner testified that just before she saw Dr. Tobin in 2009 she was treating with Dr. Chow for carpal tunnel syndrome. She testified that Dr. Chow conducted electrodiagnostic studies on both of her hands. She testified that she did not know whether or not that would include diagnostic evidence of pathology to the elbow. When shown Petitioner's Exhibit 1 and asked whether it refreshed her memory as to any conversations regarding right elbow or ulnar nerve problems with Dr. Tobin back in 2009, Petitioner testified that she discussed her right elbow and that at time he said to treat it carefully, take Ibuprofen and keep it in a straight position as much as she could. She testified that it improved at that point in time.

On redirect examination, Petitioner testified that in 2009 she had already been diagnosed with left cubital tunnel syndrome and understood what it felt like. She testified that in November of 2011 her right elbow symptoms came back and did not go away using conservative measures, and that it felt exactly like the left cubital tunnel diagnosis or possibly a little bit worse.

The Application for Adjustment of Claim for 12 WC 1491 was entered into evidence at the time of arbitration as Arbitrator's Exhibit 4. The Application alleged a date of accident of February 1, 2009 for a claim involving the right upper extremity. (AX4). The Application for Adjustment of Claim for 12 WC 13522 was entered into evidence at the time of arbitration as Arbitrator's Exhibit 5. The Application alleged a date of accident of November 22, 2011 for a claim involving the right upper extremity. (AX5). The Application for Adjustment of Claim for 14 WC 32555 was entered into evidence at the time of arbitration as Arbitrator's Exhibit 6. The Application alleged a date of accident of November 13, 2012 [*sic*] for a claim involving the right upper extremity. (AX6).

The medical records from Missouri Plastic and Hand Surgery for March 10, 2009 through February 4, 2010 were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Petitioner was seen on March 10, 2009, at which time it was noted that she had worked for 6 or 7 years at Vienna Correctional Center, during which time she reported that she was involved with data entry and other highly repetitious tasks. It was noted that in 2007 after working there for 7 years, Petitioner then moved into counseling where she had other highly repetitious tasks described as constant writing and data entry. Petitioner stated that Dr. Chow did her carpal tunnel releases, and that she had developed ongoing

numbness and tingling in the little and ring fingers on the left side and, to a lesser extent, on the right. It was noted that Petitioner was wondering what the problem was and if it was work-related, and that she had indicated that Dr. Chow would not take a position. It was noted that Dr. Tobin thought Petitioner had cubital tunnel syndrome on the left and, given her history, her work was likely a precipitating factor. It was noted that Petitioner was given an injection, and that she had already been wearing elbow pads in the past for up to three months without effect. A work slip was also issued on that date, allowing Petitioner to return to work with no limitations. (PX1).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on March 24, 2009, at which time it was noted that her symptoms were initially better for about a week to 10 days after the injection and now were getting back to the way they were before. It was noted that the ulnar nerve was positive to percussion at the elbow and that conservative measures had been exhausted. Petitioner was recommended to undergo a left anterior submuscular transposition of the ulnar nerve, and it was noted that she wanted to proceed. (PX1).

Included within the records of Missouri Plastic and Hand Surgery was an operative report dated June 12, 2009 for a left anterior submuscular transposition of the ulnar nerve performed at Auburn Surgery Center. The pre- and post-operative diagnosis was that of left cubital tunnel syndrome. (PX1).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on June 16, 2009, at which time it was noted that she had no complaints. It was noted that the ulnar nerve had satisfactory sensation and motor function demonstrated distally. It was noted that the drain was discontinued. A work slip was issued on that date, allowing Petitioner to return to work on June 16, 2009 with limitations of right hand duty only. At the time of the June 30, 2009 visit, it was noted that Petitioner stated she was doing better, the soft tissues looked good and she was healing nicely. It was noted that Petitioner had reasonable subjective ulnar nerve sensation and good ulnar nerve motor function. Petitioner was instructed to undergo therapy. A work slip was issued on that date, allowing Petitioner to return to work on June 30, 2009 with limitations of right hand duty only. Included within the records were physical therapy notes pertaining to treatment rendered during the timeframe of July 6, 2009 through July 20, 2009. (PX1).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on July 21, 2009, at which time it was noted that she had no new complaints and thought she was doing very well. It was noted that the therapist notes demonstrated progress. It was noted that Petitioner's sensation in the ulnar territory subjectively was intact but she still reported some numbness and tingling that she perceived. It was noted that therapy was discontinued. A work slip was issued on that date, allowing Petitioner to return to work with no limitations. At the time of the September 15, 2009 visit, it was noted that Petitioner complained when she went back to work she started to have in a much milder sense some numbness and tingling to the ring and little fingers. It was noted that objectively Petitioner was doing well but subjectively she still had some complaints. A work slip was issued on that date, allowing Petitioner to return to work with no limitations. (PX1).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on November 10, 2009, at which time it was noted that she thought the ulnar nerve was doing well. It was noted that Petitioner had reached maximum medical improvement, and that no further visits were required. A work slip was issued on that date, allowing Petitioner to return to work with no limitations. At the time of the December 3, 2009 visit, it was noted that Petitioner stated that she still had some symptoms involving her shoulder, arm and forearm which were there at the beginning and had not been helped, and that these included pain and numbness and tingling to the area of the deltoid, lateral arm and dorsal forearm. It was noted that her symptoms may be secondary to cervical nerve root impingement, and Petitioner was

referred to Dr. Fonn. A work slip was issued on that date, allowing Petitioner to return to work with no limitations. (PX1).

Included within the records of Missouri Plastic and Hand Surgery was a note from Dr. Fonn dated December 31, 2009, which noted that Petitioner returned to discuss her progress. It was noted that Petitioner's history, review of systems and examination remained unchanged from the last visit, and that x-rays of the cervical spine showed osteophytic spurring and what appeared to be uncinate hypertrophy at the C5/6 and C6/7 levels. Dr. Fonn noted that this could certainly be a cause of Petitioner's left-sided symptomatology, which she reported to be as significant as previously. It was noted that Petitioner again complained of neck pain radiating down her left arm on that date, and it was recommended that Petitioner undergo an MRI of the cervical spine. The interpretive report for an MRI of the cervical spine performed at Cedar Court Imaging on January 25, 2010 was noted to reveal minimal disc findings; no findings for disc herniation or spinal stenosis at any level. At the time of Petitioner's visit with Dr. Fonn on February 4, 2010, it was noted that Dr. Fonn somewhat disagreed with the report since his review of the MRI showed at C4/5 and C5/6 there was foraminal stenosis present bilaterally which may be a little worse on the right than the left. He noted that Petitioner's current symptomatology was on the left and was not unusual as she might have an episodic aggravation of either nerve root depending on her activity levels. A CT myelogram of the cervical spine was recommended. (PX1).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on February 11, 2010, at which time she stated that her neurosurgical work-up was completely negative. It was noted that overall Petitioner had done well and was at maximum medical improvement. A work slip was issued on that date, allowing Petitioner to return to work with no limitations. (PX1).

The medical records from Missouri Plastic and Hand Surgery for November 22, 2011 through April 9, 2013 were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. Petitioner was seen on November 22, 2011, at which time it was noted that Petitioner was being seen for evaluation regarding her right elbow. Petitioner stated that back in 2009 when she saw him she mentioned she had right elbow problems at that time, but it was noted that Dr. Tobin did not have any independent recollection of this and no report was made in the medical record. Petitioner stated that she was still employed at Vienna Correctional Center and did clerical work on a computer, writing, keyboarding and using a mouse. Petitioner stated that the right elbow was beginning to feel just like the left did, and that she had pain in the medial epicondyle area and also numbness and tingling in the ring and little fingers. Petitioner stated that the surgery performed on the left elbow had worked very well and was wondering if she could have it done on the right. It was noted that Dr. Tobin believed Petitioner had right cubital tunnel syndrome and very mild right lateral epicondylitis, and that she was given an injection. It was noted that in terms of causation, he believed the same causation was in place on the right side as was causing the left. A work slip was issued on that date, allowing Petitioner to return to work with no limitations. (PX2).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on February 28, 2012, at which time she was seen for follow-up regarding her cubital tunnel syndrome on the right. It was noted that Petitioner stated that it was still bothering her, and that the injection done in the fall only took care of the problem for a short time. It was noted that Petitioner had ongoing cubital tunnel syndrome, for which she was recommended to undergo an anterior submuscular transposition of the ulnar nerve. (PX2).

Included within the records of Missouri Plastic and Hand Surgery was a letter dated April 13, 2012 directed to Dr. Tobin inquiring about the issue of causation. Dr. Tobin indicated that he felt that Petitioner's right cubital tunnel syndrome was causally related to her work injury. (PX2).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on November 13, 2012, at which time she stated she was having increasing numbness, tingling and painful sensations to the ring and little fingers on the right side. It was noted that Petitioner had had cubital tunnel syndrome on the left and had an ulnar nerve transposition. Petitioner stated that she was getting to the point where she was ready for surgery. The assessment was that of cubital tunnel syndrome, and an ulnar transposition was planned. (PX2).

Included within the records of Missouri Plastic and Hand Surgery was an operative report from Auburn Surgery Center dated March 1, 2013, which reflected that Petitioner underwent right submuscular, anterior transposition of the ulnar nerve for a pre- and post-operative diagnosis of cubital tunnel, right side. (PX2).

The records of Missouri Plastic and Hand Surgery reflect that Petitioner was seen on March 5, 2013, at which time it was noted that she had no complaints. It was noted that the soft tissues were healing nicely and there was no swelling or inappropriate ecchymosis. At the time of the March 19, 2013 visit, it was noted that Petitioner had no new complaints and that the wound was healing nicely. Petitioner was instructed in wound care. At the time of the April 9, 2013 visit, Petitioner stated she was doing very well and it was noted that range of motion to the elbow, wrist and hand was excellent. It was further noted that no further visits were required. A work slip was issued on that date, allowing Petitioner to return to work on April 13, 2013 with no limitations. (PX2).

The transcript of the evidence deposition of Dr. Gregory Tobin was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. Dr. Tobin testified that he is a plastic surgeon and is board-certified in plastic surgery. (PX3).

Dr. Tobin testified that he treated Petitioner for left cubital tunnel complaints and that her first visit with her related to that was in March of 2009. He testified that Petitioner told him that she worked for Vienna Correctional Center and had done so for 6 or 7 years at that time, and that she was initially clerical and doing things that were administrative in nature and were highly repetitious. He testified that Petitioner indicated that she was transferred into a counseling position, and that her daily activities did not change a lot and that there was a lot of keyboarding, data entry and writing and were office-related and highly repetitious. He testified that the Workers' Compensation Employee's Notice of Injury and Supervisor's Report of Injury or Illness were consistent with the history of work activities as described by Petitioner. He testified that he diagnosed left cubital tunnel syndrome and performed surgery, and that Petitioner was eventually released to maximum medical improvement in 2010 as it related to the left cubital tunnel. (PX3).

Dr. Tobin testified that with respect to the right upper extremity, he noted on the initial visit in March of 2009 that Petitioner had the same kinds of symptoms to a lesser extent on the right but they were not much of a factor for her at that time so they did not pursue it. He testified that she returned on November 22, 2011, when she had more focused complaints on the right side. He testified that she had numbness and tingling to the right ring and little fingers, and that she also had some pain in the medial epicondyle area as well. He testified that the significant finding was that she had no intrinsic atrophy, but her ulnar nerve to percussion was positive at the elbow. He testified that he thought that Petitioner had a mild right medial epicondylitis and a right cubital tunnel syndrome. (PX3).

When asked if Petitioner had cubital tunnel on the right back in 2009, Dr. Tobin testified that he was not prepared to say that with certainty but she certainly had signs that it could have been the case. He agreed that Petitioner's records did not indicate that she had any clinical presentations to necessitate injection and surgical treatment before November 22, 2011. He testified that the injections were both temporarily therapeutic and diagnostic. He testified that Petitioner ultimately underwent surgery, and that

as noted in the operative report, there were thick, tight fibers compressing the nerve at the cubital tunnel. (PX3).

Dr. Tobin testified that following surgery, he still felt that it was highly likely that Petitioner's work activities were the causative factor. He testified that the basis for his opinion on causation was found in his experience and training, as well as the fact that it was talked about at meetings and written in textbooks. He testified that he treated patients with cubital tunnel conditions that may have been caused by repetitive activities, and that Petitioner's activities fit a common profile that he experienced in his own day-to-day practice of things that caused cubital tunnel, and indicated that Petitioner's presentation was not unusual. He testified that Petitioner recovered following surgery, and that her last visit was on April 9, 2013 at which time she was "doing just fine" and she was released on a per-needed basis. (PX3).

On cross-examination, Dr. Tobin agreed that with respect to the etiology of Petitioner's cubital tunnel syndrome, he was only referring to the right cubital tunnel syndrome. When asked what specifically with her work duties did he believe contributed to cause or aggravate the right cubital tunnel syndrome, Dr. Tobin responded that it was the keyboard work and the amount of handwriting that she did. He testified that he thought it was likely with the resting of the elbow on the counter or desktop surface and also with the repetitive flexion and extension of the elbow with handwriting. He agreed that he did not have any independent knowledge of Petitioner's workstation. He agreed that he had no reason to doubt the indication on the Supervisor's Report of Injury or Illness form that the equipment was ergonomic. (PX3).

On cross-examination, Dr. Tobin testified that his reference to textbooks pertained to *Operative Surgery of the* Hand by David Green. He testified that he was referring to cumulative trauma disorders and highly repetitious tasks, of which data entry and computer work would fall. He testified that he was still performing surgeries and was doing so on a weekly basis. He testified that he performed approximately 20 cubital tunnel surgeries per year, which was a small percentage of his practice. He testified that he did far more carpal tunnel releases and that hand surgery was about 60% of his practice. (PX3).

On cross-examination, Dr. Tobin agreed that prior to his treatment of Petitioner she had treated with Dr. Chow and denied that any diagnostic testing or EMGs were performed. When asked if it was his normal course of practice with repetitive trauma to have an EMG performed, Dr. Tobin responded that he highly individualized that, and that it was when the diagnosis was unclear that he ordered those. (PX3).

On cross-examination, Dr. Tobin testified that the first time that he saw Petitioner was on March 10, 2009, but he did not know how she was referred to him. He denied that there was any sort of pain diagram or personal injury questionnaire that was completed by Petitioner. He testified that they had everyone fill out a form in terms of known medical problems and medications, but that he did not have a specific questionnaire for hand patients and that it was part of the history and physical. He testified that he first saw Petitioner on March 10, 2009 and made the recommendation for surgery on March 24, 2009 and that it was for the left side. With respect to the right side, he testified that he first saw Petitioner for right elbow complaints on November 22, 2011 and made the recommendation for surgery on February 28, 2012. (PX3).

On cross-examination when asked what were some of the co-morbid factors that led to, contributed or caused cubital tunnel syndrome, Dr. Tobin responded that they included diabetes mellitus, trauma, fractures in the elbow region and amyloidosis. He testified that increasing weight could be a problem, but that he had patients that were heavy that did not have the condition. He denied that Petitioner had any comorbid factors that could lead to cubital tunnel syndrome. When asked whether Petitioner was on any medications when he saw her for the right cubital tunnel syndrome, Dr. Tobin

responded that Petitioner was on an anti-hypertensive and a medication for esophageal reflux, neither of which were known to produce any kind of problems related to entrapment neuropathy. He denied that hypertension would lead to entrapment neuropathy. (PX3).

On cross-examination when asked if he had an opinion as to what frequency of typing could lead to cubital tunnel syndrome, Dr. Tobin responded that he did not. When asked if he had an opinion as to the duration of typing needed to lead to, contribute to or cause cubital tunnel syndrome, Dr. Tobin responded that he could not answer due to the vague nature of the question. When asked to assume that an individual were typing for two hours straight and whether he had an opinion as to whether that could lead, cause or contribute to cubital tunnel syndrome, Dr. Tobin responded that he believed that it would have to be more than two hours and for an extended length of time, such as many months. (PX3).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 4.

The CMS Reports of Injuries and Initial Medical Report were entered into evidence at the time of arbitration as Petitioner's Exhibit 5.

The Repetitive Activity Description Sheet was entered into evidence at the time of arbitration as Petitioner's Exhibit 6.

The Workers' Compensation Employee's Notice of Injury was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The report was noted to have been completed on November 15, 2011, and that the alleged accident was reported on November 14, 2011. The alleged accident date was noted to be that of February 1, 2009. The report noted that the claim was reported on March 10, 2009 and "upon doctor's advice" was suspended on March 11, 2009. It was noted that the symptoms subsided and then began to return on approximately August 15, 2011 and had worsened since that time and were an ongoing issue. The duties being performed at the time of the alleged repetitive trauma injury were that of computer data entry, using a mouse and excessive handwriting that caused the arm to be bent at the elbow most of the day. (RX1).

The Supervisor's Report of Injury or Illness was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The report was dated November 15, 2011 and noted that the oral report was received on November 14, 2011. It was noted that Petitioner advised her supervisor that she felt her right elbow area had been injured through prolonged use of her work personal computer and associated keyboarding and mouse work. It was noted that the equipment was ergonomical. The report was signed by Dan Field. (RX2).

The Summary of Disability was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The Demands of the Job was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The form was completed by Dan Field on November 15, 2011. The report noted that the Demands of the Job included use of hands for gross and fine manipulation for 4-6 hours per day. It was noted that Petitioner was also required to perform lifting of 1-10 pounds 4-6 hours per day. (RX4).

The IME report of Dr. Anthony Sudekum was entered into evidence at the time of arbitration as Respondent's Exhibit 6. The report was dated March 31, 2015, and noted that Petitioner was seen for an alleged date of injury of February 1, 2009 involving her bilateral upper extremity complaints and/or conditions. It was noted that Petitioner stated that in approximately 2006 she first began to experience numbness and tingling in her bilateral thumbs, index and middle fingers at night and also intermittently during the day. It was noted that Petitioner stated that Dr. Chow diagnosed her with bilateral carpal tunnel syndrome and subsequently performed endoscopic carpal tunnel releases in 2008. It was noted that

Petitioner stated that her carpal tunnel symptoms resolved after undergoing the carpal tunnel release surgeries, but she subsequently developed and/or noticed that she was experiencing numbness and tingling in the left ring and little fingers and left medial elbow pain. (RX6).

The IME report noted that Petitioner stated that she continued to experience intermittent numbness and tingling of the right ring and little fingers and on the ulnar side of her right palm. It was noted that Petitioner stated that the symptoms varied depending on activity. Petitioner also complained of intermittent soreness and burning to the right medial elbow, which radiated into her upper arm. It was noted that Petitioner denied any left-sided symptoms. It was also noted that Petitioner stated that she experienced intermittent neck and upper arm pain and saw a chiropractor, Dr. White, monthly for treatment of her neck pain. (RX6).

The IME report noted that Dr. Sudekum opined that there was no indication in the record that he received that Petitioner sustained at work or suffered any injury on or around February 1, 2009, and that there was no indication in the records that he received that Petitioner sustained an injury, work-related or otherwise, which might have caused cubital tunnel syndrome or any peripheral nerve pathology, if that had existed. Dr. Sudekum indicated that there was no objective evidence in the medical records that Petitioner was suffering from cubital tunnel syndrome on either side in 2009 or after that time. Dr. Sudekum further indicated that if Petitioner did develop cubital tunnel syndrome in 2009 and/or 2011, then it would be his opinion that her job activities as a Correctional Counselor and/or Secretary to the Warden at the Vienna Correctional Center did not cause or aggravate that cubital tunnel syndrome. (RX6).

The IME report noted that Dr. Sudekum opined that Petitioner currently had no objective evidence of any upper extremity peripheral neuropathy, carpal tunnel syndrome and/or cubital tunnel syndrome on either side. Dr. Sudekum indicated that Petitioner currently had mild, intermittent right upper extremity symptoms, which may be indicative of ongoing cervical pathology and/or post-operative sequelae from her previous right cubital tunnel/ulnar nerve surgery. Dr. Sudekum further indicated that Petitioner had objective evidence of cervical disc disease, cervical arthritis and foraminal stenosis based on radiographic studies including plain film x-rays and an MRI scan, and he further noted that she also saw a chiropractor regularly for treatment of chronic neck pain/cervical radiculopathy. (RX6).

The IME report noted that Dr. Sudekum opined that Petitioner's job duties at Vienna Correctional Center did not cause or aggravate any current cervical or upper extremity pathology and that he did not feel that her job activities there caused or aggravated possible previous carpal tunnel syndrome and/or cubital tunnel syndrome affecting either upper extremity. Dr. Sudekum opined that he did not feel her right upper extremity symptoms were causally related to the work injury of February 1, 2009 and/or her past or current employment activities at Vienna Correctional Center. Dr. Sudekum noted that Petitioner had some non-work-related factors which could predispose her to develop carpal and/or cubital tunnel syndrome including female sex, age over 56 years, and co-morbid medical conditions including cervical arthritis, cervical disc disease, foraminal stenosis, obesity, hypertension and hypercholesterolemia, and that these non-work-related risk factors and co-morbid conditions placed her at a relatively high risk for development of carpal and/or cubital tunnel syndrome regardless of her employment activities. (RX6).

The IME report noted that Dr. Sudekum indicated that Petitioner did not provide any history indicating that she sustained an injury to either upper extremity on February 1, 2009 and that the medical records did not indicate that she sustained an injury to either upper extremity on or about that date. Dr. Sudekum indicated that Petitioner had no objective findings on physical examination indicative of her having sustained any injury to either upper extremity on or about February 1, 2009, and that if Petitioner had sustained an injury to either upper extremity on or about February 1, 2009 then it would be his opinion that any effect of that injury had completely resolved. (RX6).

The IME report noted that Dr. Sudekum opined that, based on the information that he received pertaining to Petitioner's job activities, her work activities on or around February 1, 2009 did not involve any sustained strenuous gripping and grasping, exposure to impact, vibration or injury to either upper extremity. Dr. Sudekum indicated that Petitioner was not suffering from a work-related condition or injury to either upper extremity which would require any further evaluation and/or treatment, and that she was capable of working full duty in her pre-injury job, or in a position similar to her pre-injury job, without any restrictions on her physical activities due to any injury she may have sustained on or about February 1, 2009. Dr. Sudekum further indicated that Petitioner had reached maximum medical improvement regarding any injury that she may have sustained to either upper extremity on or about February 1, 2009. (RX6).

The medical records of Dr. James Chow were entered into evidence at the time of arbitration as Respondent's Exhibit 7. Petitioner was seen on October 30, 2008, at which time it was noted that the pillow splints at night seemed to be helping some, but that she still noticed in the daytime when doing a lot of activity there was still a tingling and numb sensation. It was noted that Petitioner would continue the pillow splints, and she was recommended to keep the arm straight even in the daytime as much as she could. At the time of the December 2, 2008 visit, it was noted that the right hand was fine but the left hand ring and small fingers continued to have a tingling and numb sensation, and that it was also sensitive to touch in the ulnar notch. It was noted that Petitioner had been placed on pillow splints which did not seem to be helping, and that even though the nerve conductive test done by Dr. Nemani in September indicated ulnar nerve was within normal limits, Dr. Chow believed that Petitioner had ulnar nerve entrapment syndrome of the left elbow. It was noted that if the symptoms continued and were not resolved, surgical decompression of the ulnar nerve and transposition of the ulnar nerve may be required. (RX7).

The records of Dr. Chow reflect that Petitioner was seen on January 20, 2009, at which time it was noted that she indicated that the pain was referring all the way down the left shoulder and all the way up the back. It was noted that Petitioner still had a tingling and numb sensation in the ring and small fingers, and that there was still tenderness in the ulnar notch and also in the ulnar nerve of the left elbow. It was noted that Petitioner stated that after the carpal tunnel release the thumb, index and middle fingers no longer had a tingling and numb sensation, and that Dr. Chow believed that Petitioner had ulnar nerve entrapment syndrome of the left elbow. It was noted that Dr. Chow suggested that Dr. Nemani repeat the ulnar nerve test on the left side to see if any abnormalities were found, and it was also noted that if the symptoms continued without any improvement, surgery may be required. (RX7).

Included within the records of Dr. Chow was a handwritten notation dated February 17, 2009, indicating that the office had received a letter from Petitioner stating she would have another doctor handle her elbow problem. A handwritten notation dated February 19, 2009 noted that a voice mail message had been received from Petitioner indicating that she preferred to treat with a physician who will help her with worker's compensation causation in regard to her elbows. (RX7).

The records of Dr. Chow reflect that Petitioner was seen on July 25, 2008, at which time it was noted that examination of the left hand revealed that the incisions were well-healed and that she was able to make a full fist without signs of complications. It was noted that Petitioner was one week status post right ECTR and approximately 1.5 months status post left ECTR. Petitioner was given an order for an anti-vibration glove, and it was noted that she was to be returned to work full duty on August 4, 2008. At the time of the August 12, 2008 visit, it was noted that Petitioner reported that in regard to the right hand she was doing extremely well and was working full duty. It was further noted that in regard to the left hand, Petitioner was having numbness and tingling into all five fingers with the fourth and fifth digits being worse, and that they were going to sleep when she was using the phone or typing. It was noted that

Petitioner was to be referred to Dr. Nemani for a left upper extremity EMG/nerve conduction study to focus on the cubital tunnel syndrome she was presenting with, and that a cubital tunnel splint would be ordered. (RX7).

The records of Dr. Chow reflect that Petitioner was seen on September 30, 2008, at which time it was noted that the "nerve test" was done by Dr. Nemani on September 23, 2008 and showed a little minor abnormality of the left median nerve which was not of concern. It was noted that the ulnar nerve was normal in the left hand. It was noted that Petitioner's main complaint was a tingling and numb sensation in the ring and small fingers of the left hand, but that the right hand was doing fine. It was noted that Petitioner had no tenderness at the ulnar notch or ulnar nerve on that date, but that she was complaining of a little aching pain in the arm including the upper arm as well. It was noted that Dr. Chow believed that Petitioner had ulnar nerve syndrome of the left hand, not the median nerve which was decompressed. Petitioner was recommended to use pillow splints for the left arm at night for sleeping and to keep the arm fully extended as much as she could. (RX7).

The records of Dr. Chow reflect that Petitioner was seen on June 13, 2008, at which time it was noted that she was one week status post left ECTR. It was noted that Petitioner stated that she continued to have numbness and tingling to the tips of all the fingers of the left hand, but she did feel it was somewhat better than it was prior to surgery. Petitioner stated that the numbness and tingling did not wake her up at night. Petitioner was encouraged to continue the range of motion to the fingers of the left hand, and it was noted that she was scheduled for the right ECTR on June 25, 2008. At the time of the July 15, 2008 visit it was noted that Petitioner was still complaining of some tingling and numb sensations in the right and small finger, and that she had a little numb sensation in the back of the hand. It was noted that Petitioner was a little sensitive to the touch in the left ulnar nerve and had a little tenderness in the arcade of Frohse. It was noted that Petitioner was ready to have the right ECTR done, and that the right hand continued to bother her. (RX7).

The records of Dr. Chow reflect that Petitioner was seen on May 1, 2008, at which time it was noted that her symptoms continued in both hands, especially the left side, and that surgical decompression of the carpal ligaments was under consideration. At the time of the April 17, 2008 visit, it was noted that Petitioner was being seen for an orthopedic evaluation of both hands, worse on the left side. It was noted that Petitioner was a right-hand dominant woman who had worked as a secretary for 25 years, doing a lot of repetitive motion with writing and typing. Petitioner indicated that in July of 2004 another person in her office quit and that she had to pick up extra work doing excessive typing, and that her hands started giving her trouble. It was noted that in the last year or so it started to get worse, and that Petitioner started waking up at night every night three times per night even with the splints on. It was noted that x-rays of the left hand CMC joint appeared to have early signs of osteoarthritic changes. It was noted that Petitioner had generalized pain and tenderness in the first dorsal canal, CMC joint, wrist joint, elbows, the medial and lateral epicondyle and the ulnar notch, and that even the left shoulder had pain. It was noted that Dr. Chow agreed with Dr. Alam that Petitioner appeared to have carpal tunnel syndrome, especially in the left hand, and that surgical decompression of the carpal ligaments would be needed. (RX7).

Included within the records of Dr. Chow was the EMG/nerve conduction study report from Dr. Nemani dated September 23, 2008, which noted that Petitioner complained of paresthesia in the left upper extremity particularly in the left 4-5th digits, and that she had surgery for left carpal tunnel syndrome in the past. The study was interpreted as suggesting that as Petitioner had surgery for carpal tunnel syndrome in the past there may be residual electrophysiologic abnormalities, and that the left median palmar sensory absolute distal latency was normal. (RX7).

The Settlement Contracts for case numbers 08 WC 26357 and 08 WC 43755 were entered into evidence at the time of arbitration as Respondent's Exhibit 8. The contracts alleged a date of accident of

March 1, 2008 involving repetitive motion of the left upper extremity and right upper extremity, and were settled for 20% of the right hand, 17.5% of the left hand and 20% of the left arm. (RX8).

CONCLUSIONS OF LAW

With respect to disputed issues (C) and (F), given the commonality of facts and evidence relative to both issues for all three pending claims, the Arbitrator addresses those jointly.

The Arbitrator finds that Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on February 1, 2009, November 22, 2011 and/or November 13, 2011, and that her current condition of ill-being is causally related to her work activities.

In so concluding that Petitioner's right cubital tunnel syndrome is unrelated to her work activities for Respondent, the Arbitrator finds the opinions of Dr. Sudekum to be more persuasive than the opinions of Dr. Tobin in these matters. The Arbitrator finds to be more persuasive Dr. Sudekum's opinions that there was no indication in the records that he received that Petitioner sustained at work or suffered any injury on or around February 1, 2009 and that there was no indication in the records that he received that Petitioner sustained an injury, work-related or otherwise, which might have caused cubital tunnel syndrome or any peripheral nerve pathology, if that had existed; that there was no objective evidence in the medical records that Petitioner was suffering from cubital tunnel syndrome on either side in 2009 or after that time; and that if Petitioner did develop cubital tunnel syndrome in 2009 and/or 2011, then it would be his opinion that her job activities as a Correctional Counselor and/or Secretary to the Warden at the Vienna Correctional Center did not cause or aggravate that cubital tunnel syndrome. (RX6). These opinions, when coupled with Petitioner's co-morbidities as noted by Dr. Sudekum to include cervical arthritis, cervical disc disease, foraminal stenosis, and obesity which, per Dr. Sudekum, placed Petitioner at a relatively high risk for development of carpal and/or cubital tunnel syndrome regardless of her employment activities and the fact that no confirmatory diagnostic testing was performed prior to the undertaking of surgical intervention by Dr. Tobin, causes the Arbitrator to place greater weight upon the opinions of Dr. Sudekum in these matters.

Furthermore, the Arbitrator does not find to be persuasive the opinions of Dr. Tobin in this case as to the issue of causation in light of his admission that he did not have any independent knowledge of Petitioner's workstation and his concession that he had no reason to doubt the indication on the Supervisor's Report of Injury or Illness form that the equipment was ergonomic. (PX3). This, when coupled with Dr. Tobin's admission on cross-examination that he did not have an opinion as to what frequency of typing could lead to cubital tunnel syndrome, causes the Arbitrator to place lesser weight upon the opinions of Dr. Tobin in the matters at hand.

Furthermore, similar to Dr. Sudekum who opined that Petitioner's work activities did not involve any sustained strenuous gripping and grasping, exposure to impact, vibration or injury to either upper extremity, the Arbitrator finds that Petitioner's job activities for Respondent -- which, per her testimony, primarily consisted of handwriting and computer data entry -- are insufficiently repetitive or cumulative to support a finding of causation.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on February 1, 2009, November 22, 2011 and/or November 13, 2011, and that her current condition of ill-being is causally related to her work activities. All benefits are denied. The remaining issues of notice, medical bills, temporary total disability benefits and nature and extent are moot, and the Arbitrator makes no conclusions as to those issues.

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

Julia Rodriguez,
Petitioner,
vs.

NO: 12WC 13522

Illinois Department of Corrections/
Vienna Correctional Center,
Respondent,

17IWCC0727

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, notice, temporary total disability, medical, causal connection, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

DATED: NOV 17 2017

o10317
CJD/rlc
049

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RODRIGUEZ, JULIA
Employee/Petitioner

Case# **12WC013522**

12WC001491
14WC032555

ILLINOIS DEPT OF CORRECTIONS/VIENNA CORRECTIONAL CENTER
Employer/Respondent

17IWCC0727

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:

4377 MICHAEL MILES
ATTORNEY AT LAW
PO BOX 907
CARBONDALE, IL 62903

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

0558 ASSISTANT ATTORNEY GENERAL
AARON WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

JUN 29 2016

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

17IWCC0727

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

Julia Rodriguez
Employee/Petitioner

v.

Illinois Department of Corrections/
Vienna Correctional Center
Employer/Respondent

Case # **12** WC **13522**

Consolidated cases: **12 WC 1491,**
14 WC 32555

An *Application for Adjustment 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 **May 11, 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 **November 22, 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.

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

In the year preceding the injury, Petitioner earned **$68,400.00**; the average weekly wage was **$1,315.00**.

On the date of accident, Petitioner was **50** years of age, *single* with **0** dependent children.

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

ORDER

Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent, and that her current condition of ill-being is casually related to her alleged accident. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent is entitled to a credit for **all amounts paid under group health plan** under Section 8(j) of the Act.

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

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

Signature of Arbitrator

6/23/16
Date

ICArbDec p 2

JUN 29 2016

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

Julia Rodriguez,
Petitioner,
vs.

NO: 14WC 32555

Illinois Department of Corrections/
Vienna Correctional Center,
Respondent,

17IWCC0728

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, notice, temporary total disability, medical, causal connection, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

DATED: NOV 17 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

o10317
CJD/rlc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RODRIGUEZ, JULIA
Employee/Petitioner

Case# **14WC032555**

12WC001491
12WC013522

ILLINOIS DEPT OF CORRECTIONS/VIENNA CORRECTIONAL CENTER
Employer/Respondent

17IWCC0728

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:

4377 MICHAEL MILES
ATTORNEY AT LAW
PO BOX 907
CARBONDALE, IL 62903

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
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ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
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1350 CENTRAL MANAGEMENT SYSTEMS
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 29 2016

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

17IWCC0728

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

Julia Rodriguez
Employee/Petitioner

v.

Case # 14 WC 32555

Consolidated cases: 12 WC 1491, 12WC 13522

Illinois Department of Corrections/
Vienna Correctional Center
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Herrin**, on **May 11, 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 **November 13, 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.

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

In the year preceding the injury, Petitioner earned **$68,400.00**; the average weekly wage was **$1,315.00**.

On the date of accident, Petitioner was **50** years of age, *single* with **0** dependent children.

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

ORDER

Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent, and that her current condition of ill-being is casually related to her alleged accident. All benefits are denied; the remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent is entitled to a credit for **all amounts paid under group health plan** under Section 8(j) of the Act.

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

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

Melinda M. Price Gullion

Signature of Arbitrator

6/23/16

Date

ICArbDec p 2

JUN 29 2016

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

Sergio Lagunas n/k/a Sergio Delgado
by his Parent/Guardian Maria Diaz next of kin
of Raul Lagunas, deceased,
Petitioner,

17IWCC0729

vs.

NO: 13 WC 31481

Ravenswood Disposal Services,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical, wages, rate, penalties, survivor's dependency and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 3, 2016, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay §7(a) death benefits on behalf of Petitioner Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, totaling $48,089.90, and weekly benefits of $473.39 until Sergio's 18th birthday, or until his 25th birthday if he is enrolled in an accredited educational institution.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

17IWCC0729

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: NOV 17 2017
o9/28/17
DLS/rm
046

David L. Gore

Stephen J. Mathis

DISSENT

I respectfully dissent from the Decision of the majority. I would have found that Petitioner, Sergio Lagunas n/k/a/ Sergio Delgado (Sergio) was no longer entitled to survivor benefits under the Workers' Compensation Act after his adoption.

Sergio was born on November 9, 2001 to Maria and Raul Lagunas. Sergio's biological parents were divorced on August 18, 2010. Under the Judgement for Dissolution of Marriage, Raul was required to pay child support and was able to declare Sergio as a dependent for income tax purposes. Maria married Isidro Delgado on October 17, 2010. Raul died in a work-related accident on September 15, 2013. On July 1, 2014, Isidro Delgado formally adopted Sergio. On October 19, 2015, Sergio's birth certificate was amended to name Isidro Delgado as his father.

In finding Sergio was entitled to survivor benefits, the Arbitrator relied on the fact that at the time of Raul's death he had a legal obligation to support Sergio, and therefore, Sergio was his legal dependent. I agree with the Arbitrator that at the time of Raul's death, Sergio was a dependent minor under the Workers' Compensation Act and entitled to death benefits. However, I would have found that Sergio's entitlement to these benefits terminated upon his legal adoption by Isidro Delgado.

I acknowledge that the Workers' Compensation Act provides that a spouse's entitlement to survivor benefits terminates after remarriage and after a lump sum payment of two years of compensation benefits. 820 ILCS 305/7(a). In addition, the Act does not have any similar provision terminating the survivor benefits of dependent minors upon adoption. Nevertheless, the administration of the Workers' Compensation Act must be interpreted in light of the rest of the Illinois Compiled Statutes, including the Adoption Act. The Adoption Act provides in pertinent part (750 ILCS 50/17):

> "Effect of order terminating parental rights or Judgment of Adoption. After either the entry of an order terminating parental rights or the entry of a judgment of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child and shall be deprived of all legal rights as respects the child, and the child shall be free from all obligations of maintenance and obedience as respects such natural parents."

In my opinion, the adoption of Sergio terminated his dependency on his late father and therefore his entitlement to survivor benefits. Also in my opinion, my interpretation furthers the public policy interests of both the Workers' Compensation Act and the Adoption Act. The public policy objective of the Adoption Act is to terminate all parental rights and responsibilities of biological parent in *lieu* of the adoptive parent. The public policy interest of the Workers' Compensation Act is to protect dependent children in case of work-related death of a parent upon whom the child is legally dependent. Hypothetically, if Isidro Delgado died in a work-related accident after his legal adoption of Sergio, Sergio would be entitled to survivor benefits under the Workers' Compensation Act. In effect, the Decision of the Arbitrator provides Sergio with "enhanced" survivor benefits because he would be entitled to survivor benefits upon the work-related death of his biological father, Raul and his adoptive father, Isidro. That result would appear to be fundamentally unfair and might have due process implications.

Based on the reasoning stated above, I would have found that Petitioner, Sergio Lagunas n/k/a/ Sergio Delgado (Sergio), was no longer entitled to survivor benefits under the Workers' Compensation Act after his adoption, reversed the Decision of the Arbitrator, and terminated survivor benefits as of the date of adoption. For these reasons, I respectfully dissent.

Deborah L. Simpson

Deborah L. Simpson

RWW/dw
O-9/28/17
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

17IWCC0729

LAGUNAS, SERGIO N/K/A SERGIO DELGADO BY HIS PARENT/GUARDIAN DIAZ, MARIA NEXT KIN OF LAGUNAS, RAUL DECEASED
Employee/Petitioner

Case# 13WC031481

RAVENSWOOD DISPOSAL SERVICES
Employer/Respondent

On 11/3/2016, 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 0.50% 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.

0159 LAW OFFICE OF FRANCIS DISCIPIO
1200 HARGER RD
SUITE 500
OAK BROOK, IL 60523

4866 KNELL & O'CONNOR
ANDREW FERNANDEZ
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

17IWCC0729

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
FATAL

Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, next of kin of Raul Lagunas, deceased.
Employee/Petitioner
v.
Ravenswood Disposal Services
Employer/Respondent

Case # **13** WC **31481**

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

DISPUTED ISSUES

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

B. ☒ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☒ What were Decedent's earnings?

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

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

J. ☒ Who was dependent on Decedent at the time of death?

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

L. ☐ What compensation for permanent disability, if any, is due?

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

L. ☐ What compensation for permanent disability, if any, is due?

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

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

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

Signature of Arbitrator

November 3, 2016
Date

NOV 3 - 2016

FINDINGS

On the date of accident, **September 14, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Decedent's death *is* causally related to the accident.

In the year preceding the injury, Decedent earned **$37,674.70**; the average weekly wage was **$724.51**.

On the date of accident, Decedent was **47** years of age, *single* with **1** dependent child.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$1,497.60** for death benefits and **$14,062.50** for funeral expenses, for a total credit of **$15,560.10**.

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

The Arbitrator finds that Decedent died on **September 15, 2013**, leaving **1** survivor, **Sergio Lagunas, n/k/a Sergio Delgado** as provided in §7(a) of the Act.

ORDER

Respondent shall pay §7(a) death benefits on behalf of Petitioner Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, totaling **$48,089.90,** and weekly benefits of **$473.39** up the Sergio's 18th birthday, or until his 25th birthday if he is enrolled in an accredited educational institution.

Respondent shall pay unpaid medical bills for medical services provided to the deceased Raul Lagunas totaling **$17,570.61**, to be adjusted in accord with the fee schedule provide by §8.2 of the Act

Respondent shall be given credit for **$1,497.60** paid in disputed death benefits. Respondent shall also be given credit for **$14,062.50** for paid funeral and burial expenses.

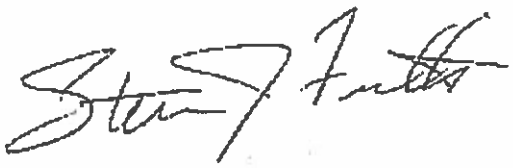
Respondent shall pay **§19(k)** penalties in the amount of **$32,081.46**.

Respondent shall pay **§19(l)** penalties in the amount of **$10,000.00**.

Respondent shall pay **§16** penalty fees in the amount of **$12,832.58.**

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

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



Signature of Arbitrator

November 3, 2016
Date

NOV 3 - 2016

Sergio Lagunas, n/k/a Sergio Delgado, by his parent/ guardian Maria Diaz, next of kin of Raul Lagunas, deceased
v.
Ravenswood Disposal Services
13 WC 31481

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***B:*** Was there an employee-employer relationship?; ***C:*** Did an accident occur that arose out of and in the course of Decedent's employment by Respondent?; ***G:*** What were Decedent's earnings?: ***J:*** Who was dependent on Decedent at the time of death?; ***K:*** Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?; ***M:*** Should penalties be imposed upon Respondent?; ***N:*** Is Respondent due any credit?

Prior to the presentation of evidence Petitioner's motion to amend the Application for Adjustment, dismissing Lissette Lagunas and Raul Lagunas as Petitioners and joining Sergio Lagunas, n/k/a Sergio Delgado, by his parent/guardian Maria Diaz, next of kin of Raul Lagunas, deceased, as Petitioner was granted without objection.

Maria Diaz, Sergio Delgado, and Branko Vardijan testified at trial.

FINDINGS OF FACT

Maria Diaz testified on behalf of Petitioner. She married Raul Lagunas on June 4, 1996. Sergio Lagunas was born November 9, 2001. Petitioner's Exhibit #7, Sergio's birth certificate, listed Maria Diaz and Raul Lagunas as his parents. Following Sergio's birth Maria and Raul lived together until they divorced on August 18, 2010. The divorce decree, Petitioner's Exhibit #5, entered by Judge Thomas J. Kelley August 18, 2011, included a marital settlement agreement which provided that Raul pay $313.04 in child support every other week and that Maria retain sole right to claim the minor children, including Sergio, as dependents for income tax service purposes. Ms. Diaz testified that Raul paid $200 to $300 per week in child support.

Ms. Diaz married Isidro Delgado on October 17, 2010. Isidro Delgado adopted Sergio in June 2014 (PX #5). The Judgment Order for Adoption provided that Sergio's name shall remain Sergio Xavier Delgado. A revised Certification of Birth (RX #1) notes

Isidro Delgado as the father of Sergio. Ms. Diaz testified that Sergio stopped using the Lagunas surname after the adoption and has since gone by Sergio Delgado.

Raul Lagunas was injured in an accident September 14, 2013 on Respondent's premises at 221 N. Washtenaw Ave., Chicago (PX #3). Raul was crushed between a dump truck and a front loader September 14, 2013 (PX #6). He died from those injuries at Mt. Sinai Hospital on September 15 (PX #6).

Sergio Delgado was called to testify by Respondent. He testified that his parents are Maria Diaz and Isidro Delgado. Sergio acknowledged that his birth father was Raul Lagunas. Sergio remembered living with Raul Lagunas but considers Isidro his father. Following his mother's marriage to Isidro, Sergio lived with them. Sergio testified that he did not see Raul Lagunas very frequently.

Throughout his testimony, Sergio repeatedly referred to Isidro Delgado as his dad. Sergio also uses the name Delgado at school. Indeed, Sergio's school records from Canton Middle School state his name as "Sergio Delgado (RX #5).

Respondent called Branko Vardijan as a witness on the behalf of Respondent. Mr. Vardijan is president of Respondent Ravenswood Disposal Services. Decedent Raul Lagunas was hired several years before his death. Mr. Vardijan testified that Raul did not work exclusively for Ravenswood Disposal. He testified that "we" have a landfill company and employees worked under other companies' names. Mr. Vardijan did not recall how many weeks Raul worked in the 52 weeks before his death. After reviewing Petitioner's Exhibit #2, a duplicate of Respondent's Exhibit #6, Mr. Vardijan testified that Raul was working for Respondent.

Respondent attempted to elicit testimony from Mr. Vardijan regarding conversations with Raul and Raul's requests for changes in his work status and work schedule and to be paid in cash. Petitioner's objections based on the Illinois Deadman's Act, *735 ILCS 5/8-201*, were sustained. Mr. Vardijan was barred from testifying about any conversation or event which took place in the presence of the deceased.

On cross-examination Mr. Vardijan acknowledged that Raul was doing work that employees do. He also acknowledged that he did not bring Raul's records to trial in response to a subpoena. He chose not to obtain the records from Respondent's accountants. He had no IRS W-2s or 1099s. Raul was paid by check through a staffing company but was paid directly when paid in cash. Mr. Vardijan admitted that he did not issue W-2s or 1099s to Raul. Mr. Vardijan considered Raul as his employee.

Following the death of Raul Lagunas, Raul's eldest son came to Mr. Vardijan to ask that Respondent pay for Raul's funeral expenses. Respondent paid these funeral expenses: $8,997.50 to Wolniak Funeral Home and $5,065.00 to St. Albert's Cemetery. Payment of funeral and burial expenses was stipulated. The parties further stipulated to the payment of $1,497.40 in death benefits.

On re-direct examination Mr. Vardijan admitted that he controlled Raul's work and production but that he did not control when Raul showed up for work.

While Maria testified that Raul's medical bills were sent to her, the bills themselves reflect that they were sent only to the decedent and that the decedent's employer/guarantor is listed as "Unknown" (PX #1). Petitioner's Exhibit #1 demonstrated unpaid medical bills for Raul totaled $17,570.61.

Petitioner's Exhibit #2 was a duplicate of Respondent's Exhibit #6. This document is a ledger of payments made to Decedent Raul Lagunas from September 8, 2012 through September 11, 2013. The total amount of payments was $37,674.70.

CONCLUSIONS OF LAW

B: Was there an employee-employer relationship?

In determining whether an employee-employer relationship existed several factors will assist in that determination. The Arbitrator must weigh whether the purported employer had the right to control or exercised control the manner in which work was performed, what was the method of payment, did the purported employer have the right to discharge the employee, whether special skills were involved in the work, who owned the tools or equipment used in the work, the relationship of the work to employer's purpose, the method of payment and whether payroll withholding or other deductions were made. However, the employer's right to control the manner of the work is the single most important factor, even if other factors conflict with the factor of control.

Branko Vardijan, Respondent's president, considered the decedent Raul Lagunas to be one of his employees. Mr. Vardijan's opinion is not necessarily dispositive to the employee-employer relationship. However, Mr. Vardijan freely testified on re-direct examination that he controlled Raul's work and production. Aside from this being the most important factor to consider, there was circumstantial evidence that Respondent provided the tools and equipment for the work. Petitioner's Exhibit #3, the Chicago Police Case Report and Case Supplementary Case Report, documents that Raul was killed during the operation of heavy equipment of frontend loader and truck. The

attached investigatory photographs confirm the use of heavy equipment of the sort that an employee would not ordinarily own.

Mr. Vardijan testified that Raul was initially paid for his work through a now defunct staffing company. Raul was paid cash beginning in March 2013. No payroll taxes were withheld. There was no other evidence, other than the circumstantial evidence that Raul provided services to Respondent for which he was paid, relating to the issue of employee-employer relationship.

In addition, Petitioner's Exhibit #3, the Chicago Police Incident Report, recorded the statement of Dulce Jaimes, Raul's girlfriend, that Raul worked for Respondent.

The Arbitrator finds that in consideration of all the evidence Petitioner proved that an employee-employer relationship existed between the decedent Raul Lagunas and Respondent Ravenswood Disposal Services at the time of Raul's accident on September 14, 2013 which led to his death.

G: What were Decedent's earnings?

Petitioner, Exhibit #2, and Respondent, Exhibit #6, submitted a ledge of payments to Decedent Raul Lagunas from September 8, 2012 through September 11, 2013, 53 weeks. It was stipulated the ledger reflected payments by Respondent to Raul. Respondent argues that only certain of these payments should be considered for computing average weekly wage. Respondent argues that the cash payments noted were made to Raul in his capacity of independent contractor. The Arbitrator, in light of the previous finding that an employee-employer relationship was proved, rejects this argument.

Petitioner and Respondent submitted exhibits showing payments to Raul Lagunas over a 53 week period before his death. It is clear from all the evidence that Raul was paid for performed for Respondent over that period. The Arbitrator knows of no distinction between wages paid by check or cash for work performed. While the cash payments for Raul's work are suggestive of efforts by both Respondent and Raul to evade or avoid certain legal obligations, there is a reasonable inference from the facts that the cash payments were wages as much as the payments by check.

Petitioner's Exhibit #2 and Respondent's Exhibit #6 demonstrate that Raul's total wages for the 52 weeks prior to his death was $36,924.70. Therefore, his average weekly wage at the time of his death was $710.09, equal to a benefits rate of $473.39/week.

J: Who was dependent on Decedent at the time of death?

The issue of Sergio's dependency rests on the peculiar facts presented by the evidence. At the time of his death Raul Lagunas was under a court-ordered obligation to provide support payments for Sergio. There is no dispute that Sergio was entitled to §7(a) benefits at the time of Raul's death. What is in dispute is whether the posthumous adoption of Sergio by Isidro Delgado altered his dependency status under §7(a) of the Act.

Respondent suggests that *Inventory Service Corporation v. The Industrial Commission*, 62 Ill.2d 34 (1975) and *Rebecca Hoffman-Spears, et al. v. Eastern Woolen Company, Inc.*, 4 IIC 809; 2004 control here. The Arbitrator finds that *Inventory Service* and *Hoffman-Spears* are distinguishable on the facts and do not provide guidance in determining Sergio's dependency at the time of Raul's death.

In *Inventory Service* Ana Guetersioh, on behalf of her minor daughter Glenda Guetersioh, filed for §7(a) benefits due to the work related death of Glenda's natural father, Wynn Coppenbarger, in October 1968. Glenda was the child of Ana and Wynn's marriage. Ana and Wynn divorced in 1966 and Ana then married James Guetersioh in 1967. The divorce decree provided that Wynn pay child support for Glenda. James adopted Glenda in 1968. The adoption order terminated Wynn's parental rights as to Glenda and that Glenda "be freed of all obligations" to Wynn.

The Supreme Court held that Glenda was not entitled to §7(a) benefits because Wynn owed no legal obligation to support Glenda at the time of his death. Here, the divorce decree established a legal obligation to pay child support for Sergio. That obligation was still in place at the time of Raul's death. In fact, the evidence showed that Raul had complied with the support provisions of the divorce decree before his death.

Hoffman-Spears is equally distinguishable. In that case an application for §7(a) benefits was made for the various minor children were dependents of the deceased worker William Maldonado. The Commission addressed the claim of dependency made on behalf of the minor Lauren Hoffman after William was killed at work on November 19, 1999. Decedent William Maldonado was married to Rebecca Hoffman-Spears in 1992. Lauren Maldonado was born of this marriage in 1993. Rebecca initiated divorce proceedings against William in Louisiana and William agreed to the termination of his parental rights in 1994, which included terminating his support obligations otherwise owed to Lauren. The evidence further showed that William provided no financial support for Lauren after the divorce.

The Commission, citing *Inventory Service*, affirmed the Arbitrator's finding that Lauren was not entitled to §7(a) benefits because William had no legal obligation at the time of his death to support Lauren.

The distinguishing fact here is that at the time of his death Raul Lagunas was under a legal obligation to support Sergio. Maria (Lagunas) Diaz testified credibly that Raul in fact paid child support for Sergio up to the time of his death.

The Arbitrator finds the case of *Drives, Inc. v. The Industrial Commission*, 124 Ill.App.3d 1014 (1984) more on point. Petitioner Janice Den Besten-Reitsma was the 21 year child of Alfred Den Besten when he was killed September 23, 1977. Janice was enrolled in undergraduate school at the time of Alfred's death. After graduation Janice taught school and married. She enrolled in graduate school before she turned 25. The disputed issue was whether she was entitled to §7(a) benefits after she married and enrolled in graduate school.

The Court held that she was entitled to benefits when she enrolled in graduate school. The Court found that the new dependency status from her marriage was irrelevant in determining whether benefits are owed under the Act. The Court looked to her dependency status on the date of the employee's death and found it was the controlling factor in determining entitlement for benefits. The Court found no exceptions to the 25-age rule in the Act and affirmed benefits for Janice up to her 25th birthday. The Court held that Janice was entitled to §7(a) benefits so long as she was enrolled in an accredited educational institution for whatever time she was enrolled up to age 25. The fact of her marriage did not alter her dependency status at the time of Alfred's death.

In this case, Sergio was a minor dependent as defined by the Act on the date of Raul's death. He was the natural child of Raul and therefore entitled to §7(a) benefits as of the date of Raul's death. As in *Drives, Inc.*, the change in Sergio's dependency status from the adoption was irrelevant to his dependency status as of the date of Raul's death. Whether Sergio thought of or acted as though Isidro were his natural father or that Isidro supported Sergio is equally irrelevant. The subsequent alteration in dependency did not alter dependency at the time of death as defined in the Act.

Respondent elicited substantial evidence from Sergio which established that he had severed emotional ties with Raul and came to regard Isidro as his father even before the adoption. Sergio was using the name Delgado before the adoption. The Arbitrator finds this to be irrelevant. As in *Drives, Inc.*, the status of dependency on the date of death is controlling.

Therefore, the Arbitrator finds that Sergio (Lagunas) Delgado is entitled to §7(a) benefits up to the age of 18, or up to the age of 25 if he is enrolled in an accredited educational institution. Petitioner accrued §7(a) benefits up to the date of trial totaling $48,089.90, and is entitled weekly benefits of $473.39 thereafter.

K: Were 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 #1 was admitted in evidence. Exhibit #1 was a group exhibit comprising billing statements for medical services provided to Raul after his accident up to his death. Petitioner's Exhibit #1 shows a total of $17,570.61 in unpaid medical bills. In light of previous findings that Arbitrator finds that the billing charges comprising Petitioner's Exhibit #1 are reasonable and necessary.

Respondent shall pay Petitioner, or pay directly to the healthcare providers, $17,570.61, as provided in §8(a) of the Act and adjusted in accord with the fee schedule provided by §8.2 of the Act.

M: Should penalties be imposed upon Respondent?

Penalties pursuant to §19(k) and §19(l), as well as attorney's fees under §16(a) may only be awarded in circumstances where there has been an unreasonable or vexatious delay of payment of compensation. Here, the Arbitrator finds that Respondent was unreasonable in its withholding of payment of compensation.

The Arbitrator previously found that an employee-employer relationship existed between the Raul Lagunas and Respondent. The Arbitrator particularly took note of the testimony of Respondent's president Branko Vardijan. Mr. Vardijan admitted that Respondent controlled Raul's work and production. But, more to the point here, Mr. Vardijan looked on Raul as his employee. As stated earlier, Mr. Vardijan's opinion that Raul was his employee was not dispositive of the employee-employer relationship, it is evidence of a state of mind dispositive of the issue of liability for penalties and fees.

Mr. Vardijan's belief that Raul was his employee infers that he was aware of his obligation under the Act to pay medical bills. The Arbitrator notes that Respondent paid $1,497.40, for which a credit is due. That payment is not a waiver of Respondent's obligation to pay compensation, particularly if there had been a reasonable liability

dispute. Respondent argues that the employee-employer relationship and dependency were reasonably disputed.

The Arbitrator, after considering all the evidence, finds that Respondent's defense on the issue of dependency was reasonable. Sergio's adoption, which created a new status of dependency, raised reasonable questions of whether he was entitled to §7(a) benefits after the adoption. However, in light of all the evidence, the defense based on disputed employee status was unreasonable. Respondent's president thought of Raul Lagunas as his employee. Respondent paid Raul wages almost every week in the year before Raul's death. Branko Vardijan testified that Respondent controlled Raul's work and production. The claim that Raul was not an employee but, instead, was an independent contractor rings hollow in light of the evidence. Respondent cannot reasonably deny that Raul Lagunas was its employee in the face of all the evidence.

The Arbitrator finds that Petitioner was entitled to total death benefits of $64,162.91, after applying credits. Therefore, Petitioner is entitled to penalties under §19(k) of the Act equal to 50% of compensable death benefits in the amount of $32,081.46.

The Arbitrator further finds that Petitioner is entitled to penalties under §19(l) of the Act in the amount of $10,000.00, the maximum allowable under §19(l).

The Arbitrator also finds that Petitioner is entitled to §16 attorneys' fees in the amount of $12,832.58 for Respondent's unreasonable and vexatious delay in paying compensable death benefits, due to a lack of a reasonable basis or defense to withhold payment of benefits.

Steven J. Fruth, Arbitrator

November 3, 2016
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT KLINGERMAN,

Petitioner,

vs. NO: 14 WC 32725

VACTOR MANUFACTURING, INC.,

Respondent.

17IWCC0730

DECISION AND OPINION ON REVIEW

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

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings, and arguments submitted by the parties.

Specifically, the Commission writes to modify the Arbitrator's Decision relative to the credit due Respondent pursuant to Section 8(j) of the Act. In her Decision, the Arbitrator found that Petitioner was entitled to only a credit of $1,799.05 for non-occupational indemnity disability benefits paid to Petitioner.

However, the Commission finds that the correct amount to which Respondent is entitled to as a credit under Section 8(j) of the Act is $1,799.05 plus $7,472.60, the amount of medical expenses paid by its group carrier and as indicated on the Request for Hearing and by Petitioner in his brief. Therefore, Respondent is entitled to a credit of $9,271.65 under Section 8(j) of the Act.

17IWCC0730

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed August 25, 2016, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses in the amount of $38,009.20, and as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $9,271.65 under Section 8(j) of that Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $562.55 per week for 9 4/7 weeks, commencing March 1, 2013 through May 6, 2013, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $506.30 per week for a period of 40 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused 8% loss of use of the body as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $54,500.00. 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: NOV 2 0 2017

Michael J. Brennan

MJB/pm
O: 10-3-17
052

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KLINGERMAN, ROBERT
Employee/Petitioner

Case# **14WC032725**

VACTOR MANUFACTURING INC
Employer/Respondent

17IWCC0730

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:

1097 SCHWEICKERT & GANASSIN LLP
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

1120 BRADY CONNOLLY & MASUDA
MARK F VIZZA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF LA SALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Robert Klingerman
Employee/Petitioner

Case # 14 WC 32725

v.

Vactor Manufacturing Inc.
Employer/Respondent

17IWCC0730

An *Application for Adjustment 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 **Ottawa**, on **March 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. X Was timely notice of the accident given to Respondent?
F. X Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. X Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. X What temporary benefits are in dispute?
☐ TPD ☐ Maintenance X TTD
L. X What is the nature and extent of the injury?
M. X Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **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 **$43,879.16**; the average weekly wage was **$843.83.**

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

Respondent ***has 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 **$1,799.05** under Section 8(j) of the Act.

ORDER

Medical Benefits

Respondent shall pay the bills totaling $38,009.20, 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 March 1, 2013 through May 6, 2013, which is 9-4/7 weeks TTD at the rate of $562.55.

Permanent Disability

Respondent shall pay the sum of $506.30/week for a period of 40 weeks, as provided in §8 (d) 2 of the Act, because the injuries sustained caused 8% loss of use of person as a whole.

Penalties and Attorneys' Fees

Claim for penalties and attorneys' fees is denied.

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.

08/23/2016

Signature of Arbitrator — Date

ICArbDec p. 2

AUG 25 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Klingerman	)	
Petitioner,	)	
vs.	)	**No. 14 WC 32725**
Vactor Manufacturing Inc.	)	**17IWCC0730**
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Ottawa on March 23, 2016. The parties agree that on November 1, 2011, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act, that their relationship was one of employee and employer. They agree that in the year preceding the injuries, the Petitioner earned $43,879.16 and that his average weekly wage was $843.83.

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 gave notice of the accident within the tie limits stated in the Act.
3. Whether petitioner's current condition of ill-being is causally connected to this injury or exposure.
4. Whether respondent is liable for the unpaid medical bills.
5. Whether temporary total disability is due petitioner.
6. The Nature and Extent of Injury.
7. Whether penalties or fees be imposed upon Respondent.

STATEMENT OF FACTS

Petitioner testified he was employed by respondent for 36 years as a welder. Up until shortly after petitioner's claimed accidents, petitioner stood at a non-adjustable welding table and hand welded and assembled parts known as boom turrets. The table was forty inches off the ground. After the claimed accidents, the table was made adjustable.

The job of assembling boom turrets required petitioner to hold the part in one hand and weld with the other. In 2008, respondent provided a fixture to hold the boom turret in place. Petitioner would weld fifteen different parts to the boom turret. Each part weighed fifteen to twenty-five pounds. Petitioner was required to carry four inch plates that weighed twenty-five pounds a distance of five to six feet to the table. Thereafter, petitioner had to push, pull and flip the plates as he welded. It takes ten hours to assemble one boom turret. The completed turret is shoulder high and weighs 400 pounds. The completed turret is removed from the table with a crane.

Petitioner testified that on November 1, 2011, while in the process of assembling the boom, he was flipping and welding and felt a pain in his left shoulder. Petitioner reported the injury to his supervisor, Art Zimmerman. Petitioner testified he completed an accident report for

Art Zimmerman at the time of the November 1, 2011 accident, similar to the report completed on April 24, 2012 (RX.8). At the time of hearing, Art Zimmerman was no longer employed by respondent. Petitioner did not receive medical treatment at that time. He testified that his pain increased and he continued asking Art Zimmerman about the claim every two weeks.

Petitioner testified that by April 26, 2012, his pain was so great he went directly to respondent's human resources. It was at this time he learned no report of the accident had been turned in by Zimmerman. Petitioner completed a new incident report. He was sent by respondent to Occupational Health at St. Mary's Hospital where saw Dr. Garg.

Petitioner first saw Dr. Stroink, who could not help him, and was referred by Dr. Stroink to Dr. Norris, an orthopedic surgeon.

Instead of going to Dr. Norris, petitioner went to see Dr. Meyer at McLean County Orthopedics.

Eventually he went to see Dr. Norris who performed an injection and then surgery on March 1, 2013. Petitioner was able to return to work three weeks after surgery. Petitioner has been performing his regular job as a welder since his return to work.

Roy Snyder, respondent's safety manager, testified in behalf of respondent. One of Snyder's duties is to handle workers' compensation claims. Snyder confirmed petitioner was a class one welder. This job required petitioner to handle small elements. Each cell where petitioner worked was equipped with an overhead crane. Snyder testified petitioner would not need to lift more than 50 pounds to do his job.

When an injury occurs, Snyder would be the person to receive the report. Snyder confirmed Art Zimmerman is no longer employed by respondent. Snyder searched his files and found no report of the November, 2011 accident, only the accident report from April, 2012. Petitioner did not miss work from November, 2011 through April, 2012.

Snyder agreed petitioner did not have an adjustable weld table at the time of the claimed accidents. Snyder testified that a supervisor would not come under any higher scrutiny or penalized depending upon whether the supervised employees had work accidents.

Medical Bills (PX.1)

Newsome Physical Therapy Medical Records (PX.2)

Petitioner received physical therapy beginning on March 13, 2013 until discharge on May 6, 2013.

St. Mary's Health Care Records (PX.3).

The records reflect petitioner was first seen at St. Mary's Immediate Care by Dr. Garg on April 26, 2012. The history recorded was: "[petitioner] complained of left anterior shoulder pain since November, 2011 and right shoulder pain for two to three months with no specific injury or trauma; symptoms more on left. Petitioner has pain with lifting. He denies history of prior shoulder problems or any evaluation for current symptoms. Petitioner is taking Aleve or Advil almost daily." The diagnosis was bilateral shoulder sprain; left greater than right. X-ray of the left shoulder indicated severe left AC joint osteoarthritis without subacromial spurs. Physical therapy was prescribed.

Petitioner returned Dr. Garg on May 14, 2012 after one session of physical therapy. Petitioner was on light duty and taking Naprosyn. Additional therapy was ordered. He was also seen by Dr. Garg on May 21, 2012 with increased symptom; more on the left.

Petitioner obtained an MRI of the left shoulder on May 29, 2012 which showed severe osteoarthritis at the AC joint with mild tenosynovitis of the extra articular long head of biceps tendon.

Petitioner followed up with Dr. Garg on June 15, 2012 after obtaining an MRI. Petitioner wanted to return to regular work. Petitioner was referred by Dr. Garg to a Dr. Sinha. Dr. Garg recommended occupational therapy.

Rezin Orthopedics Records (PX.4)

According to the records of Rezin Orthopedics, petitioner was first seen there by Dr. Raymond Meyer on October 3, 2012. Petitioner complained of left shoulder pain after work-related type activities back in November, 2011. He denied prior injury to the shoulder. He indicated the pain was then limiting his work and activity. Dr. Meyer diagnosed left shoulder strain and impingement and AC joint [degenerative joint disease]. Dr. Meyer injected the shoulder.

Petitioner returned to Dr. Meyer on October 17, 2012. Petitioner reported no lasting improvement from the injection. Surgery was recommended.

McLean County Orthopedics Records (PX.5)

Petitioner was first seen by Dr. Joseph Norris with McLean County Orthopedics on November 21, 2012. Petitioner reported anterior and superior pain to his left shoulder that was not related to any particular injury; only chronically after 33 years of welding. Dr. Norris injected the shoulder.

Petitioner returned to Dr. Norris on January 7, 2013 and reported the injection mildly helped but the pain had returned and affecting his daily activities. Dr. Norris recommended surgery and an MRI before surgery to rule out rotator cuff injury. Petitioner returned to Dr. Norris on January 14, 2013 after undergoing the MRI. Dr. Norris recommend arthroscopy, subacromial decompression, distal clavicle excision, biceps tenotomy and possible rotator cuff tendon repair of the left shoulder.

Petitioner underwent left arthroscopic subacromial decompression, distal clavicle excision, biceps tenotomy and limited intraarticular debridement for left subacromial impingement, AC joint arthritis and biceps tendinopathy on March 1, 2013 by Dr. Norris.

Petitioner followed up with Dr. Norris on March 11, 2013, when physical therapy was started. On April 8, 2013, petitioner reported good progress with therapy and was released to return to work as a welder with some lifting restrictions.

On May 6, 2013, petitioner was reportedly doing well. He had full and symmetric range of motion and was back to full strength. He was released to return to work full duty and released from doctor's care.

Dr. Paul G. Perona September 10, 2013 Medical Report (PX.6)

Petitioner was examined by Dr. Perona on September 10, 2013. Petitioner, left had dominant, gave a history of left shoulder pain since November, 2011 which he related to working as a welder performing repetitive movement with his arms. He reported only occasional pain, especially with overhead movements, working full duty without problems. Petitioner reported he felt he still had weakness in his shoulder.

Dr. Perona believed petitioner's condition was caused by his 32 years as a welder based upon being asymptomatic before he began his employment with respondent, the type of

repetitive work he did and the fact the pain began while working. Dr. Perona believed the treatment rendered to petitioner was reasonable and necessary. Dr. Perona reported petitioner was pain free and able to perform all work activities without restrictions. Dr. Perona also believed petitioner's time off work of approximately three months was appropriate given the surgery performed.

Dr. Paul G. Perona Deposition of December 3, 2013 (PX.7)

[At the time of Dr. Perona's deposition petitioner moved to admit Dr. Perona's report. Respondent objected and the Arbitrator sustained the objection in the transcript of the deposition. Subsequent to Dr. Perona's deposition, Dr. Breslow's deposition was taken. The parties agreed that as long as Dr. Breslow's report was allowed in, Dr. Perona's report would be allowed in. The objection was moot and Dr. Perona's report was allowed in at trial.]

Dr. Perona testified in behalf of petitioner. Dr. Perona performed an exam of petitioner at the request of petitioner's attorney on September 10, 2013. Dr. Perona confirmed his opinion, and the reasons for the opinion, stated in his September 10, 2013 report (PX.6).

Dr. Ann R. Stroink September 11, 2012 report (PX.8 & RX.3)

Petitioner presented to Dr. Stroink on September 11, 2012 with left shoulder pain since the end of last year. He reported it was a work injury as he builds parts for work. Dr. Stroink referred petitioner to Dr. Norris for an orthopedic evaluation as the pain emanated from the shoulder.

Dr. Marc Breslow February 5, 2014 Deposition (RX.1)

Dr. Breslow, board certified orthopedics with specialty in sports medicine, was called upon to testify in behalf of respondent. Petitioner had been examined by Dr. Breslow on October 25, 2012 (RX.1, p.8). The petitioner's history was that he worked as a welder and developed atraumatic onset of pain in November, 2011 that he associated with work-related activities (PX.1, p.9). Dr. Breslow reviewed a job description, first report of injury, occupational therapy notes from May, 2012, the May 29, 2012 MRI report of the left shoulder, Dr. Stroink September 11, 2012 report and X-ray and Dr. Meyer's October 3, 2012 note.

Dr. Breslow's examination revealed pain to palpation of petitioner's acromioclavicular joint of his left shoulder and positive impingement sign (PX.1, pp.10-11). Dr. Breslow reviewed the MRI showed degenerative changes of the acromioclavicular joint with impingement upon the supraspinatus tendon (RX.1, p.11). At the time of the exam, petitioner had persistent left shoulder pain, despite undergoing physical therapy, injection and oral medications (RX.1, pp.11-12).

Dr. Breslow diagnosed petitioner's condition as subacromial impingement of the left shoulder and symptomatic AC joint arthritis (RX.1, p.12). Dr. Breslow concluded that because petitioner did not have a traumatic event at work, petitioner's condition was not work-related (RX.1, p.12). Dr. Breslow believed the degenerative arthritis was caused by a genetic component, chronic wear and tear, and/or a traumatic event (RX.1, p.13). Dr. Breslow did not believe petitioner's work activities aggravated his pre-existing condition (RX.1, p.13). Dr. Breslow did not believe the treatment petitioner received to his shoulder was necessitated by any work accident as Dr. Breslow was unaware of a work accident (RX.1 p.13). Dr. Breslow recommended petitioner undergo an injection to the AC joint; even though the need for the

injection was not due to any work accident. (RX.1, p.14). Dr. Breslow did not believe anything in petitioner's job caused the arthritis (RX.1, pp.14-15).

On cross examination Dr. Breslow agreed he did zero to three exams a week, mainly at the request of respondent (RX.1, pp.16-17). His review of the records took ten minutes, as well as his exam of petitioner (RX.1, pp.16-17). Dr. Breslow agreed the dominant limb would likely be effected by overuse (RX.1, pp.17-18). Repeated number of movements would make a difference as to the causal relationship of the overuse injury (RX.1, p.19). Dr. Breslow agreed that some activity may aggravate arthritis (RX.1, p.20). Dr. Breslow agreed that the fact petitioner worked for respondent as a welder for 33 years could contribute to the development of symptomatic arthritic condition (RX.1, p.21). Dr. Breslow did not know the details of petitioner's job (RX.1, p.22). Dr. Breslow agreed that it was possible the nature of certain jobs could cause or aggravate arthritis (RX.1, p.23). Dr. Breslow agreed some repetitive activities can cause overuse injuries (RX.1, p.24).

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

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:

Petitioner testified he had been performing the same job as a welder for respondent for 36 years. For fifteen years before November 1, 2011, petitioner performed the job as a welder at a non-adjustable table, where he assembled boom turret. He was required to push, pull and flip the plates as he weld them to assembly the boom turret was shoulder high when assembled.

On November 1, 2011, while petitioner was assembling the boom turret, he felt pain in his left shoulder. He immediately reported the incident to his supervisor, Art Zimmerman and a report was completed.

Although petitioner did not receive medical treatment until April 26, 2012, the history to the medical providers at the time treatment was finally rendered, was consistent with the claimed work accident of November 1, 2011.

The Arbitrator therefore finds petitioner sustained accidental injuries to his left shoulder that arose out of and in the course of his employment with respondent on November 1, 2011.

E. In support of the Arbitrator's decision with regard to whether timely notice of the accident was given to respondent, the Arbitrator makes the following finding:

Petitioner testified that he reported the injury to his then supervisor, Art Zimmerman, at the time of the occurrence. Petitioner completed a report for Art Zimmerman. No action on petitioner's claim was taken by respondent. Zimmerman left respondent's employ. Petitioner testified that by April 26, 2012, his pain was so bad he went directly to human resources. It was at this time that petitioner learned Zimmerman had not turned in the report of the November 1, 2011 injury.

Respondent's safety manager, Roy Snyder, confirmed he would be the person who would receive the report of injury. Snyder looked through his file and did not find the report of the November 1, 2011 occurrence.

Based upon the foregoing, the Arbitrator finds timely notice of the accident was given to respondent. The Arbitrator makes this determination despite Snyder's testimony that no report

was found. Snyder's testimony fell short of the saying petitioner did not report the injury, only that he [Snyder] did not find the report. The only one who could refute or confirm petitioner reported the injury, or that a report was completed and given to Zimmerman, was Zimmerman and he was not available to testify.

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 having any problems with his shoulders prior to his employment with respondent. He was employed by respondent as a welder for over thirty years. His job as a welder required him to push pull and flip plates as he welded.

Petitioner received initial treatment from Dr. Garg at St. Mary's Health Care April 26, 2012. The history contained in the records was consistent with development of left shoulder pain in November, 2011 and right shoulder pain for two to three months with no specific injury.

Petitioner sought treatment from Dr. Ann Stroink for left shoulder pain on September 11, 2012. Petitioner related left shoulder pain since the end of last year which the petitioner related to a work injury from building parts for work. Petitioner was referred to Dr. Norris by Dr. Stroink.

The petitioner next received treatment from Dr. Meyer at Rezin Orthopedics, which was on October 31, 2012. Petitioner's history was consistent with shoulder pain after work-related activities in November, 2011.

On November 21, 2012, petitioner was seen by Dr. Norris of McLean County Orthopedics. Petitioner reported anterior and superior pain in the left shoulder which was not related to any particular injury; rather, was chronically from welding for 33 years. On March 1, 2013, Dr. Norris performed surgery left arthroscopic subacromial decompression, distal clavicle excision, biceps tenotomy and limited intraarticular debridement for left subacromial impingement, AC joint arthritis and biceps tendinopathy.

Dr. Paul Perona examined petitioner on September 10, 2013 at the request of petitioner's attorney. Dr. Perona testified via deposition after his examination and review of all of the medical records that petitioner's condition was caused by the repetitive work he did for respondent as a welder for 32 years. At the time of his exam of petitioner on September 10, 2013, Dr. Perona's diagnosis was status post left shoulder arthroscopy, subacromial decompression, distal clavicle resection and biceps tenotomy for left shoulder acromioclavicular joint, severe degenerative joint disease, left shoulder subacromial impingement and left shoulder biceps teninopathy.

Based upon the foregoing, the Arbitrator finds petitioner's left shoulder subacromial impingement, AC joint arthritis and biceps tendinopathy, which necessitated the treatment provided by Dr. Garg, Dr. Stroink, Dr. Meyer and Dr. Norris, including the surgery performed on March 1, 2013, was caused by the repetitive work petitioner performed as a welder for 32 years for respondent.

The Arbitrator makes this finding despite the opinion of Dr. Breslow, who concluded that because petitioner did not have a traumatic event the precipitated the condition, it was not caused by petitioner's employment with respondent. The Arbitrator took into consideration Dr. Breslow believed one of the causes of degenerative arthritis can be chronic wear and tear, as well as the fact that Dr. Breslow did not know the details of petitioner's job and agreed that petitioner's job

as a welder for respondent for 33 years could contribute to the development of symptomatic arthritic condition.

Accordingly, the Arbitrator finds petitioner proved by a preponderance of the evidence that left subacromial impingement, AC joint arthritis and biceps tendinopathy was caused by the repetitive work accident that manifested itself on November 1, 2011.

J. In support of the Arbitrator's decision with regard to the medical bills incurred, the Arbitrator finds the following:

Respondent disputed the liability for the medical bills. The medical evidence, which includes the treating physicians' records and the exam report and deposition of Dr. Perona confirmed the reasonableness and necessity of the treatment. The Arbitrator therefore awards the following bills to be paid in accordance with §8 and §8.2 with respondent to be given credit for any payment made directly or pursuant to §8 j:

$17,872.50-McLean County Orthopedics/Dr. Norris
$9,041.00 - Center for Outpatient Medicine
$1,762.00 – Empire Anesthesia
$725.00 – Rezin Orthopedics
$468.70 – Prescription Partners
$155.00 - Central IL Neuro Health/Dr. Stroink
$7,985.00 – Newsome Physical Therapy

K. In support of the Arbitrator's decision with regard to temporary benefits, the Arbitrator finds the following:

The Arbitrator, having found petitioner sustained a work injury to his left shoulder that arose out of and in the course of his employment with respondent, also finds the evidence supports petitioner was temporarily and totally disabled due to the work injury from March 1, 2013 through May 6, 2013. This period of disability is supported by the treating physician, Dr. Norris', records and confirmed by Dr. Perona. Accordingly, the Arbitrator awards temporary total disability from March 1, 2013 through May 6, 2013, which is 9-4/7 weeks at the rate of $562.55 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 welder and that he was capable of returning to his regular employment as of May 6, 2013 and has continued to work at that same job as a welder since his return to work, without problems. 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 56 years of age, and is now 60 years of age. The Arbitrator notes the petitioner has a work life of approximately six years ahead of him. Therefore, the Arbitrator gives less 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 over the past three years without any problems, at his previous earning capacity as a welder. 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. Norris' care on May 6, 2013, petitioner had full range of motion, no pain and wanted to return to work with no restrictions. Dr. Norris complied with petitioner's request and released him to return to work without restrictions. Petitioner testified he has been able to perform his usual job without problems. 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 person as a whole pursuant to § 8(d)2 of the Act.

M. In support of the Arbitrator's decision with regard to penalties and attorney's fees, the Arbitrator finds the following:

Respondent relied upon the opinion of Dr. Marc Breslow to deny benefits. Although Dr. Breslow's opinion is not sufficient to defeat the claim for benefits, the reliance by respondent on Dr. Brewslow's opinion is sufficient to defeat the claim for penalties and attorney's fees. Furthermore, petitioner claimed to have reported the injury in November, 2011, and did not follow up until April, 2012.

For these reasons, the Arbitrator denies the claim for penalties and attorney's fees.

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 penalties denied	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Patrick Scott,

Petitioner,

vs.

NO: 13 WC 24528
(Consolidated with 14 WC 19896-
-under separate decision)

Village of Alsip, fire Department,

Respondent.

17IWCC0731

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, wages/benefit rates, temporary total disability, medical expenses, credit, permanent partial disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 49-year-old employee of Respondent, who described his job as a firefighter/paramedic in 2013. Petitioner started working for Respondent in 1993. His job was responding to emergency calls for injured people, sick people, and responding to fire calls in and outside of the town. Petitioner identified PX12 as the job description and he indicated it was reasonably and accurately outlined. On the date of accident, **March 2, 2013 (13 WC 24528)**, Petitioner testified that he was working with Greg Breuter and Bill Peterson and a 3rd person. His title then was lieutenant paramedic. On that day, they responded to a fire alarm at a building about 4:00am. Petitioner testified that he injured his

left shoulder that day taking the air pack out of the seat of the engine. Petitioner testified that they pulled up to the scene and he did a size up of the building as they are supposed to do. Petitioner stated that he got out of the engine, reached up and was taking the air pack out of the seat when he felt a sharp pain in his left shoulder. The air pack is a breathing apparatus that they wear in case there is smoke in the building or life hazards in the air. He was reaching overhead. Petitioner testified that it is a cylinder and harness that goes over both shoulders and clips to the waist and weighs about 40 pounds. Petitioner testified that after they took care of the situation and found that there was no fire in the building he reported the injury to the deputy chief at the scene. Petitioner testified that they went back to the station and one of the other firemen on duty took Petitioner to St. Francis (MetroSouth) in the chief's car. In the ER, they evaluated Petitioner's left shoulder, took x-rays and discharged Petitioner on medication with instructions of no lifting with the left shoulder. Petitioner then sought care at Mid-American Orthopedics, Ortho Immediate Care later the same day. Petitioner was examined by Dr. James Moravec who diagnosed a possible rotator cuff tear of the left shoulder. The doctor advised Petitioner to stay off work and to begin therapy. The doctor also prescribed medication. Petitioner started the therapy and returned to the doctor March 18, 2013. The records indicated that Petitioner was anxious to return to work and requested an injection for the pain. Petitioner stated that he was still having problems raising his arm and certain lifting activities. Petitioner testified that he just wanted to return to work and try to avoid surgery. He received the injection and the doctor allowed Petitioner to return to work and to return as needed. Petitioner did return to work and noticed he was having difficulty putting on his turnout coat and he had issues getting in and out of the rig/fire engine. The coat is fire retardant and a heavier material when fighting fires. Petitioner again saw Dr. Moravec May 8, 2013 and Petitioner testified that he then was still having a considerable amount of pain. Dr. Moravec diagnosed possible left rotator cuff tear and ordered an MRI; the doctor allowed Petitioner to then remain working full duty. Petitioner underwent the left shoulder MRI May 8, 2013 and was diagnosed with two partial thickness tears of his left rotator cuff. Petitioner returned to the doctor May 13, 2013 and the doctor recommended surgery; either shoulder repair or shoulder replacement. The notes indicated then that Petitioner did not want to take time off work and he requested a 2nd opinion regarding surgery. Petitioner obtained a 2nd opinion June 12, 2013 from Dr. James Leonard at Midwest Orthopedic Consultants. The doctor reviewed the x-rays and MRI and recommended resurfacing of the humeral head and instructed Petitioner to stay off work. Petitioner was seen for an IME by Dr. Gregory Primus July 12, 2013. Petitioner returned to see Dr. Leonard July 25, 2013, and he recommended arthroplasty at that time. Petitioner wanted to return to work at that time but the doctor did not return Petitioner to work. Petitioner underwent surgery at Christ Hospital August 9, 2013 where the doctor placed hardware in the shoulder and replaced the humeral head. Petitioner returned to Dr. Leonard on August 14, 2013 and he was instructed to remain off work and to begin therapy. Petitioner started therapy and returned to the doctor September 5, 2013. Petitioner was then instructed to remain off work and remain in therapy; the same recommendations were made at the October 7, 2013 visit. Petitioner saw Dr. Leonard November 18, 2013 and the doctor continued the therapy. Petitioner then had requested to return to work, however, the doctor said no work. Petitioner continued therapy and returned to Dr. Leonard December 30, 2013. Dr. Leonard allowed Petitioner to return to

work at that time but instructed him to be careful lifting so he did not damage the repairs. Petitioner was instructed not to do heavy lifting and to protect the shoulder. Petitioner returned to work and was also advised to return to be seen in 6 months. Petitioner testified when he then returned to work his left arm was fatigued occasionally and he still had issues raising it up overhead all the way and all the way to one side. Petitioner continued to work then as a firefighter paramedic lieutenant.T.14.-27.

- On the date of accident, **May 27, 2014 (14 WC 19896)**, Petitioner testified about 4:00am they had a call for possible smoke in a building. Petitioner stated that as he was hurrying down the stairs he missed the bottom step, grabbed the rail and pulled his **right arm.** Petitioner testified that he had a really sharp pain in his right shoulder and he became extremely nauseous. Petitioner testified that prior to that date he had no difficulties or problems with his right shoulder nor any treatment or medical visits regarding his right shoulder. Petitioner sought treatment later that day at Midwest Orthopedic Consultants and was evaluated by Dr. Weisberger who evaluated Petitioner and recommended a right shoulder MRI, which was done later that day. The MRI showed a rotator cuff tear of the right shoulder. Petitioner saw Dr. Leonard two days later (May 29, 2014). The doctor reviewed the MRI that indicated the two tears and he recommended surgery and to be off work. Petitioner had the right shoulder surgery to repair the rotator cuff June 13, 2014 performed by Dr. Leonard at Christ Hospital. Petitioner saw Dr. Leonard (post-surgery) June 19, 2014 who recommended therapy and to remain off work. Petitioner returned to the doctor in August, September, and October of 2014 and the doctor recommended continuation of therapy and to remain off work. Petitioner again saw Dr. Leonard December 8, 2014 and records noted Petitioner then having difficulty in therapy. Petitioner stated at that time he noticed some weakness and having some pain trouble. The doctor then prescribed a cortisone injection and continued Petitioner in therapy. Petitioner stated he was then instructed to restrict any pushing, pulling, or lifting with the right shoulder to 5 pounds. Petitioner returned for therapy and complied with the restrictions. Petitioner again saw the doctor January 12, 2015, again complaining of the pain with therapy. Dr. Leonard then recommended another MRI that was done January 22, 2015. Petitioner returned to Dr. Leonard January 26, 2015. The doctor then recommended further surgery. On April 8, 2015 Petitioner was sent to Dr. John Stamelos for an IME at Respondent's (pension board) request. Petitioner was sent for another IME with Dr. Levin April 13, 2015. Petitioner underwent the 2nd right shoulder surgery (right rotator cuff repair) at Christ Hospital April 14, 2015. Petitioner returned to see Dr. Leonard April 23, 2015 who Petitioner start therapy and remain off work. Petitioner agreed Respondent had sent him for a series of examinations by various doctors.T.27.-34.

- Petitioner had his pension hearing May 21, 2015 and he was provided a line of duty disability pension as a result of his right shoulder injuries. Petitioner agreed Dr. Stamelos indicated that Petitioner was permanently disabled and unable to return to work as a firefighter. Petitioner's disability pension began May 28, 2015. Petitioner returned to see Dr. Leonard May 27, 2015. Dr. Leonard continued therapy and restrictions as before and advised Petitioner to remain off work. Petitioner acknowledge that Dr. Leonard's notes then indicated that Petitioner was beginning a job as a teaching instructor at Moraine Valley Community College as an EMT instructor. Petitioner testified that he is the lead instructor

for EMT class and emergency medical technician class; he had continued teaching since his retirement. As an adjunct instructor, he teaches two days per week. Petitioner had a follow up with Dr. Leonard July 1, 2015 and therapy was continued. Petitioner saw the doctor August 3, 2015 and the treatment notes indicated that Petitioner had complaints of pain with overhead activities; sometimes even just changing a lightbulb. He indicated with those activities his arms would get fatigued very easily and he would get sore quickly. Petitioner was continued in therapy and still advised to be off work with the same restrictions; Petitioner was allowed to continue teaching. On September 15, 2015, the doctor continued the same restrictions and indicated that they were likely permanent restrictions. Petitioner saw Dr. Leonard December 14, 2015 and his notes indicated that Petitioner reported good days and bad days and that he was unable to do overhead activities. Petitioner indicated that his arms became very fatigued and sore while trying to do anything overhead for any length of time. At that time the doctor placed Petitioner at maximum medical improvement (MMI) and indicated Petitioner was unable to return to work but he removed the lifting restrictions. Petitioner saw the doctor for the 6-month checkup June 13, 2016. Petitioner then noted episodic bilateral shoulder pain which was alleviated by activity modification—when he felt pain he stopped doing the activity. Petitioner indicated that he had continued teaching and he was also a day per week at the pro shop at Palos Country Club. Petitioner was instructed to see the doctor in a year.T.34.-39.

- Petitioner testified that currently there are days where the humidity and weather have an effect to where his left shoulder becomes sore and on those days he has difficulty getting dressed. He stated when really sore it is hard to even put a shirt or a coat on. Rainy and cold weather affects his shoulder. Petitioner does take medication at times; Norco when the pain is too bad. Petitioner testified that he has difficulty lifting with his left arm/shoulder and he has difficulty lifting with both arms due to lack of strength. He noted no other left shoulder/arm problems. Prior to March 2, 2013 Petitioner noted he had no problems with his left shoulder and had no prior medical evaluations, treatment, or MRI's regarding that shoulder. As to the right shoulder he testified there is a lot of weakness and getting dressed is a problem and a lot of times he does not even realize his shirt sleeves are not straight until his wife fixes them for Petitioner. He has difficulty with his right shoulder as with the left (L>R) with cold and humid weather and rain. He has strength issues with the right shoulder and difficulty with overhead activities.T.39.-42.

- Petitioner was to see the doctor for a year follow up. Petitioner testified the doctor indicated Petitioner would likely in the future need to get both shoulders completely replaced. He does have hardware in his left shoulder. With replacement, they would replace the socket and humeral head. Petitioner testified that after the 1st accident he was off work from June 12, 2013 through January 2, 2014 but was not paid benefits. Petitioner testified that during that point he received sick time pay that he had accumulated during his years with Respondent.

The Commission finds that there is no question Petitioner had pre-existing degenerative osteoarthritis in the shoulder (Dr. Primus indicated it significant), but there is no evidence of prior shoulder complaints or treatment and Petitioner had been performing his duties as a

firefighter/paramedic, by all indications, in the weeks, months and years before this accident. Petitioner had passed fit-for duty exams before so clearly any pre-existing shoulder issue had been insignificant. Petitioner described grabbing the air pack that weighed about 40 pounds, and brought it down when he felt the shoulder pain. Petitioner's grabbing the air pack may be routine in his profession but clearly not normal everyday activities of someone not a firefighter/paramedic; clearly Petitioner was at increased risk with the activity being done regularly at his heavy job and clearly at risk for aggravating/accelerating the pre-existing condition. Petitioner apparently requested to return to full duty and the treating doctor allowed him to. While Petitioner had improvement with initial treatment, his pain continued and when he did return to full duty it progressed (there is no evidence of intervening incident). Clearly, despite Dr. Primus opinion that it was just a strain type injury (temporary exacerbation) and that Petitioner had reached MMI when he returned to work, the evidence and testimony shows otherwise. Petitioner did not reach a plateau back to his prior baseline condition but rather the problem progressed and he saw Dr. Leonard (after he had returned and worked a few months full duty) who ultimately performed surgery on the shoulder. Dr. Leonard found Petitioner's condition related to the accident and that opinion is more supported with the entirety of the treating records rather than Dr. Primus opinions. Also, while Petitioner may have had the pre-existing condition, there is no evidence that Petitioner had a 'longstanding diagnosis' of the pre-existing osteoarthritic condition; he never had any evidenced prior treatment. Petitioner's testimony was having been pain free prior to this incident. Petitioner's medical records show no prior complaints or treatment while he did have prior knee and an elbow issues. Petitioner's testimony is unrebutted and supported by the records and opinions of Dr. Leonard to find that Petitioner met the burden of proving a causal relationship between the March 2013 incident and Petitioner's condition of ill-being since. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to causal connection.

The Commission finds that Respondent indicated wages/benefit rates as an issue. The parties stipulated to average weekly wage (AWW) of $1,690.00; temporary total disability rate (TTD) of $1,126.67/week; permanent partial disability rate (PPD) of $712.55/week (max rate); rates as found by Arbitrator. Respondent did not argue the issue it is therefore deemed as waived. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to AWW as stipulated and benefit rates correct.

The Commission, with above finding of an ongoing causal connection finds evidence and testimony to support the TTD award as is. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to total temporary disability.

The Commission finds that Respondent stopped paying TTD per the §12 examination by Dr. Primus. Petitioner then received sick pay. Clearly, that was not the intent of §8(j) as that refers to non-occupational disability pay (group disability). Respondent's would otherwise not pay TTD and force employees to take and use sick time to get the credit at the expense of employee's sick

benefits. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to no credit to Respondent regarding salary/sick time paid.

The Commission, with the above finding of causal connection, finds evidence and testimony to support the medical expenses award as is. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to medical expenses.

The Commission, with the above finding of causal connection, finds evidence and testimony to support the PPD award as is, considering the factors set out in §8.1(b) of the Act. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to Permanent partial disability.

The Commission finds, regarding penalties and attorney fees, that Respondent relied on the opinions of Dr. Primus. Support for Dr. Primus' causal connection opinion can be found in testimony and the treating records. Dr. Primus opinion of a temporary strain and Petitioner being at MMI when Petitioner returned to work (at Petitioner's request) can be is supported by evidence and the history Petitioner relayed. Dr. Primus' opinion was also based on his feeling the activity was simply normal activity of everyday living, rather than the increased risk of the job duties of a firefighter/paramedic. Respondent's acceptance of Dr. Primus opinion was reasonable and in good faith. The evidence and testimony finds that Respondent did not act in an unreasonable or vexatious manner in delaying payment of benefits to Petitioner. Petitioner has failed to meet the burden of proving entitlement to the penalties and attorney fees. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and, herein, reverses/modifies the Arbitrator's decision to deny any and all penalties and attorney fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,126.67 per week for a period of 31-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 60 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of 12% of Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $75,306.50 for medical expenses under §8(a) of the Act.

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

17IWCC0731

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: NOV 20 2017
d-9/28/17
DLG/jsf
045

Stephen Mathis

Deborah Simpson

Dissent

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

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCOTT, PATRICK
Employee/Petitioner

Case# **13WC024528**

14WC019896

ALSIP FIRE DEPARTMENT
Employer/Respondent

17IWCC0731

On 10/18/2016, 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 0.47% 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:

0391 HEALY SCANLON LAW FIRM
KEVIN T VEUGELER
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CHICAGO, IL 60602

0507 RUSIN & MACIOROWSKI LTD
JEFF RUSIN
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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Patrick Scott
Employee/Petitioner

v.

Alsip Fire Department
Employer/Respondent

Case # 13 WC 24528

Consolidated case: 14 WC 19896

17IWCC0731

An *Application for Adjustment 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 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **March 2, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$91,824.20**; the average weekly wage was **$1,690.00**.

On the date of accident, Petitioner was **49** years of age, married, with no dependent children.

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

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

Respondent shall be given a credit of $7,087.22 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

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$1126.67**/week for **31 1/7** weeks, commencing **3/2/13** through **3/18/13** and **6/12/13** through **12/31/14,** as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$75,306.80,** pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Nature and Extent

Respondent shall pay Petitioner permanent partial disability benefits of **$712.55**/week for **60** weeks because the injuries sustained caused the **12%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Penalties

Respondent shall pay to Petitioner penalties of **$10,000.00**, as provided in Section 16 of the Act; **$55,277.74**, as provided in Section 19(k) of the Act; and **$10,000.00**, 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.

13 WC 24528

17IWCC0731

Findings of Fact

The disputed issues in this matter are: 1) causal connection; 2) medical bills; 3) temporary total disability; 4) temporary total disability paid by Respondent; 5) non-occupational disability benefits; 6) penalties; 7) attorney's fees; 8) 8(j) credit; and 9) the nature and extent of Petitioner's injuries. *See*, AX1.

The Petitioner testified that he was employed as a firefighter/paramedic beginning in 1982 and since 1993; he has been employed with the Alsip Fire Department. Firefighter/paramedics with the Alsip Fire Department are responsible for providing emergency medical services, rescue and fire suppression. They are to perform physically demanding work on slippery, hazardous surfaces; while wearing personal protective equipment that weighs approximately 50 pounds; and while wearing a self-contained breathing apparatus. PX12.

Petitioner testified that prior to March 2, 2013, he did not have any problems with his left shoulder, nor had he ever received any medical treatment for his left shoulder. On March 2, 2013, Petitioner was responding to a fire alarm when he injured his left shoulder. Specifically, he was retrieving a 40 pound air pack from a shelf above his head; when he lifted it, he felt immediate pain in his left shoulder.

Petitioner was taken from the fire scene to MetroSouth Hospital by the Alsip Fire Chief. A history taken at MetroSouth Emergency Department indicates Petitioner had a sudden onset of left shoulder pain when reaching to lift something at work. Petitioner was prescribed Vicodin, placed on restricted duty and instructed to follow-up with a doctor. PX1; PX8.

Later that day, Petitioner was evaluated at Mid-America Orthopedics by Dr. James Moravek. Medical records received into evidence indicate Petitioner was a left-hand dominate firefighter; injured while putting on some gear getting ready for a call. Dr. Moravek confirmed that Petitioner had no prior history of a left shoulder injury or left shoulder pain. Dr. Moravek performed an examination of Petitioner's left arm, noting a decreased range of motion. Dr. Moravek's assessment was that Petitioner had glenohumeral arthritis that was exacerbated. Dr. Moravek prescribed physical therapy, medication and keeping the petitioner off work. PX2.

On March 18, 2013, Petitioner returned to Dr. Moravek requesting an injection to ease his left shoulder pain; as the office note indicates, Petitioner was anxious to return to work. Petitioner was given a cortisone injection and a note allowing him to return to

work. Petitioner testified he returned to work as a firefighter/paramedic for the Alsip Fire Department.

Petitioner returned to Dr. Moravek on May 8, 2013, complaining of continued left shoulder pain, especially with overhead activities. Dr. Moravek prescribed an MRI to determine if Petitioner had a possible rotator cuff tear. A May 9, 2013 MRI revealed several tears of the left rotator cuff. On May 13, 2013, Dr. Moravek reviewed the MRI results with Petitioner. A second injection was given and surgery was recommended. PX2.

On June 12, 2013, Petitioner was evaluated by Dr. James Leonard of Midwest Orthopaedic Consultants. Office notes from that visit reveal a history that Petitioner, a firefighter/paramedic, was reaching out while in the rig when he grabbed something and felt a pull and significant pain in his left shoulder. Dr. Leonard noted:

> Patrick J. Scott is a 49-year-old, left-handed dominate male who injured his left shoulder about four months ago while working as a firefighter. Since that time, he has had a significant amount of pain to his left shoulder.

Given Petitioner's desire to return to work, Dr. Leonard recommended a left humeral head resurfacing surgery and placed Petitioner off work. PX3.

On July 2, 2013, Petitioner was evaluated by Dr. Gregory Primus pursuant to §12 of the Workers' Compensation Act, upon request of Respondent. Dr. Primus opined that Petitioner's injury occurred "during a routine maneuver that he performs every time he is putting on his backpack while getting down off of his truck. There did not appear to be any unusual risk or traumatic event that led to this increased pain." Dr. Primus further opined that "I do not believe this should be regarded as compensable for his work related claim." As a result, Respondent denied any further benefits. RX4, pp. 6-11, 76; Ex. 2, pp. 9-11.
On August 9, 2013, Petitioner underwent an arthroplasty at Christ Hospital and was instructed to begin physical therapy and placed off work. PX3.

Petitioner continued to be evaluated by Dr. Leonard in September and October 2013 and was instructed to continue physical therapy. PX3.

On November 18, 2013, Petitioner returned to Dr. Leonard still complaining of weakness. Despite this, Petitioner requested a full duty release to return to work.

Instead, Dr. Leonard recommended additional therapy and continued the petitioner's "off work" status. PX3; PX11, pp. 8-9.

On December 30, 2013, Dr. Leonard released Petitioner to return to work, however, Petitioner was cautioned to protect his shoulder and avoid heavy lifting. Petitioner was instructed to return in six months. PX3.

Petitioner testified that he was not paid TTD while treating for this injury; that he used his sick and vacation time and as a result, received his full salary. Petitioner further testified that since his return to work, he continues to experience pain in the left shoulder, along with decreased strength and range of motion and weather sensitivity. He takes Norco for pain.

Deposition of Dr. James Leonard dated March 5, 2014

Petitioner presented the testimony of Dr. Leonard who testified that the work injury on March 2, 2013 caused or contributed to the need for the left shoulder surgery that was performed on August 9, 2013. Dr. Leonard testified that the surgery involved placing hardware in the shoulder which in the future, will lead to arthritis and the eventual need for a total shoulder arthroplasty. In addition, it is expected that Petitioner will experience continued issues regarding strength, weather sensitivity and limited range of motion. PX11, pp. 12, 18-19.

Petitioner testified that during his tenure, his employer required him to attend "fit for duty" exams, performed by Dr. Terrence Moisan. Received into evidence as Petitioner's exhibit 5 are the periodic medical exams of Dr. Moisan. Prior to March 2, 2013, Dr. Moisan's records do not note any issues or problems with Petitioner's left shoulder; nor that Petitioner was unable to perform his job duties as a firefighter/paramedic due to left shoulder injury.

Deposition of Dr. Gregory Primus dated December 17, 2013

Respondent presented the testimony of Dr. Primus who opined that the need for the August 9, 2013 surgery was not the March 2, 2013 incident for the following reasons:

1. The Petitioner "had severe pre-existing degenerative osteoarthritis," (RX4, p. 17),
2. Petitioner had a "longstanding diagnosis of degenerative arthritis," (RX4, p. 23),
3. By March 18, 2013, Petitioner had "no pain" in his shoulder, (RX4, Ex. 2, pp. 10/11),
4. Dr. Primus "did not identify a work related accident or any increased risk or hazard that initiated the pain but did note that his pain was noted

during a normal activity and maneuver that he has done on a repeated basis based on his job duties," (RX4, p. 17); and

5. Petitioner suffered a temporary exacerbation of his underlying degenerative condition.

Upon cross-examination, Dr. Primus testified that there is no evidence Petitioner had prior treatment to or any symptoms regarding his left shoulder, before March 2, 2013. Dr. Primus also conceded that Petitioner was able to work in a full duty capacity and perform his activities of daily living without difficulty or pain prior to March 2, 2013. Dr. Primus defined "temporary," as a condition that returns to baseline. He also testified that if Petitioner's condition did not return to baseline, it would mean his condition wasn't temporary. RX4, pp. 29-32, 43-46.

A review of the record indicates that Dr. Primus was not provided a job description, the March 2, 2013 x-rays, fitness for duty records from Dr. Moisan, or intraoperative photographs. Dr. Primus was unable to say whether reviewing these records could change his opinion. RX4, pp. 17, 28-29, 32, 90-95, 104.

On cross-examination, Dr. Primus testified that Petitioner suffered an acute exacerbation of his degenerative joint disease, which occurred as a result of him performing his firefighting activities for Respondent. Dr. Primus also stated that all of the treatment to Petitioner's left shoulder was reasonable and necessary and that Petitioner continued to complain of left shoulder pain throughout his care. RX4, pp. 56-59, 106.

Respondent also submitted a June 4, 2014 §12 examination report of Dr. Joseph T. Monaco. Dr. Monaco noted a review of relevant medical records of MetroSouth Medical Center, Midwest Orthopaedic Consultants, the operative report of Christ Hospital, the May 9, 2013 MRI study, along with physical therapy records. On examination, Dr. Monaco noted continued complaints of left shoulder pain, which Dr. Monaco described as "functionally disabling pain". Dr. Monaco also confirmed complaints of weather sensitivity. Dr. Monaco stated that Petitioner suffered a work-related injury to his left shoulder on March 2, 2013. Dr. Monaco performed an AMA rating noting a 20% impairment of the left upper extremity which converts to a 12% person as a whole impairment. RX3, pp. 6, 8, 11.

Conclusions of Law

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

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 preexisting 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 left shoulder injuries are causally connected to his work activities as a firefighter/paramedic with Respondent, specifically the accident of March 2, 2013. The Arbitrator finds that Petitioner's March 2, 2013 lifting incident caused the need for the August 9, 2013 surgery performed by Dr. Leonard.

Petitioner testified that he did not have any problems with his left shoulder prior to March 2, 2013. This was confirmed by the medical records submitted into evidence. The Arbitrator finds Petitioner's testimony to be credible and unrebutted.

The opinions of Dr. Primus are not persuasive. The Arbitrator notes that Dr. Primus' opinion is based on the improper premise that Petitioner had "a longstanding diagnosis of degenerative arthritis." The evidence demonstrates that the petitioner's left shoulder was asymptomatic, pain free, untreated and undiagnosed, as demonstrated by Dr. Moisan's regular "fit for duty" exams. Unfortunately, Dr. Primus did not review these records.

Furthermore, Dr. Primus's opinion is based on the incorrect premise that the act of retrieving and donning a 40 pound air pack during the response to an emergency call, is not an "increased risk" incidental to Petitioner's employment.

The Arbitrator notes that there was no testimony offered to refute Petitioner's testimony of his physical condition prior to March 2, 2013. In addition, Respondent's §12 examiner, Dr. Monaco found Petitioner's left shoulder injury and resultant surgery causally connected to the March 2, 2013 accident, resulting in permanent impairment.

The Arbitrator concludes that Petitioner's March 2, 2013 accident arose out of and in the course of his firefighting duties with Respondent and his present condition of ill-being is causally related to the March 2, 2013 incident.

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 submitted the following unpaid medical expenses related to his left shoulder without objection concerning reasonableness and necessity:

Exhibit 6 – Midwest Orthopedic Consultants: $28,258.80
Exhibit 7 – Advocate Christ Medical Center: $41,080.00
Exhibit 8 – Advocate Medical Group: $43.00
Exhibit 9 – Midwest Anesthesiologists: $5,580.00
Exhibit 10 –Palos Medical Group: $345.00

Based on the above, the Arbitrator finds Respondent responsible for medical expenses by the above providers.

K. What amount of compensation is due for temporary total disability?

Petitioner was unable to work from March 2, 2013 until March 18, 2013, when he requested and received a release to return to work. Subsequently, he was taken off work by Dr. Leonard on June 12, 2013 and remained off work pursuant to his orders until January 2, 2014. The petitioner testified that he used his sick and vacation time during this period and was not paid TTD. The Arbitrator finds that Respondent is responsible for temporary total disability benefits in the amount of $1126.67 per week for 31 2/7 weeks.

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

The Arbitrator notes that nature and extent is at issue. Section 8.1(b) of the Act sets forth five factors which constitute the basis for the determination of the permanent partial disability level. Those factors are as follows:

1. The purported level of impairment;
2. The occupation of the injured employee;
3. The age of the employee at the time of the injury;
4. The employee's future earnings capacity; and
5. Evidence of disability corroborated by the treating medical records.

Impairment Rating

The only impairment rating offered into evidence was from Dr. Monaco in relation to petitioner's injury on March 2, 2013. Dr. Monaco determined that Petitioner had an impairment of 20% of the upper extremity and/or 12% of the whole person.

The Arbitrator recognizes that impairment ratings are based on objective, scientific evidence and well-reasoned medical opinions. Further, the Arbitrator notes that Dr. Monaco's impairment rating establishes an objective finding and/or impairment for Petitioner's condition as of the time of the examination. The Arbitrator also notes that Dr. Monaco's impairment rating addresses Petitioner's condition of ill-being following his surgery, which is the proper way of addressing the level of impairment. Dr. Monaco's impairment rating supports the Arbitrator's opinions as to causation. The Arbitrator concludes that Petitioner's injuries caused 12% loss of a person as a whole.

Occupation

Petitioner is employed as a firefighter/paramedic and testified that he worked his regular duty job which is a heavy to very heavy physical demand level, without restriction, from March 2013 through June of 2013. Thereafter, with regards to his left shoulder injury, Petitioner was off work and eventually returned to work in a full duty capacity on January 1, 2014. He worked his full duty job without restrictions from January 1, 2014 through May 27, 2014, when he sustained a new, separate work-related injury. The Arbitrator notes that on several occasions, the petitioner requested that he be returned to work even though his doctor did not agree that he should. Also, he continued to exhibit pain symptoms.

From January 1, 2014 through May 27, 2014, the petitioner never reported any injury or inability to perform his job to his supervisor. Petitioner had not missed any time from work relating to his left shoulder. He had not sought any follow-up medical treatment for his left shoulder since December of 2013. He testified that he had not scheduled any future medical appointments, physical therapy or other conservative medical care.

Age

Petitioner was 49 years old at the time of this work accident. He was able to undergo successful surgical intervention, physical therapy and work conditioning. He continued to work in the heavy to very heavy physical demand level, without evidence of any increased risk of further injury. Petitioner also testified that he continued to exercise with various foundational and core exercises in order to maintain his physical fitness. The Arbitrator gives some weight to this factor.

Future Earnings Capacity

Petitioner's wage records and testimony reflect that he has continued to work his regular duty job and was earning the same amount as he did prior to the accident. In terms of the March 2, 2013 accident, Petitioner's anticipated length of career and anticipated future earnings may change and some weight is given to this factor.

Evidence of Disability Corroborated by Treating Records

The Arbitrator notes that the petitioner suffered an aggravation of a preexisting condition as a result of the March 2, 2013 accident. He received reasonable care and therapy and was released to return to work on a full duty basis, on March 22, 2013. Thereafter, petitioner underwent surgery on August 9, 2013 and underwent successful postoperative care and therapy.

In December of 2013, Petitioner was placed at MMI and authorized to continue working full duty without restriction, until a second accident. Based upon the foregoing, the Arbitrator finds that Petitioner made a good recovery following this work accident, but still suffered from some residual pain and limitations in regards to range of motion. These limitations affected his ability to perform some activities at work and daily living so that he did not perform them in the same manner as he did prior to his accident. Based upon the totality of the evidence, including the five factors set forth above, the testimony of Petitioner, the surgery performed and the impairment rating submitted by Respondent, the Arbitrator finds Petitioner suffered 12% loss use of a person as a whole as a result of his work-related accident.

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.

While Respondent relies on the opinion of Dr. Primus to deny causal connection, a 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; rather, it is whether the employer's conduct, in relying on the medical opinion to contest liability, is reasonable under all circumstances presented. *Continental Distributing v. Industrial Commission,* 98 Ill.2d 407 (1983).

It is well-settled that a respondent's good faith basis for disputing a claim will not subject it to an award of penalties and fees. The reliance on the opinions of a qualified §12 examiner may demonstrate a good faith denial of benefits. However, in order to rely on a §12 examiner, Respondent may not fail to provide relevant materials and simply accept a demonstratively flawed opinion. Here, Dr. Primus provided five bases for his opinion that Petitioner's shoulder injury and need for surgery were not related to his work activities. The fact that Petitioner had a degenerative arthritic condition of the left shoulder is not germane to the evaluation of causal connection. An aggravation of a preexisting condition as a result of a work accident or work activities is compensable under the Act.

Dr. Primus' statement that Petitioner had a longstanding diagnosis of degenerative arthritis prior to the accident is unsustainable. There is no evidence in the medical records or any testimony in the record that supports this conclusion. Petitioner was not diagnosed with arthritis in his left shoulder prior to March 2, 2013. Dr. Primus states that the March 2, 2013 incident caused a temporary exacerbation because Petitioner was pain free as of March 18, 2013. This is also not true. Petitioner presented to Dr. Leonard complaining of pain to the left shoulder on March 18, 2013 and requested a cortisone injection in an effort to return to work.

Dr. Primus' conclusion that the petitioner was engaging in a routine activity that did not expose him to an increased risk when he was injured, is not only incorrect but an improper opinion for a medical doctor. Dr. Primus was either not provided all of the relevant medical records or he ignored records from Drs. Leonard, Moisan and Monaco. Dr. Primus conceded that if he was provided this information, it may have affected his opinions. Furthermore, while requesting a causal connection opinion from Dr. Primus,

Respondent failed to provide a job description, list of job duties or a description or photograph of Petitioner's air pack.

The Arbitrator takes note that Dr. Monaco, Respondent's other §12 examiner, found Petitioner's injury to his left shoulder to be causally connected to his March 2, 2013 accident. The Arbitrator rejects the opinions of Dr. Primus as not persuasive nor supported by the evidence.

In light of this, it cannot be said that Respondent had a good faith basis for denying Petitioner's claim for benefits, based on the opinions of Dr. Primus. Respondent offered exhibits into evidence that belie its denial of this claim. For purposes of assessment of penalties and fees, the respondent bears the burden to show that it had a reasonable belief that the delay in paying petitioner his benefits was justifiable. *Gallegos v. Rollex Corp.*, 03 IIC 0173 (Mar. 10, 2003), *City of Chicago v. Indus. Comm'n*, 98 Ill.2d 407 (1983). The employer must show that the facts in its possession would lead a reasonable person to believe the employee is not entitled to prevail under the Act. *Cook County v. Indus. Comm'n,* 160 Ill.App.3d 825, 830 (1st Dist. 1987). Therefore, the Arbitrator finds the failure to provide benefits under the Act to be vexatious and unreasonable and orders penalties pursuant to Section 19(k) of the Act in the amount of $55,277.74 (50% of outstanding TTD of $35,248.68 + 50% of outstanding medical of $75,306.80).

In addition, a delay in payment of 14 days or more creates a presumption of unreasonable delay. 820 ILCS 305/19(l). In this case, Respondent has not met its burden to show that the delay in paying TTD was reasonable. Pursuant to Section 19(l), the Arbitrator further awards penalties in the amount of $10,000.00. Finally, the Arbitrator awards attorneys' fees pursuant to Section 16 of the Act in the amount of $10,000.00.

N. Is Respondent due any credit?

Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j) because the petitioner received his full salary during the time he was off for treatment of his injuries. The petitioner testified that he did not receive TTD therefore he used his sick and/ or vacation time and therefore, did receive the full amount of his salary.

§8(j) states Respondent is entitled to a credit "in the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under the Act, then such payments so paid to the employee from

any such group plan.... shall be credited to or against any compensation payment for temporary total incapacity for work."

Respondent argues that because the petitioner received his full salary, even though this was accomplished because the petitioner utilized his sick and vacation time, it is entitled to a Section 8(j) pursuant to Section 8(j)(2), which states in relevant part, "where an employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each payment...."

Respondent's argument would defeat the purpose of the Act and defeat the responsibility of the employee to pay TTD. An employer has the burden to establish its entitlement to a §8(j) credit. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Commission,* 949 N.E.2d 198, 350 Ill.Dec. 710 (1st Dist. 2011). The Arbitrator finds that Respondent has not met its burden of proof establishing entitlement to a §8(j) credit therefore that benefit is not awarded. Also, Respondent claims to have paid $23,580.58 in non-occupational disability benefits, which Petitioner disputes. There was no evidence submitted to support this claim therefore the Arbitrator cannot award this benefit.

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

Patrick Scott,
Petitioner,

vs. NO: 14 WC 19896

Village of Alsip, Fire Department ,
Respondent,

17IWCC0732

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, 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 18, 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: NOV 20 2017
o92817
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCOTT, PATRICK
Employee/Petitioner

Case# **14WC019896**

13WC024528

ALSIP FIRE DEPARTMENT
Employer/Respondent

17IWCC0732

On 10/18/2016, 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 0.47% 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:

0391 HEALY SCANLON LAW FIRM
KEVIN T VEUGELER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

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

Patrick Scott
13 WC 24528
14 WC 19896

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

Patrick Scott
Employee/Petitioner

Case # 14 WC 19896

v.

Consolidated case: 13 WC 24528

Alsip Fire Department
Employer/Respondent

17IWCC0732

An *Application for Adjustment 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 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. ☒ 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 _____

17IWCC0732

FINDINGS

On the date of accident, **May 27, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$94,111.68**; the average weekly wage was **$1,809.84**.

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

Respondent ***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 $70,277.22 for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of $70,277.22.

Respondent is entitled to a credit of **$44,951.39** and all benefits paid pursuant to PEDA, under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$1206.55**/week for **80 6/7** weeks commencing **5/27/14** through **12/14/15**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $70,277.22 for TTD previously paid.

Medical benefits

Respondent shall pay Petitioner reasonable and necessary medical services of **$124,532.00**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any and all medical services previously paid and all benefits paid by PEDA.

Nature and Extent

Respondent shall pay Petitioner permanent partial disability benefits of **$721.66**/week for **125** weeks because the injuries sustained caused the **25%** loss of the person as a whole based on loss of trade, 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.

17IWCC0732

Findings of Fact

The disputed issues in this matter are: 1) medical bills; 2) temporary total disability; 3) whether Respondent is due a credit; and 4) the nature and extent of Petitioner's injury. *See,* AX2.

Petitioner testified that on May 27, 2014, he was responding to a fire alarm when he again, injured his right shoulder. He was descending a set of stairs when he missed a step and attempted to grab the railing with his right arm. Petitioner noted immediate pain in his right shoulder. Accident, arising out of, and causal connection were stipulated to by the parties.

Later that day, Petitioner was evaluated at Mid-America Orthopedics by Dr. Michael Weisburger. Medical records received into evidence indicate Petitioner stumbled down stairs stretching his right arm. Dr. Weisburger performed an examination of Petitioner's right arm, noting pain and a decreased range of motion. He prescribed an MRI and referred Petitioner to Dr. James Leonard, for evaluation and treatment. A May 27, 2014 MRI of the right shoulder indicated a history of work-related trauma and was positive for full and partial thickness tears of the rotator cuff. PX2.

On May 29, 2014, Petitioner returned to Dr. Leonard, complaining of acute pain in his right shoulder. Dr. Leonard reviewed the May 27, 2014 MRI, noting two rotator cuff tears and recommended surgical repair of the right shoulder. PX3.

On June 13, 2014, Petitioner underwent right rotator cuff repair at Christ Hospital and was instructed to begin physical therapy. Petitioner continued to be evaluated by Dr. Leonard in June through September, 2014 and instructed to continue physical therapy.

On September 15, 2014, Petitioner returned to Dr. Leonard complaining of pain in the left shoulder, due to overuse because of the restrictions on the right. Dr. Leonard recommended additional therapy and continued the petitioner's "off work" status.

On October 27, 2014, Dr. Leonard noted Petitioner continued to have difficulty with overhead activities in physical therapy however, the petitioner was instructed to continue physical therapy. On December 8, 2014, Petitioner returned to Dr. Leonard complaining of right shoulder pain in physical therapy and with overhead activities. Dr. Leonard's exam noted inflammation in the right shoulder. Petitioner was instructed to continue physical therapy, placed on restrictions of no lifting greater than five (5) pounds and given a cortisone injection. Due to continued right shoulder pain, Dr. Leonard recommended a repeat MRI on January 12, 2015. PX3.

A January 22, 2015 MRI indicated some tendonitis of the right rotator cuff. On January 26, 2015, Dr. Leonard reviewed the January 22, 2015 MRI noting continued right shoulder pain; and recommended a repeat surgery to the right shoulder to address pain relief.
On April 14, 2015, Petitioner underwent a repeat rotator cuff repair at Christ Hospital and was instructed to renew physical therapy. PX4.

Petitioner's first post-operative visit was on April 23, 2015, when he was instructed to continue physical therapy and remain off work. PX3.

On April 8, 2015, Dr. John Stamelos performed an independent medical examination ("IME") of Petitioner, at the request of Respondent. Based on his review of the medical records, Dr. Stamelos found to medical and orthopedic certainty that Petitioner was permanently disabled as a firefighter/paramedic, based on his work-related right shoulder injury. PX13.

Petitioner testified that on May 21, 2015, the Pension Board of the Alsip Fire Department found him permanently disabled and awarded a duty disability pension as of May 25, 2015.

On May 27, 2015, Dr. Leonard noted Petitioner was retiring from the Alsip Fire Department and would begin teaching activities as a fire instructor. Dr. Leonard instructed Petitioner to continue physical therapy and remain off work. PX3.

Petitioner's next visit with Dr. Leonard was July 1, 2015, when Petitioner was instructed to continue physical therapy. On August 3, 2015, Petitioner returned to Dr. Leonard who noted that Petitioner was no longer performing high lifting labor work but was teaching. Petitioner was instructed to continue physical therapy and return to the clinic in six (6) weeks.

Petitioner returned as instructed on September 15, 2015, with continued pain. He was placed on likely permanent restrictions of no lifting, pushing, pulling, or carrying greater than five (5) pounds and instructed to continue a home exercise program and return in three (3) months' time.

On December 14, 2015, Petitioner returned as instructed and was noted to be at maximum medical improvement ("MMI"). Petitioner was instructed to return to the office in six months for continued evaluation.

Petitioner's last visit with Dr. Leonard was June 13, 2016. At that time, Dr. Leonard noted Petitioner had good and bad days, tired quickly and was selective in his activities. Petitioner was noted to continue his teaching activities along with working at a golf course one day a week. Petitioner was instructed to follow-up in one year.

Again, Petitioner testified that his employer required him to attend "fit for duty" exams by Dr. Terrence Moisan, which were received into evidence. Prior to May 27, 2014, Dr. Moisan's records do not note any issues or problems with Petitioner's right shoulder, nor any period that Petitioner was unable to perform his job duties as a firefighter/paramedic, due to a right shoulder injury. PX5.

Petitioner testified he is retired from the Alsip Fire Department due to the condition of his right shoulder. Currently, he is a firefighter/paramedic instructor for Moraine Valley Community College, in the Fire Science program. He continues to experience pain, lack of range of motion and weather sensitivity to his right shoulder. He continues to take Norco for pain.

Conclusions of Law

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

Petitioner submitted the following unpaid medical expenses related to his right shoulder without objection concerning reasonableness and necessity:

Exhibit 6 – Midwest Orthopedic Consultants: $74,076.00
Exhibit 7 – Advocate Christ Medical Center: $41,201.00
Exhibit 9 – Midwest Anesthesiologists: $9,255.00

Based on the above, the Arbitrator finds Respondent responsible for medical expenses of the above providers pursuant to the medical fee schedule; and Respondent shall be given a credit for any and all medical benefits previously paid.

K. What amount of compensation is due for temporary total disability?

Petitioner was unable to work from May 27, 2014 until he was placed at MMI on December 14, 2015. The Arbitrator finds that Respondent is responsible for temporary total disability benefits in the amount of $1206.55 per week for 80 6/7 weeks. Both parties have agreed that PEDA paid the petitioner through May 28, 2015.

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

The Arbitrator notes that nature and extent is at issue. Section 8.1(b) of the Act sets forth five factors which constitute the basis for the determination of the permanent partial disability level. Those factors are as follows:

1. The purported level of impairment;
2. The occupation of the injured employee;
3. The age of the employee at the time of the injury;
4. The employee's future earnings capacity; and
5. Evidence of disability corroborated by the treating medical records.

These five (5) factors were discussed in the consolidated case and in addition, the Arbitrator finds and concludes that as a result of the injury to Petitioner's right shoulder and subsequent two surgeries, Petitioner was unable to return to work as a firefighter/paramedic with the Alsip Fire Department. Dr. Stamelos confirmed that Petitioner was permanently disabled as a firefighter/paramedic. Based on the above, the Arbitrator finds Petitioner has suffered a loss of trade pursuant to §8(d)2 of the Act to the extent of 25% loss use of a person as a whole.

N. Is Respondent due any credit?

Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j). The Petitioner has agreed on its Request for Hearing, that Respondent has paid medical bills in the amount of $44,951.39 through its group medical plan. The Arbitrator awards the Respondent a credit in the amount of $44,951.39.

17IWCC0732

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
13WC25528 & 14WC19896
SIGNATURE PAGE

Signature of Arbitrator

October 18, 2016
Date of Decision

OCT 18 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 Causal connection To No CC-left knee	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anita Roman,

Petitioner,

vs. NO: 12 WC 30107

ABM Janitorial Services,

Respondent.

17IWCC0733

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-(knee), notice, temporary total disability, medical expenses, prospective medical care, 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 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 was a 53-year-old employee of Respondent, who described her job as a maintenance employee; the entire time working for Respondent. Petitioner is right hand

17IWCC0733

dominant. Petitioner speaks no English at all. Petitioner began working for Respondent May 2010. Petitioner's job duties included sweeping, mopping, cleaning desks, bathrooms, taking out garbage. She would clean equipment when it was to be cleaned. Petitioner had worked five days a week, eight hours per day for Respondent and the entire time she was on her feet. Petitioner had to lift/carry things over 20 pounds; full trash cans more. Petitioner often had to lift/carry things more than 20 pounds. She had to take out the garbage at 9:00am and there was always a lot of garbage to lift and take out. (It was noted that accident was stipulated to). On the date of accident August 17, 2012. Petitioner testified that the service elevator was occupied that day; she believed for remodeling. Petitioner stated that her supervisor told Petitioner and a co-worker to lift the service cart up through the escalator. Petitioner stated her co-worked was in front and about half way up the wringer for the mop bucket fell out. When they got to the top of the escalator the cart was stuck and she did not have room to get around the cart and the escalator kept taking her up and she fell as she could not get around the cart; she was trapped. She was finally able to get out of the way and get up and the supervisor came and asked how Petitioner was. Petitioner stated she reported that she was in a lot of pain but she was asked to finish the day so she did. Petitioner stated it was the co-worked who was finally able to lift the cart after it was stuck; the escalator was moving when it occurred. Petitioner testified when the cart became stuck she fell forward and she had pain in both knees-(mostly left bruising) and her low back.

- Petitioner received first medical treatment at MercyWorks as she was sent there by someone from Respondent-(initially 8/21/12); she went there about two times. She had been taken off work and given medications and told to ice her knee. Petitioner testified that she last worked for Respondent August 21, 2012. Petitioner then sought treatment on her own to Dr. Krishna Chunduri; August 27 through November 15, 2012. The doctor took Petitioner off of work and sent Petitioner for a low back MRI and two MRI's of her left knee and sent her for therapy for her back about 12 times, September 2012. Petitioner testified that Dr. Chunduri gave Petitioner an injection to her back and sent Petitioner to Dr. Gabriel Levi for her knee. Petitioner understood that Dr. Chunduri stopped treating her back then as he thought she had a problem with her heart. Petitioner had been under care of Dr. Levi regarding her left knee from November 21, 2012 and last saw the doctor June 12, 2015 and the doctor had prescribed surgery for her left knee and she wanted to have that surgery. Petitioner had no insurance coverage other than workers' compensation.

The Commission notes that accident was not disputed. Petitioner's testimony is unrebutted and supported with the treating medical records as to her back injury. Petitioner testified of the mechanism of injury consistent with her back injury, but the histories in medical records and reports are not consistent with that resulting in a knee injury. Other than a 2010 normal left knee

x-ray, there was no evidence of a prior knee condition and Petitioner's knee symptoms are shown in records, but Petitioner received no active left knee treatment until April 2014; over a year and a half after the accident. Petitioner's doctor, Dr. Levi, has suggested surgery for a torn meniscus based on his reading of the MRI. Respondent's examiner, Dr. Verma, opined Petitioner only suffered a contusion and no tear; he noted the mechanism of injury described would not be consistent with a meniscal tear and he testified he did not see a tear on the MRI. There is a question raised as to severity of Petitioner's pain complaints to Dr. Levi-(on the couple of visits she saw him) given she indicated to him she was not able to work or even leave her house, but Petitioner had been working at her other full time employment with Primrose Candy by her own testimony-(albeit she was not accurate as to dates). Clearly, evidence submitted by Respondent showed her employment at Primrose when she advised Dr. Levi she could not work with her severe pain. Dr. Verma in his report and testimony indicated that he was aware of the fact Petitioner was working. Further, Dr. Verma opinions are supported with the examination by Dr. Andersson September 4, 2012-(normal left knee exam. Maximum medical improvement) and the full duty release, by MercyWorks within weeks after her fall. The opinions of Dr. Verma appear to be more persuasive and supported in the record that Petitioner at worst suffered a left knee contusion type injury. Any left knee torn meniscus issue diagnosed by Dr. Levi, in light of the fact of no active treatment for over a year and a half after the fall accident, and the supported opinions by Dr. Verma and other records in evidence, is not shown to be related. The evidence and testimony finds Petitioner met the burden of proving a causal relationship regarding her back injury (herniated disc), but Petitioner failed to meet the burden of proving a causal relationship between the accident and her current left knee condition of ill-being and the Dr. Levi recommendation for surgery. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence-(regarding the knee), and, herein, reverses the Arbitrator's decision, finding that Petitioner failed to meet the burden of proving a causal connection related to her left knee condition of ill-being.

The Commission finds that Respondent did not argue the issue of notice. Regardless, the issue was stipulated to by the parties. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to timely notice of accident.

The Commission, with the above finding of no ongoing causal connection, regarding the left knee, warrants modification to deny the 2nd period of temporary total disability-(TTD)-(January 28, 2015-March 10, 2017). The TTD for August 21, 2012 through November 25, 2012 is affirmed. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and herein, denies TTD for any periods after November 25, 2012.

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The Commission, with the above finding of no ongoing causal connection, regarding the left knee, warrants modification to deny medical expenses after 2012 and further to deny all prospective medical care. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and, herein, reverses the Arbitrators decision to deny any and all medical expenses after September 2012, regarding back, and November 2012, regarding the knee, and to deny the requested prospective medical care regarding the left knee.

The Commission finds that this matter was heard under §19(b) of the Act, so any permanent partial disability determination is deferred for further hearing and presentation of evidence, for conditions of ill-being-(if any) causally related to the accident, to be presented before the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $317.02 per week for a period of 13-6/7 weeks-(August 21, 2012 through November 25, 2012)($4,392.99 total TTD), 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 medical expenses through November 25, 2012 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.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 20 2017
d-9/28/17
DLG/jsf
045

Stephen Mathis

Deborah Simpson

Dissent

I respectfully dissent from the majority decision and would affirm the Arbitrator's well reasoned decision in its entirety. Petitioner's testimony of the mechanism of injury was consistent with the histories in her medical records. Other than a 2010 x-ray (normal), there is no evidence of Petitioner having a prior knee condition. Although Petitioner received no active left knee treatment until April 2014, Petitioner's ongoing symptomology in regard to her knee is supported throughout the treating records. However, Respondent's Section 12 examiner, Dr. Verma, opined that Petitioner only suffered a contusion based upon the reported mechanism of the injury and his failure to observe a tear on the MRI. Petitioner's treater opined that she suffered a torn meniscus based upon his interpretation of the MRI and his objective findings on examination pursuant to multiple testing maneuvers he performed which Dr. Verma did not.

Petitioner's claim turns on credibility. Petitioner testified that she does not speak English and testified through a Spanish speaking interpreter. Although the medical histories provided by Petitioner are consistent in regard to the mechanism of injury and ongoing symptomology, there are inconsistencies with respect to when she was working and what job she was performing post accident in regard to her concurrent employer. The Arbitrator had the opportunity to observe Petitioner's demeanor and hear Petitioner's testimony live. After hearing petitioner's testimony, the arbitrator found Petitioner to be credible notwithstanding the inconsistencies in the records. The Arbitrator did an extensive analysis of the inconsistencies and provided an extensive explanation of her credibility findings. Ultimately, the basis of the majority's modification of the Arbitrator's decision is Petitioner's credibility or lack thereof. I would defer to the credibility finding of the trier of fact who had the opportunity to hear the Petitioner's testimony in person. Accordingly, I would affirm the Arbitrator's well-reasoned decision in its entirety.

David L. Gore

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

ROMAN, ANITA
Employee/Petitioner

Case# **12WC030107**

ABM JANITORIAL SERVICES
Employer/Respondent

17IWCC0733

On 3/29/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.90% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0347 MARSZALEK AND MARSZALEK
STEVEN A GLOBIS
120 W MADISON ST SUITE 801
CHICAGO, IL 60602

6020 GOLDBERG SEGALLA LLC
EMILY E BORG
311 S WACKER DR SUITE 2450
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)

ANITA ROMAN
Employee/Petitioner

v.

ABM JANITORIAL SERVICES
Employer/Respondent

Case # 12 WC 30107

Consolidated cases: D/N/A

17IWCC0733

An *Application for Adjustment 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 **03/10/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ 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. X Other **Is this claim ripe for a permanency determination?**

FINDINGS

On the date of accident, **8-17-12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to a left hip and low back condition that required care, including one injection, through October 18, 2012. The Arbitrator further finds that Petitioner established causation as to a left knee condition that requires surgery, as recommended by Dr. Levi, and that remained unstable as of the hearing.

In the year preceding the injury, Petitioner earned **$24,727.56**; the average weekly wage was **$475.53**.

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

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

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

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

ORDER

Medical benefits

The Arbitrator declines to award some of the medical expenses claimed by Petitioner since they relate to a different injury, i.e., the right elbow injury that was the subject of a separate, now settled, claim against another employer. In the instant case, the Arbitrator awards only the following medical expenses: 1) Illinois Orthopedic Network, $1,844.71, per the fee schedule; 2) Mid-City Spine and Ortho, fee schedule charges of $459.74; 3) Gold Coast Surgical Associates, fee schedule charges of $1,020.50; 4) Metro Anesthesia Consultants, fee schedule charges of $1,829.66; 5) JMS Supplies, fee schedule charges of $2,438.53; 6) Advantage Imaging, LLC, fee schedule charges of $2,326.27; 7) Orthopedic and Rehabilitation Centers, fee schedule charges of $1,949.97; 8) IWP, $184.64; 9) Infinite Strategic Innovations, $57.15; and 10) RX Development Associates, $9,069.11. See pages 14-15 of the attached decision for further details.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $317.02/week during two intervals: 8/21/12 through 11/25/12 (13 6/7 weeks) and 1/28/15 through 3/10/'17 (110 2/7 weeks), pursuant to Section 8(b) of the Act. These two intervals total 124 1/7 weeks.

Prospective Care

The Arbitrator does not view this case as ripe for a permanency determination, as argued by Respondent. Respondent shall authorize and pay for prospective care in the form of the left knee surgery recommended by Dr. Levi.

Dismissal of Duplicate Filing

At the beginning of the hearing, Petitioner voluntarily dismissed a duplicate foiling, 14 WC 19035.

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

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

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

Molly C Mason

Signature of Arbitrator

3/29/17
Date

MAR 29 2017

Anita Roman v. ABM Janitorial Services
12 WC 30107

Summary of Disputed Issues

The parties agree Petitioner sustained an accident while working for Respondent on August 17, 2012. The disputed issues include causal connection, medical expenses, two intervals of temporary total disability and whether the case is ripe for a permanency determination. Petitioner proceeded pursuant to Sections 19(b) and 8(a), seeking prospective care in the form of a left knee surgery recommended in 2015. Respondent maintains Petitioner has reached maximum medical improvement. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she does not speak English. She testified through a Spanish-speaking interpreter.

Petitioner testified she started working as a maintenance employee for Respondent in May 2010. She was still working in this capacity as of her August 17, 2012 accident. Her duties included sweeping, mopping, taking out garbage and cleaning bathrooms, desks and equipment. She worked five days a week, eight hours per day. She was on her feet during her entire shift. She was required to lift various items, including garbage that could weigh more than 20 pounds.

Petitioner denied having any left knee or low back problems before the accident. Records and bills in PX 2 and RX 10 show, however, that she underwent bilateral knee X-rays on March 6, 2010 secondary to "chronic pain." The radiologist interpreted the right knee films as showing mild to moderate degenerative changes. He described the left knee films as negative. PX 2. RX 10, p. 1.

Records in RX 18 reflect Petitioner began working for Primrose Candy in October 1998 and sustained a right elbow injury while working for this company on July 12, 2012. The Arbitrator addresses the treatment Petitioner underwent for this injury because it overlaps with some of the treatment rendered in the instant case. After July 12, 2012, Petitioner initially underwent care at Concentra. RX 18, pp. 27-39, 44. She then saw Dr. Chunduri on August 27, 2012 (with the doctor taking her off work) and underwent therapy with Dr. Ather thereafter. She underwent a right elbow MRI on September 4, 2012, started seeing Dr. Wiesman on November 5, 2012 (with the doctor prescribing a splint, EMG and light duty) and underwent a Section 12 examination by Dr. Heller on November 19, 2012. Dr. Heller found Petitioner to be at maximum medical improvement and capable of full duty. Dr. Wiesman continued to recommend care and impose various restrictions after Dr. Heller's examination. Dr. Weisman administered a right elbow injection on December 3, 2012 and recommended a lateral epicondylectomy on January 14, 2013. RX 18, p. 52.

With respect to the instant case, Petitioner testified the service elevator at work [for Respondent] was not available on August 17, 2012 due to remodeling. On that date, a supervisor directed her and a co-worker to transport a service cart via an escalator. As she and the co-worker were transporting the cart, while riding up the escalator, the wringer section of the mop bucket fell off. She picked up this section. Near the top, the cart became stuck in the escalator but the escalator continued to move. Petitioner could not maneuver around the stuck cart and fell forward. Petitioner testified she felt pain in her lower back and both knees after she fell. Her left knee hurt more than her right. A supervisor came to the scene and asked if she could finish her shift, which she did.

Petitioner testified she first underwent treatment on August 21, 2012, at which point she went to MercyWorks at Respondent's direction. She testified she did not return to work after finishing her shift on the day of the accident. Between that day and August 21st, she took over the counter pain medication.

The MercyWorks records of August 21, 2012 set forth a consistent history of the accident. The examining physician, Dr. Patel, noted that Petitioner reported falling and landing on both knees the previous Friday while trying to dislodge a cleaning cart on a moving escalator. He also noted that Petitioner reported developing left hip pain and increased knee pain over the weekend. He stated that Petitioner denied any prior left hip or knee problems.

Dr. Patel described Petitioner's gait as antalgic. On knee examination, he noted tenderness to palpation in the patellar area of both knees, mild swelling over the left knee and a small ecchymosis on the medial portion of the left knee. On pelvic examination, he noted tenderness to palpation over the left anterior superior iliac spine and normal flexion and extension of the left hip joint. He indicated Petitioner was able to bear full weight on her left and right legs.

Dr. Patel diagnosed a left hip contusion and bilateral knee contusions. He directed Petitioner to start taking Naprosyn and discontinue the Motrin she had been taking at home. He took Petitioner off work and instructed her to return in one week.

On August 27, 2012, Petitioner saw Dr. Chunduri, a physician of her own selection. Under cross-examination, Petitioner clarified that a former attorney referred her to this physician.

Dr. Chunduri's note of August 27, 2012 sets forth a consistent history of the work accident. The doctor indicated that Petitioner complained of severe pain, burning, numbness and tingling radiating from the left hip down to the left ankle. He noted that Petitioner had not yet started physical therapy.

Dr. Chunduri described Petitioner's gait as antalgic. On examination, he noted positive straight leg raising on the left only, positive lumbar tenderness on the left from L4 to S1, knee extensions of 3/5 on the left versus 5/5 on the right and decreased sensation to light touch of the left leg.

Dr. Chunduri diagnosed left lumbar radiculitis. He causally linked Petitioner's symptoms to the work accident. He prescribed a lumbar spine MRI as well as physical therapy and medication. He directed Petitioner to stay off work. PX 2.

Petitioner returned to MercyWorks on August 28, 2012, as directed, and again saw Dr. Patel. The doctor described Petitioner's right knee as feeling much better. In terms of Petitioner's complaints, he noted mild left knee pain, "pain in left hip with radiation down left leg" and no back pain.

Dr. Patel described Petitioner's gait as slightly antalgic. On right knee re-examination, he noted a full range of motion and minimal tenderness to palpation over the patella and no joint instability. On left knee re-examination, he noted mild tenderness to palpation over the patella, ecchymosis over the medial knee and a full range of motion with mild pain. On pelvic re-examination, he noted tenderness to palpation over the left ASIS and pain with left leg abduction, flexion and extension.

Dr. Patel obtained X-rays of the left femur and pelvis. He described the films as negative for fracture. [The X-ray reports are not in evidence.] He diagnosed left hip and left knee contusions. He prescribed physical therapy, ice/heat treatments and continued Naproxen or Ibuprofen. He continued to keep Petitioner off work but indicated she could resume full duty on September 4 and 12, 2012 [his August 28, 2012 note states both dates, in separate places.] He directed Petitioner to return to MercyWorks on September 12, 2012. PX 1.

A MercyWorks progress note dated August 29, 2012 reflects that an employee called Petitioner to ask about her selected therapy location, with Petitioner indicating she had not yet found one. A subsequent note shows an "open referral" to Accelerated. PX 1.

A MercyWorks "work discharge status sheet" in RX 18 (the subpoenaed records from Primrose Candy) reflects Petitioner was released to full duty as of September 4, 2012. RX 18, p. 41.

From August 29, 2012 through November 25, 2012, Petitioner received temporary total disability benefits in the amount of $235.80 per week from Primrose Candy in connection with her right elbow claim [12 WC 30108.] RX 17.

Petitioner began a course of care with Dr. Ather at MidCity Spine and Ortho Rehabilitation on August 30, 2012. The doctor recorded a consistent history of the August 17, 2012 work accident. He noted that Petitioner complained of constant left knee pain, rated 8-10/10, along with numbness and tingling. He further noted that Petitioner had seen a doctor at MercyWorks.

Dr. Ather indicated he performed a variety of knee, hip, pelvic and lumbar tests. With respect to the left knee, he noted negative Apley's and McMurray's testing but a reduced range of extension and flexion. He described left femoral nerve traction testing as positive. On hip examination, he noted reduced left hip flexion and extension. He indicated Petitioner was unable to abduct her hip due to pain. PX 3.

On September 4, 2012, Petitioner underwent an initial physical therapy evaluation at Accelerated Rehabilitation. The evaluating therapist wrote to Dr. Patel on that date, acknowledging the doctor's referral and recommending six weeks of therapy. The therapist's letter sets forth a consistent history of the work accident and reflects Petitioner complained of 8/10 pain throughout her entire left leg. The therapist also noted complaints relative to the left hip. Petitioner did not return to Accelerated Rehabilitation thereafter and was discharged from therapy on October 18, 2012. RX 13, pp. 15-17.

Petitioner underwent lumbar spine and left knee MRIs on September 5, 2012. [Both MRI reports show Dr. Chunduri to be the prescribing physician.] The radiologist interpreted the lumbar spine MRI as showing disc bulging at L4-L5 and a 4 mm central disc herniation with annular tearing and no stenosis at L5-S1. With respect to the left knee, he noted an intra-substance mucoid tear of the posterior horn of the medial meniscus. He described the lateral meniscus and collateral and cruciate ligaments as normal. PX 2.

Petitioner returned to Dr. Chunduri on September 6, 2012, with the doctor noting ongoing complaints of hip pain and pain radiating from the low back down the left leg to the ankle. His examination findings were unchanged. He noted the results of the lumbar spine MRI but made no mention of the left knee MRI. He opined that Petitioner's radicular pain was due to the L5-S1 disc

herniation. He recommended two more weeks of physical therapy and medication, to be followed by an injection, if necessary. He directed Petitioner to remain off work. PX 2.

Petitioner also saw Dr. Ather on September 6, 2012, with the doctor noting persistent left knee and low back complaints. The doctor applied kinesio tape to Petitioner's left knee and instructed Petitioner how to perform various exercises. PX 3.

Petitioner also saw Dr. Ather (or his associate, Dr. Dzielawski) on September 7, 10, 11 and 12, 2012. PX 3.

A MercyWorks note dated September 12, 2012 reflects that Petitioner was a "no show" on that date. PX 2.

Petitioner saw Dr. Ather (or his associate, Dr. Dzielawski) on September 17, 18, 19, 24, 25 and 26, 2012. PX 3.

On September 27, 2012, Dr. Chunduri noted that Petitioner described her radiating pain as having worsened over the preceding two weeks. His examination findings were unchanged. He recommended continued therapy and medication along with a left L5 and S1 transforaminal epidural steroid injection. PX 2.

Dr. Chunduri administered the left L5 and S1 transforaminal epidural steroid injection on October 11, 2012.

Petitioner returned to Dr. Chunduri on October 18, 2012. The doctor noted that Petitioner reported some improvement of her lower back pain secondary to the injection but was still experiencing numbness and tingling going down her left thigh. He also noted that Petitioner "now feels the pain in her knee is more pronounced as compared to prior to the injection." His lumbar spine examination findings were unchanged. He opined that the left knee symptoms, "which [Petitioner] mentioned on initial presentation," appeared to be a separate issue from the paresthesias she was experiencing secondary to the radicular symptoms. He recommended a left knee MRI (expressing no awareness that Petitioner had already undergone this study on September 5, 2012) and a repeat L5-S1 injection. He continued to keep Petitioner off work. PX 2. RX 18, p. 49.

On October 25, 2012, Petitioner returned to Dr. Chunduri and reported improvement of her low back and left leg symptoms. She also reported "an episode of chest pain for approximately four hours" as well as shortness of breath over the preceding week. The doctor's examination findings were unchanged. He recommended she discontinue therapy and further treatment, pending the results of an EKG. He directed Petitioner to stay off work and return in one week. PX 2.

Petitioner underwent a second left knee MRI on November 6, 2012, at a different facility. The interpreting radiologist, Dr. Pai, noted intra-substance degeneration signal within the posterior horn of the medial meniscus and the anterior horn of the lateral meniscus. He saw no detectable tear. He also noted "fissuring in the articular surface of the lateral femoral condyle." PX 2.

Petitioner also underwent an EKG and right upper extremity MRI on November 6, 2012. PX 2.

On November 15, 2012, Dr. Chunduri advised Petitioner that her EKG results were abnormal. He also noted more episodes of chest pain associated shortness of breath. He recommended a cardiac stress test and indicated he would provide no further treatment until Petitioner had been cleared cardiovascularly for ischemia. He continued to keep Petitioner off work. PX 2.

On November 19, 2012, Primrose Candy's Section 12 examiner, Dr. Heller, issued a report indicating Petitioner complained of "multiple areas of pain," including pain in her back and knee, but that he told her his examination was limited to the right elbow and shoulder. Dr. Heller diagnosed a posterior elbow contusion and found no need for additional treatment. He further found Petitioner capable of resuming full duty. RX 11, pp. 46-48. [As noted earlier, Petitioner continued seeing Dr. Weisman for her right elbow after November 19, 2012, with the doctor imposing restrictions and recommending a right lateral epicondylectomy in January 2013. RX 18, p. 52.]

Petitioner saw Dr. Levi, an orthopedic surgeon, on November 21, 2012. The doctor noted that Petitioner reported falling at work while on an escalator, injuring her left knee. He also noted that Dr. Chunduri was treating her for lumbar radiculopathy. He stated that Petitioner denied having any left knee pain before the work fall.

On left knee examination, Dr. Levi noted a significantly tender medial joint line to palpation, a positive McMurray to the medial meniscus, a range of motion from 0 to 115 degrees with significant pain past 90 degrees, stability to varus/valgus stress testing and negative Lachman's and anterior drawer testing.

Dr. Levi indicated he reviewed a knee MRI. He did not identify the date of this MRI. He indicated the MRI showed a medial meniscus tear and no arthritic changes. He recommended a left knee arthroscopy and indicated he wanted to see a left knee X-ray. He recommended that Petitioner undergo therapy and remain off work pending the knee surgery. He also noted that Petitioner would need to be cleared by a cardiologist before undergoing the surgery. PX 4.

On November 21, 2012, counsel for Primrose Candy sent Petitioner's former counsel a letter referencing Dr. Heller's finding of maximum medical improvement and directing Petitioner to report to work on Monday, November 26, 2012. RX 11, p. 45.

Petitioner testified she resumed working for Primrose Candy on November 26, 2012. Under cross-examination, she testified she did not resume her former machine operator duties on this date. Instead, she was assigned to a job that allowed her to sit at times. [The Arbitrator again notes that Dr. Wiesman continued to impose restrictions following Dr. Heller's examination.] Petitioner further testified she stopped working for Primrose Candy in January 2014.

At Respondent's request, Petitioner saw Dr. Andersson, an orthopedic surgeon, on January 22, 2013 for purposes of a Section 12 examination. The doctor's January 22, 2013 report sets forth a consistent history of the work accident and subsequent care. The doctor noted that Petitioner reported developing shortness of breath after an epidural injection and remained off work. He also noted complaints of thoracic and lower back pain, local pain over the left hip and knee and pain and numbness going down the front of the left leg from the back, down towards the foot. He indicated that Petitioner denied having back pain in the past.

Dr. Andersson described Petitioner as walking with a slightly left-sided antalgic gait and standing and walking "tilted to the right by about 5 degrees." On examination, he noted a limited range of lumbar spine motion, negative straight leg raising bilaterally (but with some pain in the left knee with leg elevation) and inconsistent weakness of the left foot. He described non-organic physical signs as negative.

Dr. Andersson noted that Petitioner did not bring any radiographic studies to the appointment. While it seemed to him that Petitioner had recovered from her accident by September 4, 2012, when she was released to work, he expressed a desire to review the MRI before responding to any specific questions. RX 2.

Dr. Andersson issued an addendum on February 14, 2013, after reviewing the lumbar spine MRI of September 5, 2012. He interpreted this study as showing "evidence of degenerative changes at L5-S1 with a small annular tear and central bulge, which are both related to [Petitioner's] underlying degenerative condition and not to an accident such as the one [Petitioner] described."

Dr. Andersson noted that, while Petitioner voiced knee and hip symptoms after the accident, "she did not have initial complaints from the back." He stated Petitioner "appears to have recovered from the consequences of the accident by September 4, 2012, when she was advised to return to work." He found the treatment through September 4, 2012 to have reasonable and related to the accident. He did not see a causal connection between the accident and Petitioner's back complaints. He found Petitioner capable of working, specifically referencing job duties outlined in a cover letter he received. RX 3.

A letter of April 4, 2013 in the subpoenaed Primrose Candy documents reflects that Petitioner remained on restricted duty for that company as of that date, with the administrative director contacting a physician (presumably Dr. Weisman) to ask him to "lift her light duty status" so that she could work full-time despite business being slow. Attached to the letter is a description of the job Petitioner performed "at time of her elbow injury," i.e., as of July 12, 2012. The description reflects that Petitioner operated a S.W.T. machine at that time and was required to "bend and stand throughout the shift." The letter does not contain any description of the light duty Petitioner was then performing.

At Respondent's request, Petitioner saw Dr. Verma, an orthopedic surgeon, for a Section 12 examination on June 3, 2013. The doctor recorded a consistent account of the work accident. He noted that Petitioner denied being offered transport to an Emergency Room after the accident. He indicated that Petitioner complained of pain from her buttock region into the anterior thigh and down the anterior aspect of the left leg into the left foot. He noted that Petitioner reported experiencing only temporary relief following an epidural injection. He stated that Petitioner was "no longer employed by the same firm but was now working in another position" that required her to stand the entire day, filling boxes with candy.

Dr. Verma indicated he reviewed records from MercyWorks and Dr. Chunduri, along with the two left knee MRI reports, Dr. Levi's note of November 21, 2012 and Dr. Andersson's report and addendum.

Dr. Verma indicated that Petitioner denied any past history of knee injury.

Dr. Verma described Petitioner's gait as deliberate but non-antalgic, with no decrease in stance time. He indicated Petitioner was able to get on and off the examination table without difficulty. On knee examination, he noted no effusion, "diffuse pain with palpation throughout the left lower extremity, including left thigh, knee, tibial region and ankle," full left knee extension with flexion to 110 degrees, compared with 120 on the opposite side, diffuse pain to the medial and lateral aspects of the knee without localization specifically to the joint line, normal mediolateral patellar translation with no apprehension, negative Lachman and anterior drawer testing and no varus or valgus instability. On hip examination, he noted a normal range of motion but with a complaint of diffuse anterior thigh pain and the ability to perform straight leg raising.

Dr. Verma interpreted the September 5, 2012 left knee MRI images as showing a small effusion, some early articular disease involving the patellofemoral and lateral compartments, intrasubstance signal on the medial side, but no meniscal tear, and no cruciate or collateral ligament abnormalities.

Dr. Verma obtained left knee X-rays. He interpreted the films as showing overall maintenance of the tibiofemoral compartments and trace peripheral osteophyte formation, particularly in the lateral compartment.

Dr. Verma diagnosed a "left knee contusion status post fall." He indicated he saw no indication of meniscal pathology related to the fall. He found Petitioner to have reached maximum medical improvement with regard to the left knee. He saw no indication for further knee care, including surgery. Based on Petitioner's reporting that she was performing a full-time standing position, along with the objective findings, he saw no need for work restrictions relative to the left knee.

Petitioner next underwent accident-related care on July 17, 2013, when she returned to Dr. Levi. The doctor noted that Petitioner was "unable to fully extend the [left] knee without significant excruciating pain." He also noted an effusion, significant medial and lateral joint line tenderness, pain with McMurray's testing, stability to varus/valgus stress testing and a range of motion from 10 to 100 degrees. He indicated he could get the left knee to 0 degrees but, in so doing, Petitioner "nearly jump[ed] off the table due to the pain." On right knee examination, he noted a full and painless range of motion from 0 to 120 degrees.

Dr. Levi took issue with Dr. Verma's examination findings and opinions. He described the doctor's findings of no localized knee symptoms as a "completely different exam" than his own that day. He disagreed with Dr. Verma's finding of maximum medical improvement. Referencing a September 2012 MRI, he noted a medial meniscus tear. He indicated the tear was "described as mucoid degeneration" but that Petitioner's symptoms correlated with a medial meniscus tear. He described left knee X-rays as showing only mild arthritic changes and a well-maintained joint space. He went on to state that the September 2012 MRI, which was performed in "very close proximity to the injury," showed an effusion and "an injured knee does have an effusion." He found it very reasonable to treat Petitioner via a left knee arthroscopy. He injected Petitioner's left knee with Lidocaine and Depo-Medrol. He recommended that Petitioner stay off work and return to him in one month to see whether the recommended surgery would be approved. He described the injection as both diagnostic and therapeutic. PX 4.

Records in RX 9 reflect that Petitioner underwent left knee treatment at Presence St. Elizabeth Hospital's Emergency Room on February 27, 2014. A cover sheet reflects a complaint of left knee pain. It also reflects that Petitioner reported working full-time for "Prince Rose" [sic] Candy. RX 9, p. 2. The

records do not set forth any history or examination findings. Left knee X-rays demonstrated no evidence of fracture, dislocation or effusion and "minimal tricompartmental degenerative change, with possible intraarticular loose body." RX 9, p. 3.

Petitioner returned to Dr. Levi on April 4, 2014, having last seen him on July 17, 2013. Dr. Levi revisited the work accident in his note of that date, indicating that Petitioner did not go to the Emergency Room on the day of the accident but filed a report that day and "was given extra help to complete the day's work." He noted that Petitioner rated her current left knee pain at 9/10. He also noted that Petitioner complained of back pain since the accident and rated her current back pain at 6-8/10, depending on her activity level. He stated that Petitioner described the July 2013 left knee injection as providing only one month of relief.

On left knee examination, Dr. Levi noted a mild effusion, no erythema, significant medial joint line tenderness, no tenderness to palpation along the medial or lateral collateral ligament or along the patella or patellar tendon and a range of motion from 5 to 115 degrees. He indicated that McMurray's testing caused "pain on medial meniscus." He obtained left knee X-rays. He described the standing views as showing a well-maintained joint space. He again recommended a left knee arthroscopy. He prescribed Tramadol. Regardless of the surgical recommendation, he released Petitioner to full duty. PX 4. RX 6, p. 22.

Petitioner returned to Dr. Levi on May 2, 2014. The doctor noted that Petitioner reported taking the Tramadol but still experiencing severe left knee pain. His examination findings were essentially unchanged. He described McMurray's testing as positive for a lateral meniscus tear, noting "pain associated with a palpable clunk."

Dr. Levi stated that, while he had recommended full duty at the last visit, Petitioner could not clean bathrooms and offices. He took Petitioner off work and again recommended therapy pending the previously prescribed left knee arthroscopy. He prescribed Mobic and Tramadol. PX 4. RX 6, pp. 13-17.

On May 30, 2014, Dr. Levi indicated that Petitioner reported feeling slightly depressed due to her reduced activity level. He prescribed Mobic and continued to keep Petitioner off work pending the prescribed surgery. PX 4.

Over the next year, Dr. Levi continued to see Petitioner on a monthly basis.

A letter in RX 18 reflects that Petitioner last worked for Primrose Candy on January 27, 2015 and then began a 12-week FMLA leave. RX 18, p. 23. Petitioner also saw Dr. Levi on January 27, 2015, with the doctor again recommending she undergo left knee surgery and stay off work.

On March 20, 2015, Dr. Levi noted that Petitioner had developed a flexion contracture of the left knee. He again recommended left knee surgery and kept Petitioner off work.

On May 13, 2015, Alouise Gredell of Primrose Candy sent Petitioner a letter "recapping" a meeting held with Petitioner earlier that day. Gredell indicated Petitioner last worked for Primrose Candy on January 27, 2015, exhausted her FMLA leave on April 21, 2015, and would be considered a "voluntary quit" as of May 18, 2015 if not released to unrestricted duty as of that date. RX 18, p. 24.

On May 15, 2015, Dr. Levi prescribed Tramadol for pain, noting that Petitioner was "still awaiting approval for surgery." On June 12, 2015, he directed Petitioner to "follow up when surgery is approved," noting he had "no other way to help her." PX 4. RX 18, pp. 56-58.

Dr. Verma, Respondent's Section 12 knee examiner, testified by way of evidence deposition on December 21, 2016. RX 5. Dr. Verma testified he is board certified in orthopedic surgery and holds a certificate of added qualification in sports medicine. RX 5 at 5. He performs approximately 250 knee surgeries per year. RX 5 at 5-6. He also performs medical-legal work, including independent medical examinations. RX 5 at 6. He performs 5 to 7 such examinations per week. This constitutes less than 5% of his overall practice. RX 5 at 6.

Dr. Verma acknowledged he does not independently recall Petitioner. RX 5 at 6. He identified Verma Dep Exh 2 as an accurate copy of the report he generated after he examined Petitioner on June 3, 2013. Petitioner reported injuring herself at work on August 17, 2012 when she fell forward while using an escalator to transport a cleaning cart. Petitioner explained the cart got stuck, causing her to fall. Petitioner indicated she landed on the anterior aspects of both knees. RX 5 at 7. She complained of pain from her buttock to her anterior thigh and left leg and foot. She reported deriving only temporary relief from a cortisone injection in her back. According to Dr. Verma, she also reported working in a different position, packaging candy, as of the examination. She stated that Dr. Levi was recommending left knee surgery. RX 5 at 8. She told him her attorney referred her to Dr. Levi. RX 5 at 8. She denied having any knee injuries before the work accident. RX 5 at 9. She did not mention any diagnosis of chronic knee pain from 2010. Nor did she mention any left knee X-rays that were taken before 2012. RX 5 at 9.

Dr. Verma testified he is not sure whether Petitioner was still on the escalator when she fell but he understands she fell forward basically onto her hands and knees, "impacting her knees on the floor, the corner of the escalator." RX 5 at 8.

Dr. Verma testified he reviewed records from MercyWorks, Accelerated Rehabilitation and Mid City Spine and Orthopaedics, along with reports concerning knee and low back MRIs performed on September 5, 2012 and November 6, 2012.

Dr. Verma described Petitioner as obese and walking with a deliberate gait. The term "deliberate gait" refers to a shuffle or slow walk with no antalgic, or decreased weight bearing, component. RX 5 at 10. On examination, Petitioner complained of diffuse pain in her entire left leg with no localization of the joint lines. The range of motion was diminished only with respect to pain. The patellar, neurological and stability examinations were normal. RX 5 at 11.

Dr. Verma testified that the September 5, 2012 left knee MRI showed degenerative changes in both the articular cartilage and meniscus without tearing. X-rays performed in his office showed no acute findings with mild osteophyte formation, again consistent with degenerative changes. RX 5 at 11-12. The X-ray findings were "not uncommon" for a woman of Petitioner's age. RX 5 at 12.

Dr. Verma testified that the work fall resulted in a left knee contusion. He described Petitioner's current complaints as diffuse, non-anatomic and unrelated to the work fall. RX 5 at 12.

Dr. Verma testified he disagrees with Dr. Levi's diagnosis of a meniscal tear. An impact to the front of the knee, such as Petitioner described, is not a consistent mechanism for such a tear.

Moreover, Petitioner's complaints were diffuse and not localized to her knee or the medial aspect of the knee. The MRI images showed degenerative changes with no frank meniscal tear. RX 5 at 13.

Dr. Verma testified he sees no need for knee surgery, based on the MRI and Petitioner's presentation. Anyone with diffuse pain throughout the leg has a poor prognosis when it comes to knee surgery. RX 5 at 14.

Dr. Verma testified he saw no need for restrictions with respect to the work accident. The accident caused a contusion which would have resolved within twelve weeks. The fact that Petitioner reported performing a job that required her to stand all day was certainly consistent with his other opinions. RX 5 at 15.

Dr. Verma testified that the initial treatment, namely the visits to MercyWorks and the therapy performed at Accelerated Rehabilitation, was reasonable and appropriate with respect to the accident. RX 5 at 16.

Dr. Verma opined that Petitioner is at maximum medical improvement. RX 5 at 16.

Under cross-examination, Dr. Verma testified he generated only one report, namely the report dated June 3, 2013. About 80% of the examinations he performs are for respondents. RX 5 at 17. The decreased range of left knee motion and the medial and joint line tenderness noted at Accelerated Rehabilitation are "non-specific findings." These findings could be consistent with a meniscal tear, among other things. RX 5 at 17-18. He disagrees with the radiologist's interpretation of the September 5, 2012 MRI. An intrasubstance mucoid tear is a "degeneration within the meniscus, not a tear." The radiologist misinterpreted the findings. A tear is a signal abnormality that extends to one of the articular surfaces. Intrasubstance tears, in contrast, are degenerative and generally not pain producing. RX 5 at 18-19. The second MRI, from November 2012, showed fissuring of the articular surface of the lateral femoral condyle. Such fissuring is "not necessarily" consistent with a traumatic injury. Fissuring in Petitioner's age group is degenerative. RX 5 at 19. It is possible for trauma to aggravate fissuring. RX 5 at 19. It is also possible for fissuring to produce pain and swelling. RX 5 at 20. He reviewed the images of the September 5, 2012 MRI but not the November 2012 images. RX 5 at 20. The images he reviewed revealed minimal suprapatellar effusion, or fluid. This finding is non-specific but it could be consistent with a knee injury. RX 5 at 20. Effusion that persists more than ten weeks after an injury is non-specific and has no significance. RX 5 at 20. He elicited tenderness over Petitioner's medial joint line on examination but the problem is that Petitioner "was tender everywhere." Dr. Levi noted positive McMurray's testing. A positive McMurray can be indicative of a meniscal tear but the examination has to be taken into context. RX 5 at 21. Petitioner had pain no matter what he did with her leg. Additionally, McMurray's does not necessarily produce pain. It is an actual snapping of the meniscus related to a displaced meniscal fragment. There is no evidence of such a fragment on MRI. RX 5 at 22. Dr. Levi did not indicate whether he noted snapping or not. RX 5 at 22. Even if a doctor notes positive McMurray testing and sees a tear on MRI, "you need more information" to determine whether someone has a meniscal tear. He did not perform McMurray's testing or Apley testing. Nor did he take any measurements to check for atrophy. RX 5 at 24. The effusion on the September 5, 2012 MRI is consistent with a contusion. Hypothetically, a meniscal tear can cause a contusion. RX 5 at 25. The degree of effusion in a particular patient can vary, depending on the amount of activity or weight bearing. RX 5 at 25. The intrasubstance signal prompts him to conclude there was no meniscal tear since that is indicative of underlying degenerative disease. RX 5 at 27. Reasonable treatment for a patient with such an MRI finding, a small effusion, reduced knee flexion, joint line tenderness and

positive McMurray testing would consist of weight loss, anti-inflammatory medication and activity reduction. RX 5 at 27-28.

On redirect, Dr. Verma testified he measures girth only if there is visible atrophy of the leg, which was not apparent in this case. McMurray's and Apley testing were "irrelevant" here because, no matter what maneuvers he performed, Petitioner complained of pain. RX 5 at 28.

Under cross-examination, Petitioner acknowledged finishing her workday on August 17, 2012. She denied working the following day and indicated she took over the counter medication over the weekend, before going to MercyWorks. She complained of back pain at MercyWorks but did not undergo back X-rays or care. She could not recall whether she returned to MercyWorks on September 12th, after being released to full duty. A former attorney referred her to Dr. Chunduri. She did not have left knee pain before the accident. She did not recall seeing any doctor for her left knee in March 2010. Nor did she recall being diagnosed with chronic knee pain at that time. She never underwent any low back care before the August 17, 2012 accident. Dr. Andersson told her that her MRI was normal. She saw no doctors for her knee between November 2012 and July 2013 because no one wanted to treat her. After seeing Dr. Levi in July 2013, she next saw him in April 2014. At that point, she began seeing Dr. Levi on a monthly basis until 2015. If her records from Primrose Candy show many hours of work in 2014, the records are wrong. She recalled working for Primrose Candy only through January 2014. She started out as a machine operator at Primrose Candy but, after her July 2012 accident, returned to a lighter job that allowed her to sit at times. She denied being terminated by Primrose Candy in May 2015. She acknowledged settling her claim with Primrose Candy. She received temporary total disability benefits from that company between August 29 and November 25, 2012. She has not worked anywhere since leaving Primrose Candy. She has not cleaned houses or apartments since 2015. She never worked at a building located at 210 North Wells. She has not seen Dr. Levi for almost two years. She does not take medication currently. She did have health insurance through Primrose Candy but cannot recall whether she still had this coverage in 2015. She fell and bruised her knee at some point after the accident. Her sons took her to an Emergency Room after she fell.

On redirect, Petitioner testified her knee and back felt fine before she fell on August 17, 2012. After looking at her 2014 W2 form from Primrose Candy, she reiterated she stopped working for that company in January 2014. She has no relatives who work for this company and has not shared her Social Security number with anyone. After looking at the 2015 W2 form, she again denied working for Primrose Candy in 2015. She has no explanation for the 2015 earnings shown on the form. She never received any benefits other than salary from Primrose Candy. The fall that prompted her to go to the Emergency Room did not make her knee worse. She did not undergo any follow-up care after going to the Emergency Room.

Arbitrator's Credibility Assessment

Petitioner's testimony concerning the time periods she worked for a concurrent employer, Primrose Candy, was at odds with her W2 forms. Petitioner stated she stopped working at Primrose Candy in January 2014 but acknowledged that her W2 forms from this company show earnings of $21,181.52 in 2014 and $2,039.40 in 2015. RX 14, 16. The Arbitrator, having reviewed all of the documents Respondent received from Primrose Candy via subpoena (RX 18), believes Petitioner was mistaken about the time frame and actually stopped working for that company in January 2015 rather than January 2014. A letter of April 29, 2015 directed to Petitioner by Primrose Candy includes the following sentence: "We are sending this letter to let you know that you have been off work since

1/27/15." RX 18, p. 23. A letter of May 13, 2015 directed to Petitioner by Primrose Candy references Petitioner's "time off since 1/27/15" and makes clear that Petitioner had recently exhausted both her family leave and vacation. RX 18, p. 24. The Arbitrator views Petitioner as confused rather than deliberately lying about the time frame. Along similar lines, the Arbitrator does not view Petitioner as lying when she testified that Primrose Candy did not terminate her in May 2015. In the letter of May 13, 2015, a representative of Primrose Candy informed Petitioner she would be considered a "voluntary quit" as of May 18th if she had not been released to full duty by that date. RX 18, p. 24.

The Arbitrator finds credible Petitioner's testimony that the job she performed at Primrose Candy after she resumed working on November 26, 2012 allowed her to sit at times. The Arbitrator acknowledges this testimony is at odds with Dr. Verma's report of June 3, 2013, which reflects that Petitioner was, as of that date, performing a machine operator job that required her to stand all day, filling boxes with candy. Verma Dep Exh 2. In making this finding, the Arbitrator relies on the records Respondent subpoenaed from Primrose Candy, which reflect Petitioner was in fact on "light duty status" as of April 4, 2013, per Dr. Weisman, with an administrator attempting to have her released to full duty so that she could resume her machine operator duties.

Where the Arbitrator had some problems with Petitioner, credibility-wise, was with her testimony concerning her pre-accident knee condition and any post-accident injuries. Petitioner denied having any knee problems before the work fall but records in PX 2 and RX 10 show she underwent bilateral knee X-rays in March 2010 secondary to "chronic pain." The Arbitrator notes, however, that only the right knee X-rays of that date revealed any underlying pathology. The Arbitrator also notes there is no evidence indicating any knee condition prevented Petitioner from performing concurrent factory and industrial cleaning jobs before the work fall. Under cross-examination, Petitioner initially denied being involved in any accidents after August 17, 2012. She then changed her testimony and admitted falling and bruising her knee, with this event prompting her sons to take her to the Emergency Room. She testified this occurred in 2013 but the Emergency Room records are dated February 27, 2014. RX 9. There is no evidence that this incident resulted in any significant worsening of Petitioner's left knee condition.

Arbitrator's Conclusions of Law

Did Petitioner establish causal connection as to her claimed current conditions of ill-being? Did Petitioner establish causation as to the need for the left knee surgery recommended by Dr. Levi?

The Arbitrator initially finds that the undisputed accident of August 17, 2012, caused a left hip and lower back condition of ill-being that required conservative care, including one epidural steroid injection, through October 18, 2012. In so finding, the Arbitrator relies on Petitioner's credible denial of any pre-accident back problems, Petitioner's credible account of the mechanism of injury, the records from MercyWorks and Dr. Chunduri and the lumbar spine MRI of September 5, 2012. The Arbitrator recognizes that Dr. Patel of MercyWorks, the first physician to see Petitioner after the accident, did not specifically note back pain. He did, however, note that Petitioner's left hip pain radiated down her leg and that her gait was antalgic. In the Arbitrator's view, these observations are not inconsistent with a back injury. The Arbitrator also notes that, while Dr. Patel found Petitioner capable of resuming full duty as of September 4, 2012, he did not find Petitioner to be at maximum medical improvement. He prescribed therapy on August 28, 2012 and directed Petitioner to return to MercyWorks on September 12th. PX 1. The Arbitrator assigns little weight to the opinions expressed by Dr. Andersson, Respondent's back examiner, since he indicated Petitioner should have fully recovered by September

4th. He faulted Petitioner for beginning therapy on September 8th but it was Dr. Patel, a physician of Respondent's selection, who prescribed this therapy. The Arbitrator finds it reasonable for Petitioner to have undergone additional therapy, along with an MRI and injection, after September 8th, per Dr. Chunduri, a physician of her own selection. In his addendum (RX 3), Dr. Andersson conceded that passive modalities sometimes make patients feel better. Petitioner reported improvement of her back pain to Dr. Chunduri following the injection. The Arbitrator views October 18, 2012 as an appropriate date for back treatment to end, regardless of any intervening cardiac condition.

The Arbitrator further finds that the undisputed accident of August 17, 2012 caused a left knee condition that requires surgery, as recommended by Dr. Levi, and that remained unstable as of the hearing. In so finding, the Arbitrator relies in part on Petitioner's testimony that she struck her knees. The Arbitrator also relies on Petitioner's testimony that her left knee was not problematic before the accident. While there is evidence that Petitioner underwent bilateral knee X-rays in March 2010, there is no evidence indicating she underwent any significant left knee care before the August 17, 2012 accident. In fact, as of the accident, she held two jobs. She did not seek care on the day of the accident but that was not unreasonable, given the intervening weekend. She complained of bilateral knee pain when she first sought care on the Monday after the accident.

Insofar as causation and treatment recommendations are concerned, the Arbitrator finds Dr. Levi more persuasive than Dr. Verma. Dr. Verma saw Petitioner once while Dr. Levi saw her on multiple occasions. Dr. Verma's finding of diffuse left leg pain is at odds with Dr. Levi's localized findings, which included positive McMurray's testing. Dr. Verma acknowledged he did not perform McMurray's testing. He also testified that positive McMurray's results can be indicative of a meniscal tear. Dr. Verma further acknowledged that 80% of the examinations he performs are for respondents.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims she was temporarily totally disabled during two intervals. The claim regarding the first interval, from August 21, 2012 through November 25, 2012, presents an interesting issue, since Petitioner received temporary total disability benefits from her concurrent employer, Primrose Candy, in connection with her right elbow injury of July 12, 2012, during most of this period, according to the approved settlement contract in evidence. RX 17. It does not appear, however, that the temporary total disability rate was based on a calculation that included Petitioner's earnings from Respondent, since Petitioner received only $235.90 per week. RX 17. In the Arbitrator's view, Petitioner's receipt of benefits from Primrose Candy during the period in question would bar a receipt of benefits from Respondent in the instant case only if Primrose Candy paid benefits at a rate based on concurrent employment.

Based on the causation findings and the analysis in the preceding paragraph, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from Respondent from August 21, 2012 through November 25, 2012 (the day before she resumed working at Primrose Candy), a period of 13 6/7 weeks.

As for the second claimed period, the Arbitrator finds Petitioner was temporarily totally disabled from January 28, 2015 (the day after she stopped working at Primrose Candy, based on Respondent's Exhibit 18) through the hearing of March 10, 2017, a period of 110 2/7 weeks. The Arbitrator has previously found that Petitioner established causation as to a left knee condition that requires surgery, according to Dr. Levi. The Arbitrator views Petitioner's causally related left knee condition as unstable.

Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). The Arbitrator has elected to rely on Dr. Levi rather than Dr. Verma (Respondent's knee examiner) with respect to causation, diagnosis, treatment recommendations and work capacity. The Arbitrator recognizes that Dr. Levi last saw Petitioner on June 12, 2015 but notes there is no evidence indicating Petitioner worked in any capacity or re-injured her left knee after that date. When Dr. Levi saw Petitioner on June 12, 2015, he told her there was nothing he could do for her, treatment-wise, other than the surgery he had been recommending for months. He directed her to return to him only if she secured authorization for this surgery.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner seeks an award of various medical bills (PX 5-15). Respondent introduced into evidence a fee schedule analysis of the claimed bills (RX 20). Petitioner did not offer a separate analysis.

As a preliminary matter, the Arbitrator notes that some of the claimed bills (along with some of the fee schedule amounts proposed by Respondent) relate to care rendered in connection with the right elbow injury of July 12, 2012. The Arbitrator has made every effort to separate out these unrelated bills.

In the instant case, the Arbitrator has previously found that Petitioner established causation as to a low back condition that required conservative care through October 18, 2012. The Arbitrator has also found that Petitioner established causation as to a left knee condition that requires surgery and that remained unstable as of the hearing.

The first claimed bill, from Illinois Orthopedic Network, reflects total charges of $5,155.22, "WC ins" payments of $1,477.44 and a balance of $3,592.30. PX 5. Of the claimed balance of $3,592.30, the Arbitrator awards $1,844.71, subject to the fee schedule. The Arbitrator declines to award the remaining $1,747.59, for two reasons: 1) that amount includes charges for "non-emergency transportation" provided on various dates but there is no evidence indicating Petitioner required such transportation; and 2) that amount includes charges for "prolonged services" and "special reports" of October 16, 2012, a date that Petitioner did not undergo care, according to the records in evidence.

The Arbitrator declines to award any of the Mid-City Spine and Ortho charges enumerated in PX 6 since these charges relate to care rendered in connection with the right elbow injury of July 12, 2012 [see the upper left hand section of the first page of PX 6, which references "WC DOI 7/12/2012"]. Instead, the Arbitrator awards fee schedule charges of $459.74 based on the correct Mid-City Spine and Ortho bill, which appears in PX 3, and Respondent's fee schedule analysis (RX 20).

The Arbitrator awards $1,020.50 in fee schedule charges from Gold Coast Surgical Associates (PX 7, RX 20). These charges relate to the lumbar injection performed on October 11, 2012.

The Arbitrator awards fee schedule charges of $1,829.66 for services provided by the Metro Anesthesia Consultants in connection with the injection of October 11, 2012. PX 8, RX 20.

The Arbitrator awards fee schedule charges of $2,438.53 (JMS Supplies). PX 9, RX 20. These charges relate to the injection of October 11, 2012.

The Arbitrator awards fee schedule charges of $2,326.27 (Advantage Imaging, LLC) relating to the lumbar spine and left knee MRI scans performed on September 5, 2012. PX 10, RX 20. The

Arbitrator finds it reasonable for Dr. Chunduri to have ordered these studies, based on the reported mechanism of injury and Petitioner's complaints.

The Arbitrator declines to award any of the MRI Lincoln Imaging Center charges of enumerated in PX 11. While $2,100 of these charges relate to the left knee, they stem from a repeat left knee MRI performed on November 6, 2012. The records in evidence shed no light on the question of why Dr. Chunduri ordered a second left knee MRI on October 18, 2012, since Petitioner had already undergone a left knee MRI at his direction six weeks earlier, on September 5, 2012. The remaining charges relate to an EKG and upper extremity MRI performed on November 6, 2012.

The Arbitrator awards the fee schedule charges of $1,949.97 from Orthopedic and Rehabilitation Centers (Dr. Levi). RX 20.

The Arbitrator awards the IWP medication charges of $184.64 enumerated in PX 13. These charges relate to Omeprazole prescribed by Dr. Chunduri on September 6, 2012.

The Arbitrator awards the medication-related Infinite Strategic Innovations charges of $57.15 as well as the medication-related RX Development Associates charges of $9,069.11 enumerated in PX 14.

The Arbitrator declines to award the $2,988.79 in medication charges enumerated in PX 15. These charges relate to treatment provided, or medication prescribed, by Brittany Macleod, a physician's assistant, on November 25, 2014. No records from this provider are in evidence. Additionally, the bill marked as PX 15 clearly references a date of injury of July 12, 2012, i.e., the date of the right elbow injury.

<u>Is the case ripe for a permanency determination, as argued by Respondent, or is Petitioner entitled to prospective care?</u>

Petitioner proceeded pursuant to Sections 19(b) and 8(a) of the Act while Respondent took the position that it would be appropriate for the Arbitrator to address permanency if she found the case compensable.

The Arbitrator has previously found that Petitioner established causation as to her current left knee condition of ill-being and that this condition was still unstable as of the hearing. The Arbitrator does not view this case as ripe for a permanency determination. She awards prospective care in the form of the left knee surgery recommended by Dr. Levi.

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

Steven Res,
Petitioner,

vs.

NO: 12 WC 04727

Alton Mental Health,
Respondent,

17IWCC0734

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, medical, prospective medical, permanent partial disability, penalties, fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 4, 2017, is hereby affirmed and adopted.

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

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

NOV 20 2017

DATED:
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DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RES, STEVE
Employee/Petitioner

Case# **12WC004727**

ALTON MENTAL HEALTH
Employer/Respondent

17IWCC0734

On 5/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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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CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 4 = 2017

Ronald A. Parisi

RONALD A. PARISI, 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

STEVEN RES
Employee/Petitioner

v.

ALTON MENTAL HEALTH
Employer/Respondent

Case # **12** WC **04727**

Consolidated cases: _____

17IWCC0734

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Collinsville**, on **July 27, 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 **January 2, 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 ***was*** causally related to the accident until June 1, 2015, at which point the causal relationship ended.

In the year preceding the injury, Petitioner earned **$44,864.06**; the average weekly wage was **$862.77**.

On the date of accident, Petitioner was **42** 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.

To date, Respondent has paid **$33,724.37** in TTD and/or for maintenance benefits. Respondent shall be given a credit of **$33,724.37** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$33,724.37**.

Respondent is entitled to a credit for all awarded medical expenses that it paid prior to the hearing date pursuant to Sections 8(a), 8(j) and 8.2 of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment on January 2, 2012. The Arbitrator further finds that the Petitioner's condition was causally related to the January 2, 2012 accident until June 1, 2015, at which time the causal relationship ended.

Respondent shall pay Petitioner temporary total disability benefits of **$575.18** per week for **57-5/7 weeks**, commencing **April 24, 2014 through June 1, 2015**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **April 24, 2014** through **July 27, 2016**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay the causally related reasonable and necessary medical services contained within **Petitioner's Exhibit 18 which were incurred through June 1, 2015**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for any and all medical benefits that have been paid prior to the hearing date, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$517.66** per 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 compensation that has accrued from **June 1, 2015** through **July 27, 2016**, and shall pay the remainder of the award, if any, in weekly payments.

Penalties and Fees pursuant to Sections 16, 19(k) and 19(l) of the Act are denied.

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

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

Signature of Arbitrator

April 14, 2017
Date

STATEMENT OF FACTS

Petitioner worked for Respondent as a Mental Health Technician, which involved looking after patients and checking security and documentation. On the evening of 1/2/12, Petitioner was attacked by a resident from behind, testifying he was grabbed by the neck, pulled backwards and choked. He got to where he was facing the patient while still being held around the neck, and he testified he was then struck in the face multiple times. He was yelling for help and at some point other staff came to assist. When they took the resident to the floor, they had to take Petitioner down with him. During the conflict, Petitioner testified that he heard a loud pop originating from his shoulder, and sustained cuts to his mouth and shoulder. Petitioner's accident is corroborated by various incident report forms kept by Alton Mental Health Center (Px14) and the testimony of nurse Dana Jo Ruzicka, who Petitioner testified was on the scene when the incident occurred. Ms. Ruzicka's report (Px14) noted cervical and right shoulder strains. Nothing specific was noted as to what she saw on his body. Petitioner testified another nurse, Skip, cleaned his lacerations at the medical station. He completed an incident report, and was required to go to the emergency room.

With regard to the "injury packet" (Px14), Petitioner testified he didn't fill out the bottom portion of that packet himself, and that the incident report he completed was not included in the exhibit. The history of the accident was consistent that Petitioner was grabbed around the neck from behind and pulled. The Form 45 noted injury to the right shoulder, mouth and chest. The injury report noted "busted top left", scratches down his chest, with right shoulder pain and neck pain.

Petitioner reported to St. Anthony's Health Care Center on 1/3/12, testifying that he complained of fingernail cuts on his chest, a painful and swollen right elbow, and that he was still bleeding from his mouth. The records

from this facility submitted into evidence are very limited, indicating only that he was assaulted and prescribed various medications on both 1/3 and 1/4/12. There was nothing in the submitted records regarding subjective complaints, physical findings or a diagnosis. Petitioner testified that he was supposed to follow up with an orthopedic physician as well as the Respondent's workers' compensation doctor. (Px1).

Petitioner next sought treatment with Watson Orthopedics on 1/4/12. An intake form indicates he reported a 1/2/12 assault with injury to the neck, right shoulder and chest, and was prescribed a cervical collar. (Px1). A 1/10/12 cervical MRI showed multilevel spondylosis contributing to varying degrees of spinal canal and neuroforaminal encroachment, most pronounced at C5/6 and C6/7 with posterior disc protrusions. (Px3). Dr. Watson took Petitioner off work on 1/16/12 "until cleared", and eventually referred him to orthopedic surgeon Dr. Pineda. (Px1).

Petitioner sought treatment at Springfield Clinic on 1/25/12. The intake form notes he was referred by Watson Ortho after he had been grabbed by the neck from behind by a mental patient on 1/2/12. He reported constant neck and right shoulder/arm pain with hand numbness, noting he hadn't improved much. He also noted ringing in his ears, nose bleeds and difficulty sleeping. (Px4).

Petitioner attended therapy at Premiere from 1/26 to 2/6/12 for cervical and right shoulder problems. He initially reported elbow pain as well as numbness and tingling in the right forearm, hand and behind his right ear. Initial exam noted very guarded posture with Petitioner maintaining the right arm with the right elbow extended at his side. The right shoulder was significantly depressed versus the left, and overt pain behaviors were noted. By the end of therapy, Petitioner had made no significant progress, with the therapist noting he was limited due to easy symptom exacerbation. (Px12).

Petitioner initially saw Dr. Pineda at Springfield Clinic on 1/31/12. Petitioner reported his arm and neck were stretched or yanked at the time of the accident, and he complained of constant neck and right shoulder/arm pain with occasional hand numbness. A pain diagram shows aching down the right arm with paresthesias in the neck and shoulder and numbness in the hand. Dr. Pineda noted Petitioner was reluctant to use the right hand in any significant way, including even shaking his hand. Dr. Pineda noted the MRI films showed disc/osteophyte complexes at C5/6 and C6/7 with minimal foraminal encroachment. Noting that the cervical disease might not be the source of Petitioner's pain and, indicating a possible brachial plexopathy, Dr. Pineda recommended an EMG and a possible epidural. He noted if the problem was brachial plexopathy, "time is going to be the only choice", while if it was more of a cervical issue, injections could help. (Px4).

A right upper extremity EMG was performed with neurologist Dr. Fortin on 2/21/12. Dr. Fortin noted the Petitioner had significant guarding of the right arm – it dangled at his side, and he had considerable give-way weakness in the distal arm. He did note some edema of the hand and bluish discoloration of the distal forearm versus the left side. Petitioner reported that the tingling he felt was distal to the right elbow and circumferential in the arm. Testing reflected the findings were "entirely unremarkable", negative for radiculopathy, brachial plexopathy or peripheral neuropathy. A comment stated: "Of note on exam are autonomic features. This study does not assess autonomic dysfunction though there is no evidence for somatic nerve injury on this study."

Dr. Pineda reviewed Dr. Fortin's report on 2/28/12, and noted on exam that the Petitioner had right hand discoloration. While he moved the right hand, he had a lot of pain and fear of using it. Noting no neurologic abnormalities indicated in the EMG, Dr. Pineda noted that if Dr. Fortin's theory of a possible autonomic process was correct, including possible RSD, that this was outside of his area of expertise and recommended that Petitioner return to Dr. Fortin for evaluation. (Px4).

Following his 4/2/12 exam, which noted induration, red-bluish discoloration and swelling of the right forearm and hand, some antalgic weakness and guarding of the distal right arm, Dr. Fortin diagnosed post-traumatic reflex sympathetic dystrophy (RSD) / chronic regional pain syndrome (CRPS) of the right upper extremity, post-traumatic in onset. He prescribed prednisone, and if that failed, consideration of a stellate ganglion block with Dr. Narla, as well as a second opinion as to the RSD/CRPS diagnosis. (Px4).

On 4/19/12, Petitioner saw Dr. Salvacion (Spineworks Pain Center), who noted complaints of significant swelling and pain in the right arm, with sensation of pins and needles around the right elbow and forearm. His right shoulder pain and swelling had improved. Dr. Salvacion believed Petitioner appeared to have an autonomic dysfunction in the right upper extremity. He prescribed Neurontin and baclofen, and the initial stellate ganglion block was performed on 5/1/12. On 5/9/12, Petitioner reported a couple days of improvement with the initial block, but that his pain then returned. On 5/15/12, Petitioner reported that the second injection of 5/9/12 helped more than the first one. Dr. Salvacion's last note of 5/30/12 indicated that Petitioner reported he had seen improvement in coloration and swelling in his right arm as well as with movement, but still had bothersome pain, and a final injection was performed. (Px11).

Dr. Fortin's 7/3/12 report indicated Petitioner reported temporary relief with each block injection. Petitioner also noted ongoing headaches and ringing in his ears since the accident date. In addition to the previously noted arm symptoms and appearance, Petitioner reported severe spasms in the right arm two or three times per day. The medication did help somewhat. Dr. Fortin notes therapy had been tried but was stopped, and he recommended a TENS unit and ultrasound of the neck and arm. (Px4).

7/9/12 ultrasound testing of both arms indicated findings suggesting possible thoracic outlet syndrome (TOS) with similar findings bilaterally. Venous duplex testing from the same date was negative for deep vein thrombosis. (Px4).

Dr. Fortin then referred Petitioner to Dr. Hazelrigg, cardiothoracic surgeon at SIU Healthcare, whom he saw on 8/20/12 for thoracic outlet syndrome evaluation. Petitioner reported his arm was pulled on the accident date with a combination of neurologic symptoms (numbness, tingling, weakness), swelling and discoloration since. He also reported loss of range of motion, loss of fine motor control and muscle contractions in the right hand. Petitioner indicated his right arm swelled after the accident, so he initially thought it was broken, and over the next month he developed numbness, tingling, weakness, loss of motion and fine motor control and contractions of the right hand muscles. He also reported his arm is always purple and swollen with tingling from the elbow to hand and in the back of the upper right arm, as well as a gurgling sensation in the axilla. Dr. Hazelrigg noted the EMG and Doppler testing results. Petitioner noted no significant improvement with stellate ganglion blocks. Examination noted the right arm was grossly swollen, the skin appeared reddish-purple and the right arm was cool versus the left. He had limited range of motion of the right shoulder, elbow and wrist along with weak right grip. Dr. Hazelrigg opined that there was possible TOS, though it was "somewhat difficult to know whether that is really the cause". He planned to discuss the EMG with Dr. Fortin before deciding whether a first rib resection would be warranted. He added baclofen and Neurontin prescriptions to the hydrocodone and diazepam prescriptions Petitioner already had. (Px5).

On 9/20, 9/28 and 10/15/12 the Petitioner underwent acupuncture with chiropractor Dr. McKay at Springfield Clinic, but reported no improvement. Dr. McKay noted Petitioner had a slightly smaller right shoulder versus the left, indicating slight atrophy, and therapy was recommended. On 10/29/12, Petitioner had an acupuncture follow up, and it appears that a nurse noted a noticeable difference in the Petitioner's hands and arms, with the right arm swollen with a bluish/gray tint on half of the arm versus the left, as if a circulation problem existed. Petitioner noted he wakes up every morning with his arm feeling like it is asleep. His right hand was cold versus

the left. It was noted that a photo was taken of the right arm, but that was not part of the clinic's exhibits. Dr. McKay suspended is treatment because it wasn't helping. (Px4). An 11/7/12 note indicated a diagnosis of RSD of the right arm and limb pain, and the Petitioner was prescribed Gabapentin, Lidoderm and Baclofen. (Px4).

Dr. Fortin's 11/6/12 note indicated Petitioner reported that Dr. Hazelrigg would not perform any type of surgery unless the cause of his edema was determined. Ganglion blocks, therapy and acupuncture had failed. Petitioner had edematous right fingers and hand, swelling, and a dusky and somewhat cyanotic appearance. He was to follow up with cardiothoracic surgeon Dr. Thompson for a second opinion. (Px6).

Petitioner initially saw Dr. Thompson on 12/19/12. He complained of clawing, mild swelling, numbness, and tingling in all digits of his right hand as well as discoloration and discomfort in his right upper arm. Dr. Thompson noted limited range of motion, nearly nonexistent grip strength, and mild swelling of the right hand. He opined that Petitioner's symptoms were consistent with right-sided neurogenic TOS involving compression of the brachial plexus at the level of the pectoralis minor muscle and possibly a coexisting brachial plexus injury. A pectoralis minor muscle block, an MR venogram, and a repeat EMG were recommended. Petitioner was also referred for therapy. The pectoralis minor block was performed on 1/8/13, which did not provide significant relief. A 3/4/13 chest MRI was obtained to evaluate a possible thoracic outlet syndrome, and testing reflected no evidence of vascular compression or stenosis. (Px6).

The repeat EMG/NCV was performed on 3/4/13, this time by Dr. Phillips. (Px9). Petitioner reported numbness from the right medial elbow spiraling across to the distal extensor forearm, numbness in the last 2 fingers, weakness of the entire right arm and diffuse swelling with discoloration. While preparing to perform the test, Dr. Phillips noticed diffuse swelling of the right arm with guarding, as well as a 1 inch circumferential deep indentation at the proximal right arm, with swelling distal to it but no swelling above it. The Petitioner reported this was due to tightly wearing an ice pad, noting he left the pad in his car. Dr. Phillips told the Petitioner that wearing this constricting band could create a tourniquet effect and result in arm swelling, and thus that he should avoid it. The impression was mild bilaterally symmetrical demyelinative median sensory neuropathies across the carpal tunnels. (Px9; Rx5).

On 3/22/13, Dr. Thompson performed a right pectoralis minor tenotomy, which the report indicated provided improvement in the subpectoral space, relieving any neurovascular compression there. He noted exam reflected findings of brachial plexus compression at the subcoracoid space (pectoralis minor tendon) with both localized tenderness and reproduction of upper extremity symptoms with palpation. Post-operative diagnosis was right neurogenic TOS with pectoralis minor compression. (Px7).

On 4/10/13, Petitioner reported increased spasms since surgery. Dr. Thompson noted good pain control and improved range of motion of the arm. There was no hand swelling or discoloration. It was advised that post-op therapy was important but hadn't yet been approved. Therapist Gibson's records note therapy began on 4/1/13. On 6/13/13, Dr. Thompson noted the right arm was still swollen, red and cold with numbness, and Petitioner reported he had to keep the arm covered with a blanket at all times. He reported that his arm was so purple and gray at therapy that therapist Gibson wouldn't touch him. Dr. Thompson noted Petitioner had considerable brachial plexus symptoms that remained despite the surgery that had been performed to resolve brachial plexus compression. Petitioner had intermittent episodes of vascular changes (swelling and cyanotic discoloration) that were likely sympathetic-mediated, but no other signs of RSD/CRPS (hypersensitivity, withdrawal on approach, allodynia, etc.) and that the symptoms were chronic. He was to continue therapy, medication and to consider pain management. (Px6).

The Arbitrator's review of the records of therapist Gibson indicates Petitioner was referred there for thoracic outlet syndrome treatment. Therapy continued from 12/19/12 into February 2013, at which time a 2/4/13 report noted that a certain technique using a rolled towel resulted in temporary improvement in Petitioner's skin color where it normalized. This occurred more than once, but there are notes where the same technique resulted in no improvement in skin color. On 2/18/13, Gibson noted Petitioner's right pec minor flexibility had improved, as well as improved posture that improved excessive right scapular depression, but that this was not complete improvement, and he continued to have persistent right upper extremity/hand symptoms that limited his progress. Therapy was reinstituted on 4/19/13 following thoracic outlet surgery, and on 7/17/13 therapist Gibson noted that compression wrapping improved Petitioner's swelling, though it didn't significantly improve function. He had been educated in compression wrapping, and was to progress to a sleeve. As of the 9/6/13, Gibson was recommending discontinuation due to a lack of progress. (Px8).

On 9/12/13, Petitioner reported minimal improvement and increased swelling to Dr. Thompson since the last visit. He indicated he hadn't been doing much in therapy due to his arm swelling and turning purple there. Petitioner reported he had been wearing a compression sleeve since August, which helped with swelling, but that he felt like he was back to where he was before surgery. His symptoms were mainly focused in the right forearm and hand, which were disabling. His symptoms again did not appear brachial plexus related "but likely represent preexisting neural injury and some type of hypersympathetic component, but not one of RSD/CRPS". His medications were refilled and he was referred to pain management for long term care. (Px6).

Petitioner returned to Dr. Thompson on 1/30/14 reporting sharp/burning pain in the arm, noting he had not been able to see pain management due to insurance issues and complained his condition had worsened. At this point, Dr. Thompson noted he remained disabled due to sympathetic mediated pain that had progressed since the last visit and "is clearly characteristic of RSD". Immediate hospitalization was recommended for pain control and stellate ganglion block. (Px6).

On 1/30/14, Petitioner appeared at Barnes Jewish Hospital for stellate ganglion block, but this had to be aborted at the Petitioner's request. Petitioner reported persistent swelling and pain in the right arm since the tenotomy surgery, and over the last several days had significant swelling with intolerable pain. He did undergo the injection on 1/31/14.

On 2/17/14, Petitioner reported he didn't get much relief with ganglion block, but medication in the hospital helped. He indicated he was starting to lose hair on his arm, which Dr. Thompson noted was "unexplained but I suspect due to RSD". He was to follow up with Dr. Bottros in pain management and remained disabled. (Px6).

On 7/7/14, Dr. Thompson noted that workers compensation had stopped authorizing treatment based on Dr. Phillips findings, "stated pt had spray painted arm and use of tourniquet was possible", i.e. that he had induced his condition. Dr. Thompson indicated he continued to exhibit severe right upper extremity RSD/CRPS with full disability due to his work related injury. Ganglion blocks and medications were recommended. (Px6).

Dr. Thompson completed a work form for Petitioner on 11/18/14, indicating that he continued to show severe RSD/CRPS in the right arm, and was disabled and incapable of sedentary activity, but that Petitioner was continuing to work light duty for Respondent. He noted that Petitioner developed RSD/CRPS following the pectoralis minor tenotomy surgery for thoracic outlet syndrome. He indicated that ganglion blocks were desired to interrupt nerve root pain, but had been denied. He indicated that Petitioner should be able to return to a productive job if proper treatment could be instituted. (Px6).

On 11/19/14, Respondent wrote to Dr. Thompson indicating he was continuing to note Petitioner was working light duty when he had not worked at all, in any capacity, for Respondent since his 1/10/12 injury. (Px6). At a 12/4/14 follow up, Dr. Thompson noted Petitioner had minimal improvement, that all his current symptoms were attributable to RSD/CRPS, and that he needed chronic pain management and was to have sympathetic block that month. Exam noted he had swelling and slight cyanotic discoloration, but that it was warm with brisk capillary refill. Therapy and medication were prescribed. (Px6).

Stellate ganglion blocks were performed at Barnes Jewish Hospital on 12/15/14. Petitioner noted that following the TOS surgery, the right arm pain changed in quality but still persisted. Current complaints were right arm and hand pain, 2/10 to 10/10, with numbness, and relief with compression sleeve or lying on his back. He also reported symptoms of swelling, hair loss, pain to touch and weakness in the right arm. Anesthesiologist Dr. Li examined Petitioner and indicated that he met the Budapest criteria for CRPS diagnosis. It appears that Petitioner's non-workers compensation health coverage with Respondent ended as of 1/10/15. (Px10).

Dr. Thompson testified on behalf of Petitioner via deposition on 8/13/15 (Px13). Dr. Thompson is a board certified vascular surgeon who limits his practice exclusively to the treatment and care of TOS. However, he testified that he also treats RSD/CRPS at his facility, as it is a condition seen occasionally "as part of or occasionally separate" from TOS. He explained that TOS involves a compression of blood vessels or nerves as they pass from the area of the neck and upper chest through the lower part of the neck behind the collarbone towards the shoulder and arm. There are different forms of TOS which differ as to the sequelae that they produce in different terms of symptoms: nerve compression (neurogenic), vein compression (venous) or artery compression (arterial). Neurogenic TOS is the most common. (Px13).

Following his evaluation, Dr. Thompson concluded that Petitioner likely had a mix of two conditions, neurogenic TOS due to brachial plexus nerve compression that was most likely at the level of the pectoralis minor muscle tendon, and a history consistent with RSD/CRPS. Dr. Thompson felt these were concomitant, overlapping conditions that are sometimes seen together. (Px13).

Dr. Thompson relied upon a history from the Petitioner of being attacked by a patient and being put in a choke hold for approximately nine minutes, that he had his head pulled abruptly, and heard or sensed a snapping sound in the right shoulder with immediate swelling in the right shoulder region. Petitioner reported he went to the emergency room and had swelling and discoloration in the arm and down into the hand. Dr. Thompson indicated Petitioner's short-term mild improvement with the initial stellate ganglion blocks was significant in validating the diagnosis of an RSD/CRPS condition. Dr. Thompson noted that the vascular laboratory studies obtained by Dr. Fortin demonstrated no abnormality in the vein such as a thrombosis, just some mild abnormalities on the arterial pressure studies but nothing specific with respect to vascular compromise beyond that positional compression of the artery consistent with TOS. (Px13).

Dr. Thompson testified that the mechanism of injury as described by Petitioner could have likely led to a stretching of the deep muscles in the neck, which is usually a precipitating factor in the development of TOS. This mechanism of injury could have also affected the pectoralis minor muscle which attaches to part of the scapula just under the clavicle. While RSD/CRPS is not typically associated with a particular mechanism of injury, it does tend to follow the occurrence of an injury. The Petitioner gave no history of any other injury occurring between the accident date and the time Thompson first saw him. (Px13).

Dr. Thompson testified that the fact that orthopedic testing and evaluations that were normal was not surprising, noting such orthopedic studies are typically done to rule out other conditions with similar symptoms. Such studies are not specific for TOS or RSD/CRPS and are expected to be nonspecific or negative. (Px13).

Dr. Thompson testified that his 12/19/12 examination findings indicated no question of arterial insufficiency, but positive findings on positional maneuvers that he does as a part of the typical evaluation for TOS. Moderate tenderness and reproduction of his arm symptoms on palpation in the area just underneath the right collarbone overlying the area of the pectoralis minor tendon indicated he likely had a form of neurogenic TOS with brachial plexus compression at the pectoralis minor tendon level. (Px13).

The MR venogram, a vascular study, was performed to rule out a venous thrombosis due to the swelling in Petitioner's hand and fingers, as well as more comprehensive EMG/NCV studies than the previously performed study. Dr. Thompson also prescribed physical therapy specific for neurogenic TOC with on-site therapist Gibson to try to improve Petitioner's function, noting there were periods of time where therapy was not being approved. He noted therapist Gibson never indicated any concern regarding Petitioner's credibility, malingering or exaggeration of symptoms. (Px13).

Dr. Thompson testified the positive right pectoralis minor muscle block on 1/8/13 was diagnostic of TOS and predictive of likely improvement with surgical release of the pectoralis minor tendon. Despite this 3/22/13 surgery, Petitioner had persistent substantial symptoms over time that were more consistent with RSD/CRPS, and which progressed and ultimately had not resolved. (Px13).

Dr. Thompson testified that the nature of RSD/CRPS or even TOS is that the symptoms can wax and wane, and patients are subject to flares of symptoms, particularly with activities that aggravate the nerve compression/irritation. He testified that patients with RSD/CRPS can have days where the symptoms are under relatively good control, and other days where they're bedridden with severe pain – it is often unpredictable. With chronic pain conditions, the goal is to try to manage and control the symptoms. There are very few available interventions that will eliminate the problem. Dr. Thompson testified that a fairly aggressive use of physical therapy is considered to be crucial care for RSD/CRPS. He further testified that the gap in treatment between 7/7/13 and 1/30/14 was because the treatment was not being approved. He believed that the effect of this gap in treatment made Petitioner much less likely to respond or improve even if such appropriate measures were performed later, and thus that the failure to approve it was a contributor to his ultimate symptoms and long term disability. At a January 2014 visit, the Petitioner reported particularly disabling and fairly acute symptoms, and the clinical evidence of RSD was fairly obvious at that time, so Dr. Thompson hospitalized Petitioner on an emergency basis for pain control with a stellate ganglion sympathetic block to get on top of the severe pain. Dr. Thompson opined that this symptomatic deterioration was due to the delay in treatment approval. (Px13).

Noting Petitioner's improvement after the stellate block administered at the hospital, Dr. Thompson planned to perform a series of blocks over a period of time as a follow up. However, he testified that this was not approved. As a result of the lack of approval, Petitioner suffered ongoing disability, untreated medical conditions and severe chronic pain. (Px13).

Dr. Thompson had last seen the Petitioner on 12/4/14, and he continued to have evidence of severe right arm disability, with Petitioner reporting pain, swelling and discoloration in the arm, hand and fingers, with tingling and numbness, particularly in the ring and little fingers. Examination reflected substantial pain, limited range of motion and discoloration in the hand and fingers. Petitioner had adequate arterial perfusion with no evidence of tenderness to palpation over the area of the thoracic outlet space, leading Dr. Thompson's to conclude that Petitioner had recovered well from the previous TOS surgery, and that his ongoing symptoms were entirely attributable to RSD/CRPS and the chronic pain that accompanies it. Dr. Thompson recommended ongoing chronic pain management, including sympathetic blocks. (Px13).

The updated EMG/NCV studies performed by Dr. Phillips, indicating no evidence of neuropathy or peripheral nerve compression syndrome that could explain the extent or magnitude of Petitioner's symptoms, was consistent with TOS, with Dr. Thompson again noting such testing is typically nonspecific or negative in TOS patients. There was some mild evidence of bilateral carpal tunnel syndrome, but Petitioner's symptoms were not consistent with that diagnosis, and Petitioner didn't have evidence of cervical radiculopathy. (Px13).

Dr. Thompson was asked about Dr. Phillips' comment regarding a circumferential indentation in Petitioner's upper arm, and that Petitioner reported to Phillips that this was due to wearing an ice pad/pack with a band that held it in position. He had reviewed both the office notes and deposition testimony of Dr. Phillips. He himself had not observed such an indentation in Petitioner's arm at any time during his two years of treating him, and indicated that using ice for chronic pain would not be unexpected. Dr. Thompson testified that during the course of those two years in treating Petitioner, his impression was that the Petitioner was truthful and authentic in his description of his symptoms. Given the severity of Petitioner's symptoms, at times there was a great deal of anxiety and his descriptions weren't free of emotion, but Dr. Thompson never felt that Petitioner was untruthful or inauthentic. He agreed that wearing something tight around the upper arm could aggravate any swelling, but this wouldn't mitigate the impression of the underlying diagnosis or any other aspect of his care. (Px13).

Dr. Thompson has treated TOS for 24 years, and he testified that he's very careful about trying to separate out exaggeration of symptoms and an emotional component and the determination of the authentic physical findings versus the component the patient really has that is not being overlaid by emotional aspects. Dr. Thompson testified that it is not uncommon in this type of chronic pain condition for there to be psychological aspects to the patient's description of symptoms, but he has to be very careful to separate out any inclination to not believe the patient's descriptions either because then he can enter a situation where he's not going to help them. Dr. Thompson further explained that he is very careful about trying to make sure that he's hearing and examining the authentic symptoms a patient has. Again, Dr. Thompson never had a sense that Petitioner was fabricating the nature of his symptoms in any way. He recognized Petitioner had anxiety about the extent of his symptoms, and the period his treatment was not being approved and anxiety about what effect it might have on his long-term prognosis. (Px13).

Dr. Thompson testified that as an expert in the field of TOS, to his knowledge Dr. Carroll is not someone known as an expert in the field. He agreed that Dr. Carroll did not find any particular marks on the Petitioner's arm during his physical examination, which was consistent with Dr. Thompson's own previous examinations of Petitioner. Dr. Thompson noted Dr. Carroll's inability to provide an orthopedic diagnosis was consistent with TOS, as TOS is not an orthopedic condition. While TOS might be diagnosed occasionally by an orthopedic physician, he was not aware of orthopedic surgeons who treat TOS, as they typically would refer a patient to someone else for such evaluation. Based on Dr. Carroll's own statement in his report, he was rendering his medical opinion exclusively with regard to an orthopedic condition, which had been previously ruled out by other physicians. (Px13).

Dr. Thompson testified that he reviewed the surveillance footage of the Petitioner from Sam's Club and the Missouri State Highway Patrol. He saw nothing in the footage that would indicate one way or the other whether the patient had RSD/CRPS, TOC or a chronic pain condition. His review of the dash cam footage of the highway patrol stop showed Petitioner often holding the right arm in a very passive and defensive position. He noted a clawing position of the right hand and, although the resolution is not good enough to really make any conclusion on if there was any minor swelling in the hands or fingers, it certainly didn't show anything that would demonstrate against that. Dr. Thompson noted that the Petitioner's movement of his arm at different times in the video was not inconsistent with his diagnoses. (Px13).

With regard to physical therapist Ben Gibson's testimony that during a certain body position, the Petitioner's skin color changed from blue/gray back to close to normal on two occasions, Dr. Thompson indicated that the bluish or gray discoloration in the hand is consistent with and characteristic of RSD/CRPS. It can be consistent with thoracic outlet syndrome, but it is a manifestation of RSD/CRPS. (Px13).

With regard to the need for work restrictions, Dr. Thompson testified that the Petitioner would need a work environment where he did not have to use the right upper extremity in any overhead or elevated positions. He would restrict the Petitioner from prolonged or almost any keyboard use with the right hand, and no more than two or three pounds with the right arm with regard to lifting, carrying, pulling or pushing. Any activities or tasks which would aggravate his right arm pain would need to be restricted or eliminated. With regard to ongoing treatment, Dr. Thompson recommends serial sympathetic ganglion blocks and chronic, long-term, multidisciplinary pain management that would typically include some element of physical therapy and possibly occupational therapy as well as medications. Again opining that the gaps in Petitioner's treatment have been detrimental to his condition, Dr. Thompson testified that RSD/CRPS is a condition that can likely progress to a point of complete disability. The Petitioner's prognosis remained relatively poor overall. (Px13).

Neurologist Dr. Phillips provided his testimony on 4/15/15. (Rx2). His report was also admitted into evidence. (Px9). He performed Petitioner's 3/4/13 EMG/NCV. At that time, he noted a deeply indented, approximate 1 inch band around the proximal right arm, with swelling distal to it, but not proximal. He described this as a "tourniquet effect", which was "the type of thing that would cause diffuse swelling of an extremity and discoloration and a variety of other problems associated with having a tourniquet around one's arm." He asked the Petitioner about this, and was told it was caused by a tightly worn ice pad. He told Petitioner that wearing a tight band across his arm could cause all of the symptoms he described and his entire presentation. The only abnormality the test reflected was mild bilateral and symmetrical demyelinating sensory loss across the carpal tunnels. However, he noted that normal testing did not exclude TOS, and if that condition was suspected, the greatest value in EMG/NCV testing would be ruling out other conditions that could mimic it. Asked if he believed Petitioner was suffering from TOS, Dr. Phillips testified: "There was nothing I saw that could not be explained by a tourniquet." Again, severe pain, swelling and discoloration are not something you normally see acutely with tourniquet effect, but more when it's been done chronically. Dr. Phillips has never seen a tourniquet effect like Petitioner had with a compression sleeve, noting the purpose of the sleeve would be to decrease such a condition, but agreed that the Petitioner did not report to him that it was caused by a sleeve. (Rx2).

On cross examination, Dr. Phillips agreed that Dr. Thompson has an outstanding reputation regarding TOS. TOS is divided into different types, but it "depends on who you read." It can be caused by trauma. It can cause pain and other symptoms, including neck, shoulder and arm pain and numbness in the arms and hands. Asked if it can cause discoloration, Dr. Phillips testified: "Not like this." He explained that you do not see the type of swelling and discoloration Petitioner had with functional TOS. If you see what he had, it's a venous obstruction, and even then you rarely see it at his level, "so this was outside the realm and I've been doing this a long time." He would have expected to see a different type of even swelling with more venous distension, which wasn't the case with Petitioner: "so, you know, there was probably a reason I lifted up that sleeve." Dr. Phillips had no knowledge of whether the Petitioner continued to use the ice pad after the EMG.NCV testing or not. (Rx2).

Physical therapist Ben Gibson testified via deposition on 3/27/15. (Rx1). He had no knowledge of whether an ice pack could cause a circumferential indentation in a person's arm. He testified that had he seen such an unusual indentation on Petitioner's arm, he probably would have indicated it in his report, but was not certain of that. He did educate the Petitioner regarding the use of ice and cold to help decrease his pain. His notes indicated that Dr. Thompson was agreeable with the use of compression at a meeting they had on 7/3/13. The

first time Gibson documented seeing the Petitioner using a compression sleeve was 8/21/13. It was noted that this post dated the EMG of 3/4/13. He agreed he discussed with Petitioner the benefits of using a compression sleeve, but did not recall if he gave him specific instructions on how to wear it. There is a band and the top of a compression sleeve to keep it from falling down, and it has some degree of pressure, but he could not say if it had a "tourniquet-like" effect. Mr. Gibson testified the Petitioner generally did have swelling in the arm, and it generally was more prominent in the distal portion of his arm. He did not recall if the Petitioner complained of a tourniquet-like effect from the band, but believed he would have documented it if he had. Mr. Gibson testified that he did not question the credibility of Petitioner's subjective complaints, but was never asked to do so and never performed any Waddell's testing, pain magnification testing, or distraction testing. (Rx1)

On cross examination, Gibson agreed his therapy was directed towards the TOS diagnosis. He agreed that at their 7/3/13 meeting, Dr. Thompson attributed Petitioner's symptoms to RSD, not TOS. Gibson also agreed he documented pain complaints generally between five out of 10 and nine out of 10, and would wax and wane. He agreed that the Petitioner demonstrated decreased right grip strength on multiple occasions, and on 9/6/13 he observed the Petitioners skin color was consistently gray/blue/purple. He also agreed that on 2/18/13 he observed the Petitioners arm color change dramatically when a towel was put between his scapula while he laid down, making it look very similar to the left arm. While this also occurred on one other occasion, he agreed that this technique/position did not always change the arm color. On 7/2/13, Petitioner's hand was noticeably cold. He did not recall the Petitioner ever being pain-free during the extensive time he participated in therapy, but the pain level did fluctuate, as did the Petitioner's complains of swelling and color changes, so he agreed there were good and bad days. He agreed Petitioner initially on 12/19/12 indicated his pain ranged from 2 to 9 out of 10. The therapist also agreed that a person could fake grip strength by not squeezing as hard as they could, and that patient pain reports are subjective. (Rx1).

The Petitioner was examined on 6/1/15 pursuant to Section 12 by orthopedic surgeon Dr. Carroll, and the doctor testified via deposition on 9/29/15. (Rx3). Dr. Carroll testified that he has treated nerve injuries in the upper extremity for 28 years, and also performs microvascular surgeries related to the upper extremity, "from the foramen to the fingertips". The Petitioner provided him with a consistent history of the accident, and he reviewed the Petitioners medical records. He noted an initial complaint of a pop in the right shoulder, followed by the development of numbness and swelling and difficulty using his right arm. The Petitioner reported a significant loss of motion in the right shoulder, elbow, wrist and hand, and that he had less redness in his arm then he may have had in the past, but still had some purple-ish and gray discoloration, which may have diminished to a point with surgery. On examination, the Petitioner held his arm very tightly in a contracted position, meaning you hold it tightly against his side. There was some swelling in the arm but no particular marks on the skin. His left shoulder was elevated higher than the right on exam, but Dr. Carroll noted this was not the case when the Petitioner walked down the hall. Petitioner reported significant pain in the right neck and stiffness of the neck. He noted the Petitioner complained of significant pain on two attempts by the doctor to gently move it. He could not flex or extend his elbow due to pain in the triceps and held it in 90° of flexion with pronation. Range of motion was stiff in all directions in the right wrist and ring and small fingers, though Dr. Carroll was able to passively move the fingers. Sensation was diminished in all fingers of the right hand, worst in the ring and small fingers. There was no atrophy of the arm or hand, significantly diminished right grip strength versus the left, but no evidence of any compressive neuropathy in the radial, medial, or ulnar nerves. EMG testing also indicated no evidence of nerve injury or compression. X-rays of the elbow and shoulder were essentially normal other than some AC joint narrowing. Again, he saw no atrophy that would have fit with a lack of use over three years. (Rx3).

Dr. Carroll diagnosed a possible right shoulder/arm strain as a result of the 1/2/12 accident, with no evidence of any other orthopedic problem. He did not relate any care the Petitioner received for TOS to the accident, opining

that any TOS was not caused or aggravated by the accident. Nothing was documented about any neurologic injury at the time of Petitioner's initial presentations. He testified: "it showed up at a later time, and I don't argue with the diagnosis. It just doesn't appear by virtue of my review that it relates." It was his opinion that the treatment and therapy Petitioner had through Dr. Watson was reasonable and necessary as related to the accident. But things started to change after that, and Dr. Carroll was unable to relate any subsequent treatment to the accident. (Rx3).

Dr. Carroll believed Petitioner's significant subjective complaints were out of proportion to what was objectively seen. With regard to the "tourniquet-like" effect referenced by Dr. Phillips, Dr. Carroll testified that, hypothetically, if someone were to constantly apply compression around the upper arm, it could cause chronic scarring and changes in the nerves and veins by virtue of changes in blood flow to the nerves and muscles in the area. This could cause him to not move as normally as he once did and result in the nerves being pulled in unusual ways, which could cause downstream symptoms in the hands or upstream symptoms in the clavicle, brachioplexus and the thoracic outlet. In other words, it could potentially mimic thoracic outlet syndrome or other compressive neuropathy symptoms. He had no personal knowledge of whether the Petitioner was self tourniqueting, but if he were, it would raise questions as to the validity of his presentation. (Rx3).

Following his review of the video of the Petitioner at Walmart and at the traffic stop, Dr. Carroll testified that the Petitioners presentation and the use of his arm in those videos was significantly different then his presentation during the examination where he indicated his arm was too painful to move. He testified: "it was just different, a different presentation, looked like a different arm, saw use of the arm that I had not seen in the exam and had been given a history that couldn't occur". While he agreed that there was no way to determine if the Petitioner was in pain in the video, it did result in questioning the veracity of Petitioner's complaints of an inability to move his arm due to the pain. While it was clear Petitioner had been attacked at work, he opined that the treatment after he saw Dr. Watson was not causally related to the accident, and thus any restrictions the Petitioner may have are not related to the accident. (Rx3).

On cross examination, Dr. Carroll testified that about 10-15% of his practice involves patients suffering from RSD and/or TOS. Sometimes he refers such patients out, sometimes he doesn't. He did not agree that a vascular surgeon normally manages such conditions to the exclusion of other types of qualified physicians. While he is an orthopedic surgeon, his practice is not limited to orthopedic conditions. He agrees he did not find any orthopedic injury with Petitioner, and neither did Dr. Watson. He also agreed that Dr. Thompson's TOS surgery was reasonable to attempt. (Rx3).

Dr. Carroll agreed he did not perform several TOS exam techniques, but testified he was unable to do so because Petitioner held his arm to his side and said it was too painful to move it, and Dr. Carroll did not want to forcibly do anything with the arm. He agreed that he noted there was no atrophy via visualization, and that he did not perform any actual measurements of the arms. He reiterated that he did not see any markings or indentations on Petitioner's arm during his exam. He agreed that he saw discoloration in Petitioner's arm, which would be more consistent with RSD/CRPS than TOS. While symptoms can wax and wane with RSD/CRPS, TOS has a fairly stable presentation. Dr. Carroll agreed he did not know the weight of the boxes Petitioner moved in the Sam's Club video, and could not recall which arm the Petitioner used to open the car door while in the passenger seat in the video of the traffic stop. He agreed that in his initial report, prior to reviewing the video, in deference to Petitioner and his severe pain complaints, he stated that should seek an independent examination with a pain specialist "to either validate or assess his condition." (Rx3).

The Arbitrator notes that there was objection and much discussion with regard to Dr. Carroll's deposition exhibit 3, which included all of the documentation reviewed by Dr. Carol. However, there was no such exhibit

attached to the deposition that was presented to the arbitrator. The arbitrator also notes that Dr. Carol described all of the documents he reviewed in his report. His testimony was that the only things he relied upon in his opinions were the review of the medical records, his examination findings and the films of the petitioner lifting a box and being pulled over by police. As these documents and videos were all submitted into evidence, the arbitrator finds that Dr. Carol relied upon valid evidence. Because deposition Exhibit 3 was not attached to the deposition, the Arbitrator cannot make any ruling with regard to its admissibility.

Dr. Williams performed a Section 12 exam at the request of Respondent on 3/7/16, and his deposition was taken on 5/27/16. A board certified physician specializing in physical medicine, rehabilitation and electrodiagnostic medicine, Dr. Williams obtained a consistent history of the accident and subsequent treatment. He performed a physical examination, reviewed Petitioner's relevant medical history, and reviewed various exhibits and videos depicting Petitioner's physical capacity. When examined, Petitioner reported a constant pain he described as pins and needles throughout his right arm and into his right shoulder. He described weakness in his right upper limb and a feeling that his skin is going to split open when he tries to exert himself. Cold air blowing over his skin felt like "sharp knives" coming out of his skin. He indicated his symptoms would wax and wane between 6 and 10 out of 10. Petitioner also experienced sensitivity to temperature change in the arm. Dr. Williams testified that Petitioner showed him a series of photos he brought to show him the prior swelling in his right arm and hand, and that one of them revealed an unusual looking band across Petitioner's forearm. He noted that Petitioner's right arm had uneven hair lengths as well as a rectangular section on the back or the arm that Dr. Williams believed was similar to what would happen if he had shaved part of it and missed a section. Petitioner reported that his arm hair fell out several years prior after an injection, but Dr. Williams found this explanation unconvincing. Measurements of Petitioner's arms demonstrated that Petitioner's right arm muscles were larger than his left, which Dr. Williams indicated was consistent with a right hand dominant person regularly using the right arm. No swelling, pitting, or edema was observed on physical examination. The calluses on Petitioner's hands were symmetric and consistent with someone who uses both hands similarly. Dr. Williams also testified that Petitioner displayed prominent pain behaviors, pain with touch or movement and a 40% decrease with range of motion in Petitioner's right arm. He noted Petitioner was only able to raise his arm about 90 degrees. Dr. Williams reviewed the surveillance footage from Sam's Club and the Missouri State Highway Patrol respectively. Upon review of these clips, Dr. Williams testified that it was not consistent with what the Petitioner reported he could and could not do. (Rx4).

Dr. Williams agreed with Dr. Phillips that the Petitioner's symptoms and presentation could be explained by a tourniquet effect. With regard to causation, he testified that it was clear that some sort of altercation took place and that Petitioner suffered abrasions on his chest, a contusion on his right shoulder and a strain of his upper back, but these conditions had previously resolved. Dr. Williams opined that 6 weeks of physical therapy, an EMG and the cervical MRI were all reasonably necessary, and that Petitioner would have been at MMI as of 2/28/12. Dr. Williams also indicated a zero percent impairment rating with no restrictions, despite Petitioner's ongoing reports of pain, swelling and discoloration. (Rx4).

On cross-examination, Dr. Williams testified that he regularly sees patients suffering from multiple sclerosis, stroke and similar conditions, but recognized that none of these conditions apply to Petitioner. He testified that it was very rare for him to see patients diagnosed with TOS. He acknowledged reviewing numerous materials that were forwarded to him by Respondent, but that he relied on nothing other than the medical evidence and the videos. (Rx4).

Dr. Williams testified the EMG was the first mention of tourniquet and there was no other mention in any of the other medical records until addressed during the deposition. While Dr. Williams reiterated that he believed the Petitioner shaved his arm, he was unwilling to say that he did so intentionally for his workers compensation

case. With regard to the video from the traffic stop, Dr. Williams did not have an independent recollection of that clip and he could not recall which hand Petitioner used to exit the front passenger seat. As to the footage from Sam's Club, Dr. Williams admitted he did not know how much the boxes weighed and that the clip did not show Petitioner performing any overhead lifting. (Rx4).

Dr. Williams testified he disagreed with Dr. Thompson's finding of brachial plexus pathology, but agreed that he was not specifically asked to address a diagnosis of TOC. He explained that TOC is essentially a differential diagnosis, and that other conditions needed to be ruled out to do so. Dr. Williams admitted that he never asked Petitioner about the alleged self tourniquet, and claimed to have seen photos consistent with this, but testified that he did not have them in his possession. Dr. Williams testified that he reached the idea of self-tourniqueting after seeing the marks during his physical exam and correlating them with his findings in Dr. Phillips' office note. Dr. Williams testified that he would not discredit medical records indicating the witnessing of color change in Petitioner's arm, but that his opinions would rely more heavily on vascular studies. (Rx4).

Dr. Williams explained that the presentation of Petitioner's symptoms are not explained by severe pain because of the giveaway weakness he showed during his physical exam, which indicated he was not giving full effort, plus he was removing hair and had inconsistent responses to treatment. However, he agreed it was possible that the Petitioner had severe pain. While Petitioner noted waxing and waning symptoms, he opined it did not make sense in this case in that Petitioner describes drastic variations in his pain. Dr. Williams agreed that he could not definitively say Petitioner was self-tourniqueting his arm or even that this was the most likely explanation for his symptoms. (Rx4).

Dr. Williams opined that Petitioner reached maximum medical improvement on February 28, 2012 and sustained 0% impairment pursuant to the AMA guidelines 6th edition, and that Petitioner did not require any physical restrictions. (Rx4).

At trial Petitioner denied shaving his arm prior to seeing Dr. Williams, and testified that he has been open an honest with all of his treating physicians throughout the course of his care.

At trial, the Arbitrator viewed the Petitioner after he took off his compression sleeve and shirt. The right shoulder was slightly lower than the left, but there was no significant difference in the size of the arms. There was little to no hair on the right arm, and there was no hair in the right armpit versus the left. The Arbitrator noted red spots and indentation on the top of his arm, and the Petitioner stated that the indentation was the location of the ice pack velcro strap. The Petitioner's right arm was shaking, and he demonstrated clawing of the right 4th and 5th fingers.

Petitioner testified in November of 2013 he was doing well after physical therapy. Petitioner's last appointment with Dr. Thompson was in July of 2013. (T. 119) Petitioner's home exercise program continued to improve until mid October. Id.

The Arbitrator notes that the traffic stop and Sam's Club videos were reviewed. At Sam's Club, while looking at computer items, the Petitioner is seen using his right hand to scratch or rub his head, without any indicia of pain or lack of motion. While there are periods of time where the Petitioner keeps his right hand in his pocket, there are other times where he moves the arm freely, swinging it while he walks, again with no indicia of pain or difficulty with motion. His presentation in this video, quite simply, is significantly different then the presentation he seems to have made to multiple physicians. The Petitioner is seen bending down and lifting a very large computer box into a cart. In doing so, he uses his right hand and has it underneath the box, holding its weight, while gripping it on top with the left-hand. Again, there are various times that the Petitioner is using his

right hand and arm to touch, hold, and review various store items. He is also seen pulling and pushing the cart using his right hand, on occasion only his right hand. He is seen moving in adjusting the box while it is in the cart as well, which involves lifting and motion of the right arm. He is visualized lifting other boxes into a cart as well. In short, there is nothing about the Petitioner's appearance in this video which would indicate any problem whatsoever with his right arm. He uses it in what the Arbitrator sees as a normal fashion. The videos are dated 11/2/13. Petitioner testified the box weighed 18 pounds and at the time of his video, his restrictions from Dr. Thompson were 25 pounds.

Petitioner submitted job search records (Px15) from 10/20/15 to 7/15/16 which reflected an intermittent search in this time, approximately 125 entries. Some entries that indicated he had an interview resulted in an issue with the interviewer either seeing his arm or indicating he needed to be released by his doctor. Nothing was indicated as to what the proposed jobs included, now whom he spoke with from the prospective employer. He submitted online applications, applications, "in person" or resume. A vocational counselor, Tracey Fortenberry, testified on behalf of the Petitioner. Ms. Fortenberry was retained by Petitioner to perform a labor market survey. (Px17). She testified that, according to Respondent's Section 12 examiners, Petitioner had no restrictions and therefore was open to obtain employment. In contrast, according to Dr. Thompson's restrictions, Petitioner is permanently disabled and cannot work. Ms. Fortenberry noted she placed more weight on Dr. Thompson's opinion because he is the only physician that examined Petitioner for TOS, and indicated that based on a medical determination of permanent disability, the Petitioner is not employable. A "Demands of the Job" form noted Petitioner's job required lifting up to 100 pounds up to 3 times per day, pushing a 225 pound hand cart, lifting various weights 6 to 8 hours per day, and occasional bending/stooping and reaching. (Px14).

Petitioner testified that he graduated from Chester High School in 1987. He attended Southern Illinois University for one year, "then I did the course at the correspondence school", and then attended Worsham College in Chicago from 1996 to 1997. He also attended one semester at John A. Logan College that he testified he didn't get credit for because his scholarship did not pay his tuition.

Respondent presented documentation regarding Petitioner's application for a Funeral Director / Embalmer's license in September 2002 indicated he attended John A. Logan College from 1988 to 1992 and received an associate's degree, that he attended Canterbury University in Cheshire, UK from 1993 to 1995 and received a bachelor's degree, and that he attended Worsham College for mortuary science from 1996 to 1997. (Rx7). A transcript from Canterbury was included, which notes classes taken and grades awarded, but does not indicate dates, just that 1995 was the year of graduation. It reflects a degree in Business Administration.

Petitioner testified that prior to working for Respondent he worked as a funeral director and embalmer in Missouri, Illinois, and Tennessee. He testified that his Illinois license was revoked because his preliminary college "wasn't acceptable to Illinois standards". Petitioner testified that he attended classes via mail through Canterbury and received a degree in business administration in 1995. The Illinois Department of Financial and Professional Regulation denied the renewal of Petitioner's license because they indicated that Canterbury University does not actually exist. (Rx10) Petitioner's testimony acknowledged that the information contained on his funeral director application was inaccurate, and that he signed it. Petitioner's application to Alton Mental Health Center indicates that he graduated from Canterbury University in 2004, and his vocational assessment indicates he graduated from a correspondence school in 1994, but states that couldn't remember where the school was located. (Rx9, Px17) Petitioner's funeral director application claims that he attended John A. Logan College from 1988-1992, earning a bachelor's degree. (Rx10) In fact Petitioner only attended John A. Logan College for one semester and received no credits. Neither Petitioner's Alton Mental Health application, nor his vocational assessment mentions John A. Logan College, but both indicate that he graduated from Worsham College either in 1997 or 1999. (Rx9, Px17)

Petitioner acknowledged that he signed a 2009 agreed disciplinary agreement with the State of Tennessee, in lieu of a hearing, suspending his funeral director and embalmer licenses for one year. He denied ever being reprimanded for fraud or dishonesty. The documentation of this, which Petitioner agreed he signed but denied knowledge of the specific verbiage, indicates the suspension was, in part, for "misrepresentation or fraud in the conduct of the business of the funeral establishment." (Rx6) The incident for which Petitioner was disciplined involved the sale of a casket to a family for viewing and cremation, the subsequent cremation of the deceased without the casket, and the subsequent use of the same casket with a separate deceased. Petitioner's testimony was that there was a mix up of bodies. On redirect exam, Petitioner testified that the Tennessee suspension was based on this error and produced letters he claimed to have sent to the Illinois Department of Professional Regulation stating his case. (Px20) A letter from Petitioner to the State contained within the documents subpoenaed from the State of Illinois, file stamped in September 2011, states that he entered into a settlement agreement with the state board in Tennessee when evidence was rejected by the board that indicated that only one casket was sold to each family served, and that his employer is the one who decided to settle the matter. He testified that he agreed to the suspension so the employer could save face. He also testified that via a casket manufacturer's audit, every single body that purchased a casket was provided with one. While the Petitioner was initially granted an Illinois license, once contact was made with Tennessee, the prior suspension was discovered, as well as that Petitioner had never renewed his licenses there following the end of the suspension. Ultimately, Illinois suspended the Petitioner's license for a year and imposed a fine on the Petitioner in 10/11. (Px7).

Petitioner submitted a 5/15/09 letter to the Illinois Department of Professional Regulation. In it, he denied the charges brought against him by the Tennesseee State Board of Funeral Directors, but that because evidence presented was not accepted by the Board, he accepted a voluntary one year suspension. On 5/5/14 he again wrote to the Department indicating he wanted to deactivate his funeral director/embalmers license, as he had not been and did not intend to practice in that field in Illinois. He noted that: "One point of concern I have, and have only been made aware of recently is the license look up page on your website. I am requesting that if all information cannot be removed, that at least my City be removed as I am experiencing problems with a troubled relative that may use this information to locate me." (Px20).

Respondent submitted evidence of two prior workers compensation claims of the Petitioner. (Rx17). One from 1993 involved the loss of 7.5% of the body as a whole, with no indication of the specific body part. Another from 1998 involved the back, right elbow and chest. He slipped and fell and hit his back and right shoulder. This also resulted in the loss of 7.5% of the body as a whole. (Rx17). While the Petitioner did initially testify that he had no prior workers compensation claims to the right arm, he acknowledged both of these claims. Given the fact these cases date back over ten years prior to the date of accident, the Arbitrator does not find these cases relevant to the current issues in this case.

Petitioner submitted his claimed medical expenses as Petitioner's Exhibit 18, which were indicated to total $7,519.20 in outstanding charges.

Px19 was the Petitioner's Petition for Penalties and Attorney Fees based on the termination of TTD as of 4/24/14.

The Arbitrator notes that Respondent's Exhibits 8, 11 and 12 were rejected at the hearing.

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:

Subsequent to all evidence being presented in this case, the Respondent indicated it was withdrawing its dispute with regard to accident. The Arbitrator agrees that the evidence presented clearly shows that an accident occurred on 1/2/12 which arose out of and in the course of the Petitioner's employment with Respondent, and which resulted in injury to the Petitioner. Working in Respondent's mental health facility, he was physically attacked by a mental resident in a violent fashion. At a minimum, the end of the incident was witnessed by at least two other Respondent employees, and the Respondent submitted no evidence to rebut the Petitioner's history of the incident. The increased risk of injury clearly arose directly out of the employment. The Petitioner has provided substantial evidence that he sustained an accident arising out of and in the course of his employment on 1/2/12.

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

The Petitioner's testimony indicated he initially had neck and right shoulder pain. The injury report packet from Respondent indicated he had been grabbed around the neck with right shoulder pain. The St. Anthony records unfortunately do not contain the triage or intake notes regarding Petitioner's specific complaints. The initial 1/4/12 note from Watson Orthopedics notes an assault with injury to the neck, right shoulder and chest. Shortly thereafter the Petitioner noted complaints down the right arm and in the right hand, including numbness and tingling.

As noted above, there is no real question that the Petitioner was attacked by a patient, including being grabbed around the neck and pulled or jerked, as well as an ongoing violent attack by the patient. His initial complaints are significantly consistent in terms of the neck and right upper extremity areas. Based on this evidence, the Arbitrator finds that the preponderance of the evidence supports that the Petitioner's initial neck and right upper extremity complaints were causally related to the 1/2/12 accident.

The question in this case involves the Petitioner's ongoing complaints and the validity and credibility of same.

This case was extraordinarily difficult to decide with regard to the preponderance of the evidence, as there is evidence supporting the arguments of both sides. Additionally, the record of evidence was voluminous and in some cases clearly showed the contentious nature of the dispute between the parties.

In the Petitioner's favor is that he has, as noted, pretty consistently complained of the neck and right upper extremity. Throughout his several years of treatment, there was no time when he didn't have some level of right upper extremity complaints, which would include the shoulder. There are medical records from multiple physicians which indicate one or more of the following findings on physical examination: swelling, coolness versus the left side, and color changes, all of which are evidence supporting a diagnosis of RSD/CRPS. At the same time, the evidence makes clear that there is no specific objective diagnostic test that can include or exclude such diagnosis.

Dr. Fortin initially noted, following the first EMG, that while neurologic findings were normal, his examination of Petitioner noted autonomic features, including some hand edema and bluish discoloration of the forearm, though he indicated the EMG itself reflected no somatic nerve injury without further explanation. After

reviewing Dr. Fortin's report, Dr. Pineda noted discoloration of Petitioner's right hand. As there were no orthopedic or neurologic abnormalities he could delineate, he noted that any possible autonomic process would be outside of his area of expertise. On 4/2/12, Dr. Fortin again noted discoloration and swelling in the right forearm and hand with weakness and guarding of the distal arm/hand area. Dr. Hazelrigg noted swelling, a reddish-purple tint and coolness in the right arm versus the left. Dr. McKay's nurse on 10/29/12 also noted swelling and a bluish-gray tint to half of the right arm, as if a circulation problem were occurring.

While Dr. Pineda noted the discoloration, he also noted that Petitioner was guarding the use of his right hand so significantly that he would not even shake Pineda's hand. Given the lack of objective diagnostic testing findings in this case, such guarding less than a month after the accident date seems questionable to the Arbitrator.

Dr. Hazelrigg, while noting he saw swelling, color and temperature changes in the right arm, indicated that it was possible Petitioner had TOS, but that it was difficult to know if that was the cause of the problem, and he did not want to perform any surgery unless the reason for the edema was determined. Instead of returning there, Dr. Fortin referred Petitioner to Dr. Thompson for a second opinion. It is unclear why he did not return to Dr. Hazelrigg.

Dr. Phillips' testimony is also significant in this case. The Arbitrator notes that, in his experience, Dr. Phillips is respected by his peers in the geographic area and is often called upon by local physicians to perform EMG testing. In this case, he makes it quite clear that he had concerns about the Petitioner's presentation to him. First is the issue of the band indentation around the entire circumference of the Petitioner's right arm. He clearly found this to be unusual in his experience. He opined that the vast majority of Petitioner's presented symptomatology could be explained by a tourniquet effect in the arm. He also noted that, based on his exam, it was clear to him that there was a significant venous obstruction to a degree rarely seen, and so "outside the realm." He testified that he would have expected to see a different type of even swelling with more venous distension, which wasn't the case, and so "there was probably a reason I lifted up that sleeve." This statement is telling. The Arbitrator found this testimony to be significantly persuasive in this case.

While Dr. Carroll is an orthopedic surgeon, his testimony was also significant to the Arbitrator in terms of the Petitioner's presentation to him versus the Sam's Club video. He testified that the Petitioner's presentation to him was essentially with almost complete non-movement of the right arm, and that this was significantly different than in the video. He also noted that he did not see any atrophy despite the Petitioner having subjective complaints over several years.

Some of the testimony and opinions of Dr. Thompson were not persuasive in the view of the Arbitrator. For example, he testified that the stellate ganglion blocks were diagnostic. However, multiple injections were noted to provide very temporary relief to the Petitioner. Plus, if it was diagnostic, why were three injections required? Dr. Thompson testified that he wanted to perform further blocks, noting the injection when Petitioner was hospitalized gave him relief. However, the records of Dr. Thompson noted the Petitioner indicated the injection provided him with almost no relief at the hospital. While Dr. Thompson complained that the lack of authorization of therapy and the same stellate ganglion blocks contributed to the severity and ongoing nature of Petitioner's condition, it was during this therapy that Petitioner both continued to complain of ongoing symptoms, while at the same time demonstrating an ability to move at Sam's Club that was in significant opposition to those complaints. Dr. Thompson, clearly an expert in the field of TOS, diagnosed the condition based on exam and testing, noting during surgery that there was compression and that the area of compression reproduced Petitioner's symptoms. However, following surgery, within a couple of months the Petitioner's condition not only returned to what it was, but appeared to be worse. Dr. Thompson initially noted the Petitioner's symptoms on 9/12/13, including color changes and swelling, and that while he appeared to have a

preexisting neural injury (of which neither EMG provided proof) and some type of hypersympathetic component, it was not one of RSD/CRPS. At the very next visit he diagnosed RSD/CRPS. Additionally, given the disability presentations made by Petitioner in his office, Dr. Thompson's lack of concern at the ease with which the Petitioner used his right arm in the Sam's Club video in terms of the potential for malingering or Petitioner self-triggering symptoms is concerning to the Arbitrator. While the Arbitrator does not question the credentials of Dr. Thompson, it nevertheless appeared that he generally considered the pieces of evidence which fit within his opinions and tended to ignore those that did not.

Dr. Thompson argued that the lack of authorization of treatment in late 2012 resulted in an increase in Petitioner's symptoms and hampered his recovery, and Petitioner testified that the therapy performed with therapist Gibson improved his condition, the Arbitrator notes that the records of Mr. Gibson do not support this, and in fact recommend a termination of the treatment due to a lack of improvement. Dr. Thompson also testified that, following his surgery, the Petitioner's TOS condition resolved and triggered the RSD/CRPS condition. However, the Arbitrator saw no real change in the locations and quality of the Petitioner's complaints, so it is unclear how it was determined that there was some type of change of condition leading to a change in diagnosis.

The Arbitrator believes that the degree to which the Petitioner reports whatever condition he has to be disabling is not supported by the video of his visit to Sam's Club. The Arbitrator believes that the Petitioner's right arm activities and movements in the video stand in stark contrast to how the Petitioner presented at numerous medical visits. The Arbitrator found the Petitioner's movements in that video to be normal and depicting no evidence whatsoever of a disability in the right arm. This is in opposition to multiple medical visits where the Petitioner presents with almost complete inability to use the right arm. While the Arbitrator found some of the opinions of Dr. Williams in this case to have questionable bases, what was significant was that he actually measured the Petitioner's arms and no atrophy was indicated in the right arm. Had the Petitioner been as disabled as he appeared in most of his medical visits, this would not make sense after three plus years of alleged disuse. The Arbitrator's viewing of the Petitioner's arms did not indicate any obvious visible atrophy, while one would expect a fairly significant level of atrophy over four years after the accident date.

The Arbitrator also notes that the boxes Petitioner lifted at Sam's Club, which contained a chair and a computer, were not tremendously heavy, in the Arbitrator's view of the video and experience with these types of items, they were bulky and heavy enough that it made no sense both how he was able to lift them given his medical presentations, or why he would attempt to do so if he had the significant symptoms in his arm that he describes and the potential worsening of his symptoms.

Ultimately, while, again, there is consistent evidence of visible right arm problems throughout the records of Dr. Fortin, Dr. Pineda, Dr. Hazelrigg and Dr. Thompson, there are too many things that just are not consistent with the Petitioner's presentations, and which just do not make sense.

The Petitioner's ongoing complaints are not completely credible to the Arbitrator. While he may have an ongoing disability, the lack of a true knowledge of what the condition is and what the Petitioner truly can and cannot do leaves the Arbitrator unable to make a fair and authentic determination in this regard other than a minimum level of permanency that is supported by the preponderance of the evidence.

The Arbitrator finds that the preponderance of the credible evidence in this case supports the finding that the causal relationship of the Petitioner's condition ended as of the 6/1/15 visit with Dr. Carroll. It is at that point that the Arbitrator believes the evidence became sufficient to determine that causation ended, and notes that it was not one single piece of evidence that resulted in this determination, but rather multiple pieces of evidence as noted above.

The Arbitrator notes that, with regard to the suspension of his license as an embalmer/funeral director and the issue of the re-used casket, he did not find these pieces of evidence, in and of themselves, to carry significant weight in this case. The Petitioner provided his explanation of what he called a mix-up, and the suspension was taken voluntarily. On the other hand, the evidence is clear that the Petitioner did misstate his educational background in applications for both his Illinois embalmer/funeral director's license as well as his employment application with Respondent. It also does appear that the Canterbury degree is questionable in terms of whether the Petitioner actually attended classes to obtain the degree, or whether this essentially was a "purchased" degree. This does carry some weight with regard to the Petitioner's credibility, but the vast majority of weight that led the Arbitrator to decide the issues in this case as he did was the Petitioner's testimony and the medical evidence and opinions submitted in this case.

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

Based on the Arbitrator's findings with regard to causal connection, as noted above, the Arbitrator further finds that the Petitioner is entitled to the medical expenses contained in Petitioner's Exhibit 18 which were incurred prior to and including 6/1/15. This award is subject to the medical fee schedule contained in Section 8.2 of the Act, and the Respondent is entitled to credit for any of the awarded bills that were previously paid, whether via workers compensation or group health payments to which Section 8(j) is applicable, and the Respondent shall hold the Petitioner harmless with regard to same.

Based on the findings of the Arbitrator with regard to causation, any prospective medical treatment is denied.

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

Based on the Arbitrator's findings with regard to causal connection, as noted above, the Arbitrator further finds that the Petitioner is entitled to temporary total disability benefits from 4/24/14 through and including 6/1/15, a total of 57-5/7 weeks.

The Respondent is entitled to a stipulated credit of $33,724.37 for TTD previously paid by Respondent. However, the parties also stipulated on the record that this credit is applicable to TTD benefits that were paid prior to 4/25/14, which the Petitioner was therefore not seeking via the hearing. As such, this TTD credit is not applicable to the period from 4/24/14 through 6/1/15.

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

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

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

injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 0% of the person as a whole as determined by Dr. Williams pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. 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.

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 Mental Health Technician at the time of the accident and that Dr. Thompson has opined that he has been unable to return to work in his prior capacity as a result of said injury. However, the Arbitrator finds, as noted above, that the causal relationship of any such inability to return to work is questionable and is not supported by the preponderance of the evidence.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 42 years old at the time of the accident. Neither party has presented evidence with regard to how the Petitioner's age may impact any permanent partial disability.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that if the Petitioner is credible, there may be a significant impact on his earning capacity. However, there are questions with regard to his credibility in this case.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the Petitioner's testimony regarding his ongoing disability is consistent with the medical records. However, the testimony and the medical records of Dr. Thompson have some concerning discrepancies when compared to the opinions of multiple Section 12 examiners. The Arbitrator also previously noted that there appear to be some questions with regard to the opinions of Dr. Thompson in this case as they do not seem to acknowledge any evaluation of the possibility that the symptoms may be exaggerated.

Taking all of the evidence as a whole in this case, the Arbitrator again notes that the initial injury and the severity of the attack on the Petitioner are undisputed in this case. There is no question in the Arbitrator's mind that the Petitioner's testimony in this regard was entirely credible, and that he was pulled and yanked by his neck by a violent patient, eventually also being punched and taken to the floor. At the same time, the condition that he continues to display, in the Arbitrator's view, is questionable. The Arbitrator believes that the initial TOS surgery was reasonable, although in hindsight that diagnosis may have been questionable given the lack of

improvement. However, the Arbitrator notes that there also is no question with regard to Dr. Thompson's level of expertise in this area, and thus accepts that the Petitioner may have had this condition. The ongoing problems, however, are muddied by the findings of Dr. Carroll of a circumferential band around the arm, the video of the Petitioner's activities at Sam's Club, and the measured lack of atrophy noted by Dr. Williams. Overall, the Petitioner does appear to have some level of disability, and so the Arbitrator awards the low end of what he feels the range of PPD would be for his type of injury. Given the findings regarding credibility, the true level of disability he may currently have is unknown. As of the date the Arbitrator found causation to have ended, 10% of the person as a whole is what the Arbitrator believes has been fairly demonstrated.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

The Arbitrator also notes that the Respondent argues that two prior IWCC cases, *Sheryl Taylor v. Murray Center*, 16 IWCC 0474, 12 WC 13643 (IWCC 2016), and *Michael Miller v. Illinois State Police*, 08 IL.W.C. 30052 (Ill.Indus.Com'n), 13 I.W.C.C. 1081, 2013 WL 7022713 (2013), support a finding in this case that the Petitioner's credibility is so diminished that any award of permanency is not applicable. The Arbitrator's review of these cases indicates situations of significantly greater egregious conduct by the respective claimants that resulted in determinations of a lack of credibility than was the case here. There is very solid evidence here that the Petitioner was violently attacked. While his credibility certainly appears to be lacking here, it is equally clear to the Arbitrator that he did sustain an injury. While the credibility issue results in the Arbitrator's determination that the causal relationship of any injury had ended as of 6/1/15, the Arbitrator believes the preponderance of the evidence supports that the Petitioner sustained permanent disability to the level of 5% of the person as a whole.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings above, the Arbitrator finds that the Petitioner is not entitled to penalties pursuant to Sections 19(k) and 19(l) of the Act, or to attorney fees pursuant to Section 16 of the Act. The preponderance of the evidence does not support unreasonable, vexatious or frivolous delay on the part of the Respondent under the circumstances of this case.

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 for any and all medical expenses that were paid by Respondent prior to hearing, whether directly or via a Section 8(j) health provider, which have been awarded in this decision. All such credits require the Respondent to hold the Petitioner harmless from any attempts by the providers of treatment the Respondent receives credit for to obtain reimbursement.

The parties stipulated that the Respondent is entitled to credit of $33,724.37 for TTD. However, as noted above, this credit is applicable to TTD that was incurred prior to 4/24/14. As the Petitioner did not seek TTD incurred prior to 4/24/14 at hearing, the Respondent's credit is not applicable to the awards made in this current Decision.

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

Karla Hernandez,
Petitioner,
vs.

NO: 16 WC 05262

Ron's Staffing,
Respondent,

17IWCC0735

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 9, 2017, is hereby affirmed and adopted.

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

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

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: NOV 20 2017
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DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HERNANDEZ, KARLA
Employee/Petitioner

Case# **16WC005262**

RON'S STAFFING
Employer/Respondent

17IWCC0735

On 5/9/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2553 McHARGUE, JAMES P LAW OFFICE
BRENT SCHMITZ
123 W MADISON ST SUITE 1000
CHICAGO, IL 60602

4944 KOREY RICHARDSON LLC
AMY HOFFMAN
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
ARBITRATION DECISION

Karla Hernandez
Employee/Petitioner

v.

Ron's Staffing
Employer/Respondent

Case # **16** WC **005262**

Consolidated cases: _____

17IWCC0735

An *Application for Adjustment 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 **February 22, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0735

FINDINGS

On **1/28/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**823.63**; the average weekly wage was $**205.90**.

On the date of accident, Petitioner was **31** years of age, ***married*** with 6 dependent children.

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

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

Respondent shall be given a credit of $**2,376.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

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

ORDER

Petitioner has not proven that her current condition of ill-being and apparent need for right rotator cuff surgery is causally related an accident which arose out of or in the course of her employment with the 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.

17IWCC0735

Findings of Facts

The disputed issues in this matter are: 1) causal connection; 2) medical bills; 3) temporary total disability; and 4) is the petitioner entitled to prospective medical treatment. *See,* AX1.

Ron's Staffing, (hereinafter "Respondent,") is a temporary labor company. Ms. Karla Hernandez, ("Petitioner") was an employee of Respondent's who was sent to work at M Block. Petitioner testified that she worked for Respondent for approximately one month prior to her date of injury.

Petitioner's testimony

Petitioner testified that on January 28, 2016, she was working at M Block unloading pallets when she felt pulling in her neck. Specifically, Petitioner testified that she was unloading trays of coffee and placing the coffee into packets when she felt pulling in her arm. She described feeling an electrical shock. Petitioner testified that felt this shock as she was unloading 35 pound boxes from a pallet. Per the Petitioner's testimony, she completed her regular shift and began experiencing numbness in her right arm that evening. Petitioner testified that she was seen at Excel Occupational Health on January 29, 2016.

Petitioner's treatment

Petitioner told the treating physician at Excel that she was lifting 10-20 pound boxes when she felt a "pop" in the back of her neck. By way of history, the doctor noted that "pt states that she injured R arm in 12/2014. Pt had PT for about a month". Dr. Edward Pillar diagnosed Petitioner with a possible mild right parascapular strain. Dr. Pillar noted that Petitioner's upper extremity bilateral paresthesias, subjective right arm weakness and sensory complaints were of unknown etiology and stated that Petitioner was "unable to return to work until cleared by own physician" and she was referred to her primary care physician. PX1.

Petitioner was next seen on February 2, 2016, at New Life Medical Center. Petitioner reported that she was carrying heavy boxes when she felt a sharp pain in her shoulders. Petitioner was diagnosed with strain/sprain of both shoulders. PX2.

On February 18, 2016, she was seen at American Diagnostic MRI where she underwent MRIs of both shoulders. Per Dr. Gregory Goldstein's report, the MRI of Petitioner's left shoulder showed supraspinatus tendinosis and small glenohumeral joint effusion in the soft tissue. Regarding the petitioner's left rotator cuff, the MRI was read as showing "thickening and abnormal signal to supraspinatus insertion consistent with tendinosis. No rotator cuff tears. The rotator interval is intact. Rotator cuff muscles are intact without evidence of atrophy or edema". Regarding Petitioner right rotator cuff, the MRI was read as showing "small focus measuring approximately 2mm of abnormal signal along the articular surface of the supraspinatus insertion consistent with a low grade partial tear. Remainder of the cuff tendons are intact". PX2 & PX4.

Petitioner was seen for an initial evaluation with Dr. Thomas Poepping at Illinois Orthopedic Network (hereinafter "ION"), on March 8, 2016. Her chief complaints were noted to be neck and right shoulder pain. Petitioner reported that on the date of injury, she was lifting crates weighing 20-30 pounds above the shoulder and pulling them back repeatedly, when she felt a crack and developed neck and bilateral shoulder pain, which was worse on the right. Dr. Poepping diagnosed Petitioner with right shoulder partial thickness rotator cuff tear, left shoulder supraspinatus tendinosis and neck pain. PX3.

Dr. Poepping specifically noted in his report that he did not have the MRI images to review. Following an MRI of her cervical spine that revealed no herniations, Petitioner reported to Dr. Poepping on May 3, 2016 that her neck was feeling better but she continued to have bi-lateral shoulder pain. She was given an injection in the right subacromial space with 80 milligrams of Kenalog and 8 milliliters of Lidocaine.

On May 9, 2016, Petitioner underwent an EMG study of her upper extremities. Dr. Syed Naveed's impression of the study was that it was consistent with mild distal median mononeuropathy and very mild bilateral C5/C6/C7 cervical radiculopathy. PX5.

On June 28, 2016, Petitioner was seen at ION by Dr. Poepping. He diagnosed Petitioner with right shoulder partial thickness rotator cuff tear, left shoulder rotator cuff tendinosis, mild right carpal tunnel syndrome and mild cervical radiculopathy. PX3.

Petitioner underwent an Independent Medical Examination ("IME") with Dr. Mark Levin on July 26, 2016. Petitioner reported to Dr. Levin that the last week of January she started getting pain over the left arm with overhead unloading of pallets. On January 28, 2016, she heard a "pop" in her neck. She started working rapidly and felt a shock in her cervicothoracic junction. That evening she woke from sleep with pain over both upper extremities. RX4.

Petitioner's only complaint at time of the IME was right shoulder pain. Per Dr. Levin's report, during the history portion of the exam, Petitioner would get up and demonstrate activities and move her neck and shoulder freely, with no complaints of pain. Petitioner denied any previous neck or bilateral shoulder pain.

Dr. Levin reviewed MRI film of Petitioner's right shoulder finding tendinitis but no full thickness tear. He felt that Petitioner's subjective complaints were not supported by objective findings. Dr. Levin found that Petitioner was at maximum medical improvement ("MMI") and there was no need for further treatment. He also opined that Petitioner could have worked in a light duty capacity, throughout her course of treatment.

Petitioner saw Dr. Poepping again on September 6, 2016 and he recommended that Petitioner undergo right shoulder arthroscopy, subacromial decompression distal clavicle excision and evaluation of rotator cuff for either debridement or repair. PX3.

When asked if she had any treatment to her neck or right shoulder in the years before 2016, Petitioner testified that she had not but that she had an incident in December of 2014. Petitioner testified that in December 2014, while working for another employer, she hit her back on a machine. She further testified that she treated at Concentra for that injury for about a month and that her treatment consisted of rehab for her back.

A review of the records demonstrates that Petitioner was seen at Concentra on December 17, 2014, at which time she reported right shoulder pain and was diagnosed with a right shoulder contusion. Petitioner was seen for a follow-up appointment on December 19, 2014. On that date, Petitioner stated that her pain started in the cervical spine area and radiated to her right shoulder and traveled down right arm over her triceps down to dorsal forearm and into the thumb, third and fourth fingers. She was diagnosed with cervical strain and right shoulder contusion.

Petitioner was seen for another follow-up appointment at Concentra on January 7, 2015. She reported that she was doing well but now thinks that when she works her neck pain returned and when she slept, her right arm went numb. Petitioner was last seen at Concentra on January 14, 2015, when she was discharged from care. On that date, she reported that her neck and shoulder still hurt. RX5.

Conclusions of Law
In regards to disputed issue (F), is Petitioner's current state of ill-being causally related to the injury, the Arbitrator finds the following:

The Arbitrator concludes that Petitioner has failed to prove that her current condition of ill being is causally related to her injury. Therefore, Petitioner's claim for compensation is hereby denied.

"A treating doctor's findings and opinions can be undermined, or even disregarded, through reliance on inaccurate or incomplete information." *See, Ravji v. United Airlines*, 2012 WL 440353 at 13 (Ill. Indus. Comm'n) interpreting *Horath v. Industrial Commission*, 96 Ill.2d 349 (Ill. 1983).

A thorough examination of Petitioner's medical records submitted into evidence supports the conclusion that Petitioner's treating physician relied on information he did not observe first hand. Specifically, Petitioner's treating physician, Dr. Poepping, opined that Petitioner sustained a rotator cuff tear without having reviewed her MRI films. Dr. Levin noted in his report that he reviewed the IME studies personally. Clearly, viewing the actual films of Petitioner's right shoulder is the most reliable means of diagnosing a rotator cuff tear.

A workers' compensation claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122). "[C]laimant has the burden of showing by a preponderance of credible evidence that his injury arose out of and in the course of employment, which requires a showing of causal connection." *Id.*

In *Horath*, the claimant was "stripping forms" at work on top of his company building. *Id.* at 1346. Claimant and other workers were holding ropes attached to a steel form to stabilize said forms while they were lowered. *Id.* While claimant held a rope located across his back, a gust of wind caused the form to which this rope was attached to rotate, pulling claimant into a stack of steel bars. *Id.* Following this accident, claimant felt pain in his left leg, back, neck and left arm. *Id.* Later, claimant was accused of giving varying versions of his accident to different treating physicians. *Id.* Eventually, the arbitrator found that claimant failed to show his condition of ill-being was causally connected to his workplace accident. *Id.* at 1347. On appeal, the Commission affirmed the arbitrator's decision that there was a lack of causal connection between claimant's state of ill-being and his workplace accident. *Id.* at 1348. Subsequently, the Supreme Court of Illinois affirmed the decision, as it was not against the manifest weight of the evidence. *Id.* at 1349. Special weight was given to claimant's inconsistent testimony and statements to treating medical professionals. *Id.* Because the Commission determined that claimant's testimony and statements lacked credibility, the judgment of the circuit court against claimant was affirmed. *Id.* Additionally, "[a] treating doctor's findings and opinions can be undermined, or even disregarded, through reliance on inaccurate or incomplete information." *See, Ravji v. United Airlines*, 2012 WL 440353 at 13 (Ill. Indus. Comm'n) interpreting *Horath v. Industrial Commission*, 96 Ill.2d 349 (Ill. 1983).

In the instant matter, the Arbitrator concludes that Petitioner's credibility may be called into question. Petitioner testified at trial that she had had no previous accidents, injuries, or medical treatment involving her neck or right shoulder prior to January 2016. Upon cross-examination, she then testified that she had a work-related injury in December of 2014, which she received treatment for at Concentra. Petitioner testified that her treatment at Concentra was to rehab her back. The records from Concentra directly contradict Petitioner's testimony. Per the records from Concentra, Petitioner treated for her neck and right shoulder. While treating at Concentra, Petitioner's reports with respect to her complaints of pain and radiculopathy are identical to her current complaints.

Dr. Levin noted that during the history portion of the exam, Petitioner would get up and demonstrate activities and move her neck and shoulder on a very free basis with no complaints of pain. Petitioner demonstrated that same freedom of movement during her testimony at trial. Dr. Levin's found that, from an orthopedic standpoint, Petitioner had subjective complaints of pain, which are not substantiated by objective orthopedic pathology from alleged work accidents, in January 2016.

The holdings in *Horath* and its progeny counsels the Arbitrator to disregard the opinions of chosen medical professionals, if they are based on faulty or incorrect information. The Arbitrator finds the opinion of Dr. Levin to be more persuasive and controlling in this matter. According to Dr. Levin, Petitioner's right shoulder MRI revealed some intrasubstance signal changes of the rotator cuff consistent with tendinitis but there was no full thickness tear. Dr. Levin found Petitioner to be at MMI and in need of no further care or work restriction.

The Arbitrator concludes that Petitioner has not proven, by a preponderance of the evidence, that her current state of ill-being is causally connected to her alleged workplace accident, therefore no benefits will be awarded pursuant to the Act. As the petitioner has not proven a causal connection between her current condition of ill-being and the alleged work accident, the remaining disputed issues are moot and will not be addressed.

17IWCC0735

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
16WC5262
SIGNATURE PAGE

Signature of Arbitrator

May 9, 2017
Date of Decision

MAY 9 - 2017

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

Matthew Eilerman,
Petitioner,
vs.

NO: 16 WC 21390

Kraft-Heinz,
Respondent.

17IWCC0736

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 1, 2017, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 20 2017
o110217
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EILERMAN, MATTHEW
Employee/Petitioner

Case# **16WC021390**

KRAFT-HEINZ
Employer/Respondent

17IWCC0736

On 5/1/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1053 JOSEPJ K SAMUELSON PC
5111 W MAIN ST
BELLEVILLE, IL 62226

1109 GAROFALO SCHREIBER STORM
JAMES R CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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

Matthew Eilerman
Employee/Petitioner

v.

Kraft-Heinz
Employer/Respondent

Case # **16** WC **21390**

Consolidated cases: **N/A**

17IWCC0736

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 27, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 21, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, per the stipulation of the parties, Petitioner earned **$56,205.24** and the average weekly wage was that of **$1,080.87**.

On the date of accident, Petitioner was **21** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$5,249.94** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,249.94**.

ORDER

Respondent shall pay Petitioner the sum of **$648.52/week** for a period of **77 weeks of disfigurement** (*i.e.*, 12 weeks to the right wrist, 10 weeks to the left wrist, 25 weeks to the left leg and 30 weeks to the right leg) as provided in Section 8(c) of the Act.

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

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

4/28/17

Date

ICArbDec p. 2

MAY 1 – 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Matthew Eilerman
Employee/Petitioner

Case # **16** WC **21390**

v.

Consolidated cases: **N/A**

Kraft-Heinz
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he has worked for two years as a Mechanic for Respondent. He testified that on February 21, 2016, he was standing on a motor attached to a water pump when the bolts on the motor broke, causing hot water and steam to be released. He testified that the water temperature was that of 260 degrees. He testified that he was knocked down and that immediately after it happened, he was in shock but knew that his whole body was burning.

Petitioner testified that when he got out of the area, he looked down and saw skin hanging off his hands. He testified that he remembered taking his clothes off and sitting on the ground. He testified that he was taken by ambulance and ultimately taken by helicopter to Mercy Hospital in St. Louis.

Petitioner testified that he was in the hospital for two weeks and that Drs. Smock and Pollack were his physicians. He testified that they are plastic surgeons and reconstructive surgery specialists. He testified that he had a skin graft procedure while hospitalized. He testified that the body parts affected included both wrists, his entire back, part of his buttocks and his right and left legs.

Petitioner testified that after he was discharged from the hospital, he continued to treat with Drs. Pollack and Smock and also underwent physical therapy. He testified that throughout the spring of 2016, his condition slowly improved. He testified that towards the beginning of April of 2016, he returned to work light duty and did this for about one month working in the shop. He testified that standing up was a problem, so he stayed in a chair and worked on pieces of equipment at a table. He testified that in June of 2016, he returned to his regular job. He testified that he continued to see Drs. Pollack and Smock and that he last went to their office in November. He testified that he saw the nurse on that date and that she said he looked okay and to call in if he had any further difficulty. He denied having any additional appointments scheduled.

Petitioner testified that he has not been taking any medications and that all of his medical bills have been paid. He testified that while he was off work, he received temporary total disability benefits.

Petitioner testified that he notices that every once in a while both of his wrists get irritated and itchy. He testified that the visible scarring is a concern. He testified that he did not have any restricted range of motion of his wrists. As to his back, Petitioner testified that he gets the same itchiness every once in a while and that he has visible scarring on low back. He testified that his buttocks do not bother him too much but that he has visible scarring. He testified that the skin graft sometimes has red bumps on it and that at the top of the right thigh there is visible scarring. He testified that on the lower part of his

right leg, the skin graft is down towards the Achilles area and that it gets itchy and that he has visible scarring all the way around his lower leg. As to the left leg, Petitioner testified that he does not have a graft but that there is visible scarring. He testified that whenever he crouches in a certain position, it stings in the lower legs and that he cannot stand in that position. He testified that the stinging sensation is on the outside lower part of his legs, that it starts below the kneecaps and that it goes down to the ankles.

Petitioner testified that the difficulties he experiences at work include working on certain pieces of equipment in that he cannot crouch and has to find a different position, which is sometimes difficult to do. He denied having any issues like this before the accident, and he further denied having any additional accidents or injuries since February 21, 2016.

On cross examination, Petitioner denied remembering that either Dr. Pollack or Dr. Smock told him that the stinging sensation would be permanent.

The medical records of Drs. Pollack & Smock were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner was seen on March 18, 2016 in follow-up after his injury. It was noted that Petitioner had a hot water injury with severe burns requiring skin grafting. The "Problem List" was noted to include burns involving 20-29% of the body surface with 0-9% third degree burn. It was noted that Petitioner stated that he had quite a bit of itching but otherwise was doing well. It was noted that Petitioner's wounds were healing well with predominant areas of epithelialization and scattered smaller open wounds, which should contract or epithelialize without surgery. It was noted that Petitioner was to apply antiobiotic ointment to the open areas and moisturizing lotion to the healed areas (wounds, grafts and/or donor sites). It was noted that Dr. Pollack explained the possibility that permanent discoloration or more severe scarring may result from the injury and that scar appearance may take more than one year to mature. Petitioner was to remain off work due to open wounds, use topical treatment (Aquaphor) and take medications including Percocet and Atarax. (PX1).

The records of Drs. Pollack & Smock reflect that Petitioner was seen on April 6, 2016 for follow-up of his skin graft. It was noted that Petitioner had been feeling well, was concerned about purplish graft discoloration as well as an uneven area of the right lateral/posterior thigh and that he also noted some tingling sensations when standing. It was noted that Petitioner had been using Tubigrip at home and was no longer taking pain medications. Petitioner was instructed to avoid sun exposure, wear long clothes and use sunscreen. Petitioner was allowed to return to work with light duty restrictions in a few weeks, then full duty no restrictions starting May 2nd. (PX1).

The records of Drs. Pollack & Smock reflect that Petitioner was seen on May 25, 2016, at which time it was noted that he reported that the skin had toughened up and was no longer breaking open. It was noted that Petitioner had been wearing compression pants underneath his clothes and stated that the grafts occasionally burned when he knelt down and stretched the skin. Petitioner was instructed to avoid sun exposure, wear long clothes or use sunscreen, continue the use of compression garments as much as possible, apply lotion daily and return to work full duty with no restrictions as tolerated. Petitioner was instructed to return in six months or as needed. (PX1).

The medical records of Mercy Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen in the Emergency Room on February 21, 2016, at which time it was noted that a large tank of steam exploded and burned the bilateral legs from the mid-thigh to the distal shin, the bilateral palms, buttocks, back, left posterior arm and right side. Petitioner was admitted to the Burn Unit, where it was noted that he had deep 2nd degree burns to the bilateral lower extremities and forearms and 1st and 2nd degree burns to the back. It was noted that Petitioner was to be observed to fully determine the depth and need for surgery. It was noted that Petitioner had a poor oral intake on February 23rd and that a feeding tube was placed. On February 25, 2016, it was noted that Petitioner was slowly improving but that his pain control was "quite an issue." On

March 1, 2016, it was noted that Petitioner was limited in his movement and was given a trapeze to assist with moving in bed. It was noted that Petitioner was motivated and eating a little, but benefitted from the feeding tube. (PX2).

The records of Mercy Hospital reflect that Petitioner underwent surgery by Dr. Pollack on February 29, 2016, which consisted of (1) tangential excision in preparation for split-thickness skin graft, right upper leg and right lower leg, 230 square cm; (2) placement of split-thickness autograft to right upper leg and right lower leg, 230 square cm; (3) major non-excisional treatment of partial-thickness burn wound bilateral legs for pre- and post-operative diagnoses of (1) third-degree burns, right leg and distal leg; (2) deep second-degree burns, entire right leg, most of the left leg, and back. The Discharge Summary noted that Petitioner's discharge diagnoses included burns; burns of the lower extremity, right, second degree; burn involving 20-29% of body surface with 0-9% third degree burn; cellulitis of the right lower extremity, pre-operative. It was noted that Petitioner's post-operative course was uneventful and that he had adequate pain control. Petitioner was instructed not to drive while on narcotic pain medications and that he was to minimize any shear and friction to the wounds and skin grafts. Petitioner was instructed to take Percocet as needed for pain control, apply Bacitracin to the skin graft daily, apply Eucerin cream to the wounds daily and wrap with gauze for light compression and that once the wounds completely closed, use the Tubigrip for added compression of the right leg and thigh. (PX2).

The February 20, 2017 report of Dr. Charles Puckett and a thumb drive of various pictures were entered into evidence at the time of arbitration as Respondent's Group Exhibit 1. The report of Dr. Puckett reflects that the examination performed on February 7, 2017 revealed that Petitioner appeared well-healed from the burns and that the donor sites had also healed as well. It was noted that Petitioner had full range of motion. It was noted that Dr. Puckett opined that Petitioner's care was appropriate and successful, that he had a full recovery with full work activity (no restrictions), that he was at maximum medical improvement and that no further care was recommended. It was noted that Petitioner had only one concern regarding his work and normal physical activities, and that he noted discomfort and a tightness in the calf area when he had to squat and that standing up corrected the discomfort. It was noted that Dr. Puckett opined that it was likely that this would gradually resolve and that the stretching of the calf area when squatting may actually be helpful to prevent scar contracture. (RX1).

Dr. Puckett's "Clinic Note" noted that Petitioner reported that there were some activities in his work as a mechanic that required him to crouch down and that during those periods he had "stinging" in his legs. It was noted that Petitioner reported that the stinging was relieved within seconds when he took a break to stand, but that he did report that it was necessary for him to take breaks and stand in order to complete his job tasks. It was noted that Petitioner also noticed some itching of the legs and that he continued to wear compression garments daily and was curious if Dr. Puckett believed that it needed to be continued. It also was noted that Petitioner had been very religious about keeping his burns from being exposed to the sun and inquired about whether the sun avoidance should be continued. It was noted that Dr. Puckett discussed with Petitioner that the stinging and itching of the legs was not unexpected given the nature of his injury and that he thought the symptoms would recover with time, likely months to years. (RX1).

CONCLUSIONS OF LAW

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner's current condition of ill-being is related to the accident of February 21, 2016 based upon the undisputed testimony presented at the time of arbitration and corroboration by the medical evidence at the time of trial. The Arbitrator finds Petitioner to have been a credible witness at the time of arbitration, and that the

medical records in the case documented the nature and extent of the treatment Petitioner received for the injuries sustained on February 21, 2016.

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injury, the Arbitrator notes at the outset that Petitioner claims both disability and disfigurement regarding the burn injuries sustained by him. Specifically, Petitioner seeks Section 8(c) benefits for those areas for which disfigurement can be awarded included the bilateral wrists and the bilateral legs below the knee. Petitioner also seeks a permanent partial disability award for those areas where Petitioner was burned but where such areas are not compensable under Section 8(c), including the back, the buttocks and the right leg above the knee.

Section 8(c) of the Act provides, in pertinent part: "For any serious and permanent disfigurement to the hand, head, face, neck, arm, leg below the knee or chest above the axillary line, the employee is entitled to compensation for such disfigurement, the amount determined by agreement at any time or by arbitration under the Act, at a hearing not less than 6 months after the date of the accidental injury…No compensation is payable under this paragraph where compensation is payable under paragraphs (d), (e) or (f) of this Section." 820 ILCS 305/8(c).

The Arbitrator notes that Respondent acknowledges its liability for Section 8(c) benefits to those areas compensable under Section 8(c) to which Petitioner sustained disfigurement, including the bilateral wrists and the bilateral legs below the knee. Respondent maintains that the disfigurement consists of a different pigmentation of Petitioner's skin in those areas, but, in context of other types of scarring, this disfigurement is not serious in the sense that it is grievous or abhorrent with which the Arbitrator agrees. The Arbitrator notes that the scarring is not keloidal and is not particularly noticeable from a long distance, but is sufficiently noticeable from a distance of six feet to warrant a finding of compensable disfigurement. The Arbitrator finds that there is no evidence that the disfigurement to Petitioner's wrists or lower legs would, however, place him at a disadvantage when applying for employment.

As a result thereof, the Arbitrator finds Petitioner sustained compensable disfigurement to his bilateral wrists and bilateral lower legs to the extent as follows: 12 weeks for the right wrist, 10 weeks for the left wrist, 25 weeks for the left leg and 30 weeks for the right leg, for a total of **77 weeks of disfigurement** to the compensable areas under Section 8(c) of the Act.

With respect to Petitioner's claim for a permanent partial disability award, the Arbitrator hereby denies compensation to Petitioner for alleged disability under Section 8(d)2 or under Section 8(e) to the other body parts affected by the accident. The General Assembly has limited the areas for which disfigurement may be awarded. Furthermore, Petitioner bears the burden of proving by a preponderance of the evidence that he has sustained a disability to those other parts for which he claims compensation either under Section 8(d)2 or 8(e). The Arbitrator finds that Petitioner in this case has not met such a burden by establishing that any discomfort he currently experiences is permanent in nature. The Arbitrator notes that the evaluation by Dr. Puckett has confirmed both that Petitioner has full range of motion and that the discomfort about which he currently complains will likely gradually resolve. (RX1). The Arbitrator further notes that neither of Petitioner's treating physicians has indicated that his itchiness, tightness or stinging will be permanent. As a result thereof, the Arbitrator denies compensation for alleged disability under Section 8(d)2 or under Section 8(e) to the other body parts affected by the accident of February 21, 2016.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jim Hauskins,
Petitioner,

vs. NO: 11 WC 14788

Illinois State University,
Respondent,

17IWCC0737

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 2017, is hereby affirmed and adopted.

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

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

DATED: NOV 20 2017
o110217
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAUSKINS, JIM
Employee/Petitioner

Case# **11WC014788**

ILLINOIS STATE UNIVERSITY
Employer/Respondent

17IWCC0737

On 4/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.91% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
STEVEN R WILLIAMS
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

4138 ASSISTANT ATTORNEY GENERAL
WARREN WILKE
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

APR 4 - 2017

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

17IWCC0737

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

Jim Hauskins
Employee/Petitioner

v.

Illinois State University
Employer/Respondent

Case # **11** WC **14788**

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 **Bloomington**, on **November 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. ☒ 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 _____

17IWCC0737

FINDINGS

On **January 19, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$34,144.24**; the average weekly wage was **$648.71**.

On the date of accident, Petitioner was **67** years of age, *single* with **0** 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 $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

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

ORDER

Based upon the Conclusions attached hereto, claim for compensation is denied.

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

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

Michael K. Nowak, Arbitrator

3/28/2017
Date

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APR 4 - 2017

FINDINGS OF FACT

Petitioner claimed he sustained a work-related accident on January 19, 2011. The Application alleged that, on that date, Petitioner fell and sustained injuries to the head, back, upper extremities and other parts of the body. (AX 2) At trial, the primary injury Petitioner claimed he sustained was to the left knee.

Petitioner testified that on January 19, 2011, he was in the process of taking trash out. While he was doing so, Petitioner slipped and fell on what he described as "black ice." Petitioner stated he was unconscious for a period of time and he became nauseous.

Petitioner reported the accident to Respondent immediately after its occurrence and reports were prepared which described same. In the "Incident Report," the accident was described as having occurred when Petitioner took trash out of the southeast door, took three steps and fell to the ground. When this occurred, Petitioner struck his head, lower back, right shoulder and left elbow and was out for a while before getting up. (PX 8) In the "First Report of Injury," the accident was described as having occurred when Petitioner slipped and fell on ice and injured his neck, head, right shoulder and back. (PX 9) Neither of these reports indicated that Petitioner sustained an injury to his left leg or knee.

On January 11, 2011 (a little more than one week prior), Petitioner stated he was diagnosed with prostate cancer. On that date, Petitioner was seen by Dr. Stephen Belgrave, whose medical records suggested that the cancer diagnosis had, in fact, been made sometime prior to that date. However, treatment options were discussed with Petitioner at that time. (PX 11)

Following the accident of January 19, 2011, Petitioner was treated by Dr. Mary Chow who saw Petitioner that same day. According to Dr. Chow's record, Petitioner slipped on ice and fell backward and sustained injuries to the head, low back, right shoulder and left elbow. Dr. Chow ordered a CT scan of the head which was performed on January 19, 2011. That study was normal. Dr. Chow subsequently saw Petitioner on January 28, February 1, February 18, and March 3, 2011. Most of Petitioner's injuries completely resolved with the exception of the right shoulder and Dr. Chow diagnosed him with having sustained a right shoulder strain. (PX 10) There was no reference to Petitioner having any left leg or knee complaints noted in Dr. Chow's records.

Dr. Chow ordered physical therapy for Petitioner's right shoulder strain which he received in February, 2011. The physical therapy records for treatment Petitioner received from February 8 through February 17, 2011, were received into evidence. Petitioner's right shoulder condition gradually improved. There was no reference in those records to Petitioner having any left leg or knee symptoms. (RX 3)

Petitioner testified he began radiation treatment for his cancer in February of 2011, which he continued through June of 2011. Petitioner said he received 42 radiation treatments for his cancer.

The first time Petitioner sought medical treatment for his left knee was on September 14, 2011. At that time, Petitioner was seen by Dr. David Braun because of left lower leg pain behind the left knee that had been present

for one week. Dr. Braun ordered a Doppler ultrasound of the left leg which revealed the presence of a Baker's cyst. (RX 5)

Petitioner was subsequently seen by a Harshal Jani, a Physician's Assistant, on September 20, 2011, because of left knee pain. At that time, Petitioner denied any trauma to his left knee. (RX 3)

On September 22, 2011, Petitioner was seen by Dr. Brett Keller, an orthopedic surgeon. When seen by Dr. Keller, Petitioner stated he slipped on ice the past winter and had left knee problems since then. (PX 2) This was the first time in the medical records that Petitioner attributed his left knee problems to the accident.

Dr. Keller ordered an MRI scan which was performed on October 3, 2011. The MRI scan revealed a tear of the posterior horn of the medial meniscus, tear of the lateral ligament and edema of the medial femoral condyle. (PX 3)

Dr. Keller performed arthroscopic surgery on November 2, 2011. The procedure consisted of a medial meniscectomy and debridement/excision of medial synovial plica. Dr. Keller ordered physical therapy following the surgery and, when he saw Petitioner on December 8, 2011, the left knee was stable and had a full range of motion. (PX 2 and 4)

Dr. Kevin Tu, an orthopedic surgeon, examined Petitioner on June 4, 2015. That examination was performed at the request of Respondent. Petitioner informed Dr. Tu he had sustained a twisting injury to his left knee on January 19, 2011; however, Dr. Tu noted in his review of the medical records that Petitioner had no knee complaints when he was treated shortly following the injury of January 19, 2011. He agreed that if Petitioner, did, in fact, twist his left knee on January 19, 2011, that would be consistent with the development of a medial meniscus tear. (RX 2).

Dr. Keller testified by deposition on January 30, 2015. Dr. Keller's testimony regarding his diagnosis and treatment of Petitioner's left knee condition was consistent with his medical records. In regard to causality, Dr. Keller stated that the fall sustained by Petitioner the preceding winter could have caused Petitioner's condition of ill-being. (PX 1; pp 15)

On cross-examination, Dr. Keller stated that if one sustained another injury that was more significant or severe that could be a "distracting-type injury." However, he did not note that Petitioner had sustained any such injuries. Further, Dr. Keller stated there was no way to determine how old the meniscal tear was. (PX 1; pp 15, 24)

Dr. Tu testified by deposition on December 9, 2015. Dr. Tu's testimony was consistent with his medical report. He noted the fact that the medical records for treatment Petitioner received shortly after the accident did not contain any statement that Petitioner had left knee symptoms. He testified Petitioner informed him he delayed treatment for his left knee because of the prostate cancer; however, Dr. Tu questioned why Petitioner, at the same time, sought treatment for his right shoulder and elbow conditions. (RX 2; pp 15-16)

On cross-examination, Dr. Tu agreed that if Petitioner twisted his left knee on January 19, 2011, that would be consistent with Petitioner having sustained a medial meniscus tear. He also agreed that the treatment provided by Dr. Keller was reasonable and necessary. (RX 2; pp 30-31)

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
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 sustained a slip and fall on ice while he was taking out trash on January 19, 2011. The accident was reported to Respondent in a timely manner. While Respondent disputed accident and notice at trial, Respondent tendered no evidence in support of those positions.

The primary disputed issue was whether Petitioner's left knee condition is causally related to the accident of January 19, 2011.

There was no reference to Petitioner having sustained a left knee injury in either the "Incident Report" or "First Report of Injury."

In the medical records regarding treatment Petitioner received shortly after the accident, there was no reference to Petitioner having sustained a left knee injury.

The first time the medical records indicated that Petitioner reported left knee pain was on September 14, 2011, when he was seen by Dr. Braun. At the time, Petitioner reported he had complaints of pain behind the left knee that had been present for one week. There was no reference to Petitioner having sustained an injury to his left knee on January 19, 2011.

When Petitioner was seen by PA Jani on September 20, 2011, for left knee pain, Petitioner denied having sustained any trauma to his left knee.

The first time Petitioner advised any medical providers that he had injured his left knee on January 19, 2011, was when he was seen by Dr. Keller on September 22, 2011. Obviously, the history provided to Dr. Keller was inconsistent with the histories Petitioner provided to Dr. Braun and PA Jani just shortly before he was seen by Dr. Keller.

Purportedly, Petitioner's explanation for not seeking medical treatment for his left knee was because of his diagnosis of prostate cancer and him undergoing treatment for that condition priority.

While the Arbitrator recognizes that prostate cancer is a potentially life-threatening condition, the fact is that Petitioner did, in fact, seek treatment for his right shoulder strain at the same time he commenced treatment for

prostate cancer. Further, Petitioner did not ever inform any of the medical providers that he had injured his left knee or had left knee symptoms until September, 2011.

Based upon the preceding, the Arbitrator concludes Petitioner's current condition of ill-being in regard to his left knee is not related to the accident of January 19, 2011.

All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jon Fears,
Petitioner,

vs.

NO: 10 WC 41911

Illinois State University,
Respondent,

17IWCC0738

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 2017, is hereby affirmed and adopted.

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

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

DATED: NOV 20 2017
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DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FEARS, JON
Employee/Petitioner

Case# **10WC041911**

ILLINOIS STATE UNIVERSITY
Employer/Respondent

17IWCC0738

On 4/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.91% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
STEVEN R WILLIAMS
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BLOOMINGTON, IL 61701

0499 CMS RISK MANAGEMENT
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WARREN WILKE
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0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

APR 4 = 2017

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

Jon Fears
Employee/Petitioner

v.

Illinois State University
Employer/Respondent

Case # 10 WC 41911

Consolidated cases: N/A

17IWCC0738

An *Application for Adjustment 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 **Bloomington**, on **11/28/16**. 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 _____

17IWCC0738

FINDINGS

On **March 5, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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 **$31,687.24**; the average weekly wage was **$594.07**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **0** dependent child(ren).

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 8, as provided in § 8(a) and § 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $396.05 per week for nine and two-sevenths (9 2/7) weeks, commencing November 9, 2010, through December 2, 2010, and April 21, 2011, through May 21, 2011, as provided in § 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $356.44 per week for 21.5 weeks, because the injury sustained cause the 10% loss of use of the right leg, as provided in § 8(e) of the Act.

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

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

Michael K. Nowak, Arbitrator

3/28/2017
Date

ICArbDec p. 2

APR 4 - 2017

17IWCC0738

FINDINGS OF FACT

Petitioner claimed he sustained a repetitive trauma injury to his lower extremities as a result of walking and standing on concrete floors that manifested itself on March 5, 2010. Petitioner started working for Respondent in November, 2000, and worked as a cook.

Petitioners testified he worked seven hours per day, five days per week and would stand two to three hours at a time without any breaks. Petitioner stood on concrete floors while at work. Petitioner also stated he had to regularly lift cases of food that weighed 10 to 50 pounds.

On March 5, 2010 (the date of manifestation alleged in the Application), Petitioner completed an "Incident Report" which stated Petitioner had sustained a strain to his right lower extremity as a result of walking and stair stepping (PX 4).

On April 1, 2010, Petitioner was seen by Dr. John Tran, his family physician. At that time, Dr. Tran diagnosed Petitioner with large varicose veins, especially in the right leg. Dr. Tran referred Petitioner to Dr. Jesse VanLe, a cardiovascular surgeon (PX 5).

Dr. VanLe evaluated Petitioner on April 13, 2010. Dr. VanLe diagnosed Petitioner with long standing right lower extremity varicose veins that "Worsened over past year secondary to working as a cook." Petitioner complained of heaviness and aching in both legs toward the end of the day and edema of the right ankle toward the end of the day (PX 6).

Dr. VanLe saw Petitioner on May 18, 2010, and his diagnosis remained the same. His medical record again noted the condition had worsened over the past year secondary to Petitioner's working as a cook. Dr. VanLe recommended Petitioner have an RF ablation of the great saphenous vein with stab phlebectomy (PX 6; PX 1, p 12).

On November 9, 2010, Dr. VanLe performed the ablation procedure on Petitioner's right leg (PX 1; p 14). Dr. VanLe then saw Petitioner on December 2, 2010. At that time, Dr. VanLe noted Petitioner was recovering well and the right thigh varicose veins had resolved, but Petitioner still had bulging ankle and feet varicose veins (PX 6).

Dr. VanLe evaluated Petitioner on February 11, 2011, and Petitioner's condition was essentially the same as it was at the time of the prior examination of December 2, 2010. Dr. VanLe performed a surgical procedure on April 21, 2011. That procedure consisted of a microphlebectomy (PX 6).

Dr. VanLe saw Petitioner on May 31, 2011, and noted that Petitioner was recovering well and the painful symptoms had resolved. He instructed Petitioner to return on an as needed basis (PX 6).

Dr. VanLe subsequently saw Petitioner on December 13, 2011, and January 31, 2012. Petitioner's right leg symptoms had reoccurred, but not as severe as they were previously. He recommended Petitioner have another surgical procedure performed on his right leg (PX 6). Petitioner did not undergo that recommended surgical procedure.

Petitioner was authorized to be off work by Dr. VanLe for nine and two-sevenths (9 2/7) weeks, commencing November 9, 2010, through December 2, 2010, and April 21, 2011, through May 31, 2011. At

trial, counsel for Petitioner and Respondent stipulated Petitioner was totally disabled for that period of time, but Respondent disputed liability on the basis of accident and causal relationship.

Dr. VanLe testified by deposition on April 28, 2015. In regard to his diagnosis and treatment of Petitioner's varicose vein condition, Dr. VanLe's testimony was consistent with his medical records.

In regard to causality, Dr. VanLe testified that standing on your feet all day could contribute to and worsen the swelling, heaviness and achiness symptoms generally associated with varicose veins. He also stated that prolonged standing, especially on a hard surface like a concrete floor, exacerbated the symptoms of varicose veins. On direct examination, Dr. VanLe was asked a hypothetical question which described Petitioner's work activities and was asked whether those activities could aggravate Petitioner's condition of ill-being and he opined that they could (PX 1; pp 12-13, 21, 25-26).

On cross-examination, Dr. VanLe testified that lifestyle was the main issue in regard to varicose veins. Increased weight and lack of activity would increase pressure from the legs on down; however, he stated that standing did not help and, in fact, exacerbated the problem. Walking would help because it assisted the veins in the legs in pumping blood to the heart. He opined that inactivity was the most significant risk factor for development of varicose veins (PX 1; pp 31-33, 40-41).

At trial, Petitioner testified he still has right leg pain which gets worse by the end of the day. Petitioner continues to stand primarily on concrete floors while at work. He has not sought any further medical treatment since he was last seen by Dr. VanLe, but applies heat when his leg hurts.

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

The only expert medical witness who testified was Petitioner's treating physician, Dr. VanLe, who opined that Petitioner's standing on concrete surfaces while at work aggravated his varicose vein condition.

On March 5, 2010, Petitioner completed an "Incident Report" which stated he had sustained a strain to his right lower extremity as a result of walking and stair stepping. When subsequently evaluated by Dr. VanLe, Petitioner stated his leg condition worsened over the preceding year secondary to working as a cook.

The issue in this case is whether Petitioner's standing on concrete floors while at work for two to three hours at a time during a seven hour workday subjected him to risk of injury to a greater degree than that of the general public.

In the case of Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52 (1989), the Court ruled that an injury sustained by an employee when stepping off of a curb while walking from the employer's premises to an employee parking lot did not expose the employee to a greater degree of risk than the general public and was not compensable. In the Caterpillar case, the curb was seven to eight inches in height and had a slight slope for drainage purposes, but no observable defects or obstructions. Caterpillar at 57, 62-63.

There was no dispute that Petitioner's job duties required him to stand on concrete floors for two to three hours at that time during a seven hour workday. Quantitatively, this represents a significantly longer period of time of standing on a concrete floor than what would be expected for the general public. Accordingly, the Arbitrator finds Petitioner was exposed to a greater degree of risk than the general public because of his employment.

The Arbitrator concludes Petitioner sustained a repetitive, injury arising out of and in the course of his employment that manifested itself on March 5, 2010, and that his current condition of ill-being is causally related to his work activities.

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?

There was no dispute that the medical services provided to Petitioner were reasonable and necessary and, based upon the preceding conclusion of the Arbitrator, the Respondent is liable for payment of those medical services.

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

Counsel for Petitioner and Respondent stipulated at trial Petitioner was totally disabled for the period of time he was authorized to be off work by Dr. VanLe.

Petitioner is entitled to temporary total disability benefits for nine and two-sevenths (9 2/7) weeks, commencing November 9, 2010, through December 2, 2010, and April 21, 2011, through May 31, 2011.

Issue (L): What is the nature and extent of the injury?

Petitioner's injury was an aggravation of varicose veins in his right leg. Two surgical procedures were performed and another was recommended, but not performed.

Petitioner was released return to work without restrictions; however, he still has complaints of pain in his right leg which gets worse by the end of the day. Petitioner applies heat to his right leg on an as needed basis.

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 10% loss of use of the right leg.

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

JAMIE HEAD,
Petitioner,

vs.

NO: 07 WC 023764

WHITE COUNTY COAL,
Respondent.

17IWCC0739

DECISION ON REMAND

This matter coming on remand from the Appellate Court, Fifth District, Workers' Compensation Commission Division, wherein the Court issued its mandate on November 15, 2016 affirming in part and reversing in part, the decision of the Commission dated November 7, 2014. Pursuant to the instructions of the Court, the Commission adopts the decision of the Arbitrator dated May 10, 2011 which is attached hereto and made a part hereof except for the award of penalties and fees pursuant to Sections 19(l), 19(k), and 16 of the Act which are hereby denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $602.16 per week for a period of 222 weeks, that being the period of temporary total incapacity for work, and maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner a wage differential of $335.50 per week for 12 5/7 weeks, from 4/2/10 through 6/30/10. Respondent shall pay Petitioner a wage differential of $355.46 per week, beginning 4/13/11 and continuing for the remainder of the disability under §8(d)1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,962.58 for medical expenses, and $6,624.00 for vocational rehabilitation services, 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.

17IWCC0739

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: NOV 2 1 2017

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CJD/dmm
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Charles J. DeVriendt

Joshua D. Luskin

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AARON MEDINA,

Petitioner,

vs.

NO: 14 WC 09118

17IWCC0740

SUN CHEMICAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, medical expenses and prospective medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator, but attaches the Decision of the Arbitrator, which is made a part hereof, for the purposes of the Statement of Facts with the additions and modifications stated 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).

Although we affirm the Arbitrator's finding of accident, we find that Petitioner reached maximum medical improvement (MMI) as of September, 2014, and required no further treatment per the report of Respondent's §12 examining physician, Dr. Cole. Petitioner underwent no medical treatment between September, 2014 and September, 2015. Petitioner's prognosis and recommended treatment did not appear to change during that time. All treatment after September of 2014 was not reasonable, necessary, or causally connected to the accident of March 14, 2014.

The Commission vacates that Arbitrator's award of temporary total disability. Petitioner was capable of working, but chose not to. Petitioner was working following his date of accident, and had a legitimate job offer as of April 3, 2014. Petitioner did not miss any work despite his injury and despite the fact that his treating physician, Dr. Giannoulias, gave him "do not work" slips. On May 7, 2014, Petitioner was given a work status slip indicating that he could do office work only.

17IWCC0740

Respondent offered Petitioner work within Petitioner's restrictions and Petitioner returned to Respondent at his prior wage of $17.76 per hour, but only worked one week. Petitioner testified he left his position with Respondent because Dr. Giannoulias took him off of work due to the severity of his injuries. However, this assertion is not supported by the remainder of the evidence. Therefore, we vacate the award for temporary total disability.

As such, we reverse and vacate the Arbitrator's award of temporary total disability and modify the medical award to $12,901.95, which are the charges of American Diagnostic MRI, Edgebrook Open MRI, Archer MRI, and Illinois Orthopedic Network prior to September, 2014. (3/17/14 and 6/20/14 American Diagnostic MRI: $5,100; 7/30/14 Edgebrook Open MRI: $4,875; 8/28/14 Archer MRI: $1,600; 6/17/14, 7/8/14,7/15/14, 8/5/14, 9/4/14, 9/23/14, 9/24/14 Illinois Orthopedic Network: 1,326.95).

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award for temporary total disability is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $12,901.95 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 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 $13,000.00. 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: NOV 21 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

CJD/dmm
O: 11012017
049

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

MEDINA, AARON
Employee/Petitioner

Case# **14WC009118**

SUN CHEMICAL
Employer/Respondent

17IWCC0740

On 4/4/2016, 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 0.47% 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:

1920 BRISKMAN BRISKMAN GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0581 NICHOLAS M BIGONESS LAW OFFICE
1010 JORIE BLVD
SUITE 134
OAK BROOK, IL 60523

17IWCC0740

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

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

Aaron Medina
Employee/Petitioner

v.

Sun Chemical
Employer/Respondent

Case # **14** WC **9118**

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 **2/19/16**. 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

17IWCC0740

FINDINGS

On the date of accident, **3/14/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**37,419.20**; the average weekly wage was $**719.60**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**7,233.33** for other benefits, for a total credit of $**7,233.33**.

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

ORDER

Medical Benefits
Respondent shall pay reasonable and necessary medical services of $21,381.60, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Partial Disability
Temporary partial disability is not awarded.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $479.73/week for 90 5/7 weeks commencing May 25, 2014 through February 19, 2016, as provided in Section 8(b) of the Act.

Prospective Medical Care
Respondent shall authorize and pay for the medical treatment as recommended by Dr. Giannoulias and any reasonable and necessary rehabilitative care needed.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from May 25, 2014 through February 19, 2016, and shall pay the remainder of the award, if any, in weekly payments.

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

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

FINDINGS OF FACT

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The disputed issues in this matter are: 1) causal connection; 2) temporary total disability ("TTD"); 3) temporary partial disability ("TPD"); 4) prospective medical treatment; and 5) payment of medical bills. *See,* AX1.

Petitioner's testimony

Mr. Aaron Medina, ("Petitioner") testified that on March 14, 2014, he was working as a batch maker for Sun Chemical (the "Respondent"), a manufacturer of printing ink. Petitioner was working the third shift, having been assigned to that shift since August, 2013.

On the date of his injury, Petitioner was lifting a forty (40) pound bag of material when he felt a sharp pain in his left bicep. The physicians at Concentra reviewed x-rays of the left shoulder which revealed no fractures or dislocation. A preliminary diagnosis was a shoulder strain, but the physician recommended an MRI to rule out any tendon tears; physical therapy three (3) times per week for 1-2 weeks; and limited to no use of his left arm. PX2.

On the date of the injury Petitioner was also employed by NBC/Telemundo and continued to work there until May 9, 2014. The respondent was aware of the second job and accommodated him by allowing him to work the third shift. Telemundo paid Petitioner $10.00 per hour and he worked approximately six (6) hours per day. He testified that he was only made aware that there was light-duty work available at the respondent's place of business on or about May, 2014, when he did return and was doing sedentary work.

After the EMG on May 20, 2014 Petitioner testified that Dr. Giannoulias took him off work and he has not worked since. Further treatment has been denied by Respondent and Petitioner is seeking treatment as recommended by Dr. Giannoulias. PX8.

Petitioner also testified that although he continued working at Telemundo throughout the completion of his internship, his duties changed because of his persistent shoulder pain. He was not able to meet the physical demands of the original job.

Petitioner's treatment

After leaving Concentra on the morning of his injury, Petitioner met with his attorney who directed him to Illinois Orthopedic Network; where he was seen the same day by Dr. Sajjad Murtaza, who diagnosed Petitioner as having a left rotator cuff injury and possible biceps tendon rupture. Dr. Murtaza recommended an MRI of the left shoulder and directed Petitioner to return in 1-2 weeks. Dr. Murtaza opined Petitioner was not able to work.

On March 19, 2014, Petitioner returned to the Illinois Orthopedic Network and was examined by Dr. Christos Giannoulias, an orthopedic surgeon, who reviewed the MRI's of the left shoulder and left

elbow and assessed the injury as a partial thickness rotator cuff tear and a biceps strain. Dr. Giannoulias recommended physical therapy. No recommendations concerning work were made. The MRI subsequently "did not reveal cuff injury but he continued to have burning, numbness, and pain down his arm". PX7, date of service, 6/4/2014.

According to Respondent, on April 3, 2014, Petitioner was advised through his attorney that Respondent was able to accommodate Petitioner's restrictions of no use of his left arm, and a job description was provided to Petitioner's counsel. The light duty position was office work and required no lifting or use of the left arm. RX2.

On April 9, 2014, Petitioner filed a Petition for an Immediate Hearing under Section 19(b) of the Act against Respondent, stating that he was unable to work at this time.

On May 6, 2014, following a pretrial conference, Petitioner was examined again by Dr. Giannoulias on May 7, 2014, who indicated that Petitioner could perform office work as long as he lifted no more than five (5) pounds. He also recommended an injection to the left shoulder.

Petitioner returned to work in the light duty position on May 12, 2014. Petitioner worked in the light duty position for six days and did not return to work after May 20, 2014.

On May 20, 2014, Petitioner returned to Dr. Giannoulias and the results of his EMG were discussed. The impressions were that the test produced an "abnormal study". "Electrodiagnostic evidence of a (sic) highly suggestive of a left brachial neuropathy, with the posterior being the most affected, affecting the median, ulnar and radial nerves". The doctor recommended pain management and that Petitioner not return to work.

On June 11, 2014, an employee work status report was generated by HealthWorks Medical Group, referring the petitioner for a cervical spine MRI and keeping him off work until June 25, 2014. PX3.

On June 6, 2014, Dr. Giannoulias sent correspondence to Petitioner's counsel stating that after performing an EMG, the petitioner's current diagnosis was "traumatic brachial plexus injury" which can take up to two (2) years to heal, and that he hoped the petitioner could return to work in six to eight (6-8) months from the date of injury, i.e. March 14, 2014. The doctor directly noted causation of the injury to the accident but did not recommend surgery. PX7.

On June 16, 2014, Petitioner was examined by Dr. Brian Cole at Respondent's request, and Dr. Cole diagnosed a left shoulder brachial neuropathy and recommended pain management. Dr. Cole recommended an MRI for the cervical spine "to rule out any structural pathoanatomy... and in 3 months it would be reasonable to consider repeat EMG study." In response to Respondent's specific request "do you feel Mr. Medina's current physical condition prevents him from performing light duty

work described? Dr. Cole responded, "Yes, I believe he is only capable of a desktop job with regard to the left upper extremity given his presentation today." RX1 & 2.

On August 5, 2014, Dr. Giannoulias confirmed that the MRI showed a loose body in the intra-articular aspect of the left shoulder but the biceps tendon was intact and there was no evidence of a full thickness rotator cuff tear however there was subtle articulating undersurface irregularity of the distal supraspinatus tendon, probably a small partial-thickness tear in that area. He also gave Petitioner an injection, as recommended by the IME. PX7, date of service 7/30/14.

A follow-up note dated September 23, 2014 states that Dr. Samir Sharma recommended a repeat evaluation of Petitioner's brachial plexus injury via MRI and an EMG of his left upper extremity. PX7.

On December 7, 2015, Petitioner was again examined by Dr. Cole, at the request of Respondent. Upon review of his medical records and an examination, Dr. Cole opined that the petitioner was at MMI and gave Petitioner an impairment rating of one to 5 percent (1%-5%). RX3.

Petitioner's testimony included statements that he went from December, 2014, to September, 2015, without receiving any medical treatment of any kind and wishes to have the treatment recommended by his treating doctor, i.e. diagnostic arthroscopy and removal of the loose body.

CONCLUSIONS OF LAW

F. Is Petitioner's current 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 his 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).

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 the petitioner has proven, by a preponderance of the evidence, that the injury to his left shoulder is causally related to the accident he suffered on March 14, 2014. The petitioner testified in a credible and unrebutted manner regarding the mechanism of injury. His medical records support his testimony.

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 petitioner is alleging that the Respondent is liable for $21,381.60 in unpaid, causally related medical bills as enumerated in the attachment to Arbitrator's exhibit 1. The Arbitrator awards these bills to Petitioner pursuant to Sections 8(a) and 8.2 of the Illinois Workers' Compensation Act, (the "Act").

K. Is Petitioner entitled to any prospective medical care?

Dr. Giannoulias confirmed that the MRI showed a loose body in the intra-articular aspect of the left shoulder but the biceps tendon was intact and there was no evidence of a full thickness rotator cuff tear however there was subtle articulating undersurface irregularity of the distal supraspinatus tendon, probably a small partial-thickness tear in that area. He is seeking to perform a diagnostic arthroscopy and removal of the loose body. The Arbitrator awards this prospective care and any and all reasonable rehabilitative treatment.

L. What temporary benefits are in dispute?

The petitioner seeks TPD benefits from March 15, 2014 through May 9, 2014 for his employment at Telemundo and TTD from May 25, 2014 through the date of hearing, February 19, 2016, for his employment by Respondent.

Although the petitioner testified that his supervisors at Sun Chemical know he was also working at Telemundo and accommodated his working hours so he could work there, the Arbitrator finds that petitioner did not advise his doctors that he was working two (2) jobs simultaneously and that his doctors based whether he could return to work, only on his duties at Respondent, Sun Chemical. Also, the petitioner testified that he worked at Telemundo from February 3, 2014 until May 9, 2014, when he testified that he could not work for Sun Chemical. Therefore no TPD will be awarded for the period of March 15, 2014 through May 9, 2014 for Petitioner's employment by Telemundo.

The respondent accommodated the petitioner's restriction of no use of the left arm however, Dr. Giannoulias kept him off work, seeking to perform a diagnostic arthroscopy and removal of the loose body. The Arbitrator does award TTD from May 25, 2014 through February 19, 2016.

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ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC9118
SIGNATURE PAGE

Signature of Arbitrator

April 4, 2016
Date of Decision

APR 4 - 2016

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Fernandez-Carreno,

Petitioner,

vs.

NO: 09WC 23830

17IWCC0741

FETCO,

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, 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 6, 2016 is hereby affirmed and adopted.

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

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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.

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: NOV 21 2017

Charles J. DeVriendt

o101117
CJD/rlc
049

Joshua D. Luskin

DISSENT

"Under Section 8(a) of the Act, the claimant is entitled to recover reasonable expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury. [citation omitted]." *F & B Manufacturing Company v. Industrial Commission of Illinois*, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18 (2001). Petitioner has failed to present evidence establishing that his need for arthroscopic surgeries to his knees, bilaterally is reasonable and necessary as I would afford greater weight to the opinions of Dr. Karlsson over those of Dr. Tonino. Therefore, I respectfully dissent.

Petitioner underwent a protracted course of medical treatment over a course of six years resulting in five surgeries to his right knee performed by three separate physicians. Throughout his treatment, Dr. Karlsson evaluated Petitioner on five separate occasions pursuant to §12 of the Act (02/20/07, 03/25/09, 02/25/10, 10/20/11, and 05/05/14) and prepared reports in conjunction with the evaluations (RX4, RX5, RX6, RX7, and RX8). Dr. Tonino examined Petitioner at the request of his attorney on two occasions (09/17/12 and 12/30/13) and prepared reports in conjunction with the evaluations (PX6-Pet. Ex. 2 and PX7).

Dr. Tonino provided his evidence deposition testimony on January 28, 2013 (PX6). Dr. Tonino testified he performed a physical examination of Petitioner's right knee including a McMurray's test which was equivocal. PX6, p. 12. Dr. Tonino explained a positive McMurray's test can indicate a torn meniscus but can also indicate arthritis. *Id.* Dr. Tonino subsequently performed x-rays which verified arthritis, bone on bone, in the right knee. PX6, p. 13. Dr. Tonino diagnosed arthritis which he felt caused Petitioner's knee pain as opposed to a meniscal tear. *Id.* Dr. Tonino testified a knee replacement would be warranted in the future specifically when the pain increased to the point where it woke Petitioner at night. PX6, p. 14.

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As to the left knee, Dr. Tonino performed a physical examination including a McMurray's test which was indicative of a meniscal tear. PX6, p. 13. Dr. Tonino recommended an arthroscopic meniscectomy which was previously recommended by Dr. Cole. PX6, p.14.

On cross-examination, Dr. Tonino testified his records did not contain the MRI report of May 9, 2011 of the left knee. PX6, p. 18. Dr. Tonino reviewed the May 9, 2011 report indicating the menisci appeared unremarkable. PX6, p. 19. Dr. Tonino testified in comparing the two MRI reports, May 9, 2011 and August 9, 2012, the pathology could have changed as one report appeared more indicative of a tear than the other. PX6, p. 20. Regarding causation, Dr. Tonino testified as to the right knee, a causal relationship existed between the injury and the need for the knee replacement surgery but provided no basis for his opinion. PX6, p. 16. As to the left knee, Dr. Tonino testified given the prolonged treatment on the right knee, Petitioner preferentially utilized his left knee. PX6, p. 15.

Thereafter, Dr. Tonino authored an addendum report on December 30, 2013 following a further evaluation of Petitioner and review of an MRI dated October 3, 2013. PX7. Dr. Tonino diagnosed Petitioner with a right knee meniscal tear and recommended arthroscopic surgery. As to causation, Dr. Tonino opined the original injury, despite the surgeries performed, continued to cause pain to Petitioner with an exacerbation due to the untreated left knee condition. Dr. Tonino's opinions remained unchanged from his prior evaluation as it related to the left knee. PX7. Of note in the December 30, 2013 report, Dr. Tonino comments on the surgery performed by Dr. Cole on March 30, 2011 for a suspected right knee meniscal tear which during surgery was found to be intact. PX7.

Dr. Karlsson provided his testimony on two occasions, April 29, 2013 (RX9) and August 18, 2014 (RX10). On April 29, 2013 Dr. Karlsson testified he evaluated Petitioner on four prior occasions. RX9, p. 6. Following the first evaluation, Dr. Karlsson concurred with Petitioner's treating physician who diagnosed an ACL tear and possible meniscal tear on the right and recommended surgery. RX9, p.11. Following the second evaluation, Dr. Karlsson diagnosed persistent laxity of the right knee and possible recurrent meniscal tear with a further surgical recommendation. RX9, p. 12-13. Following the third evaluation, Dr. Karlsson diagnosed the right leg with 1) post ACL revision; 2) possible medial meniscus tear; and 3) patellofemoral pain and recommended further surgery. RX9, p. 15-16. Following the fourth evaluation, Dr. Karlsson testified he evaluated Petitioner's left knee for the first time. RX9, p. 17. Dr. Karlsson obtained a history from Petitioner who related no specific mechanism of injury i.e. twist, turn, or fall with complaints of medial side knee pain and intermittent swelling. PX9, p.18. Dr. Karlsson performed a physical examination of the left knee which included a negative McMurray's test and a normal gait. RX9, p.20.

Dr. Karlsson reviewed the actual MRI films from May 9, 2011 and interpreted such films to be indicative of degenerative changes but evidencing no tears. RX9, p. 21. Dr. Karlsson testified his interpretation of the MRI was consistent with the radiologist's interpretation. RX9, p. 22. Dr. Karlsson testified as it related to the left knee, no abnormal pathology existed, and Petitioner needed no further treatment. RX9, p. 25. In regards to causation, Dr. Karlsson testified Petitioner's right knee condition and potentially altered gait did not cause Petitioner's subjective left knee complaints. RX9, p. 26.

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On August 18, 2014 (RX10), Dr. Karlsson testified he performed a fifth evaluation of Petitioner on May 5, 2014. RX10, p. 6. Dr. Karlsson performed a physical examination of both knees as well as reviewed additional medical records. RX10, p. 10-11. Dr. Karlsson testified he recommended no further treatment for either the left or right knee. RX10, p. 11-12. Regarding the left knee, Dr. Karlsson reiterated the MRI performed on May 9, 2011 showed no evidence of a tear. Further Dr. Karlsson felt if a tear was present it would be degenerative, and more importantly, given Petitioner's poor response to surgical interventions in his contralateral knee, surgery would not be indicated. RX10, p. 12. Regarding the right knee, Dr. Karlsson testified the MRI performed in 2011 (01/31/11) indicated a meniscal tear, but when surgery was later performed by Dr. Cole (03/30/11), no such tear was present. Dr. Karlsson further explained an artifact from the prior surgeries exists which can appear as a tear on an MRI, therefore surgery would not provide relief where no tear exists. RX10, p. 23-24.

I would afford greater weight to the opinions of Dr. Karlsson. Relative to the left knee, Dr. Tonino opined Petitioner's altered gait due to the right knee surgeries caused injury to the left knee. In contrast, Dr. Karlsson opined the evidence did not support such a theory. Specifically, the medical records do not memorialize an altered gait. In fact, Dr. Cole's record dated May 6, 2010 memorializes the opposite: "He walks with an otherwise, normal gait." PX3. The surveillance videos taken in September 2011 evidence Petitioner walking without an altered gait. RX12. Dr. Karlsson testified during all the evaluations he performed, Petitioner's gait was normal. RX9, p.26. More importantly, the MRI performed on May 9, 2011 did not evidence a meniscal tear as testified to by both Dr. Tonino and Dr. Karlsson. Even if such tear was present, throughout his treatment, Petitioner never responded well following surgical intervention. Given such overwhelming negative outcomes to multiple surgeries, it is unreasonable to believe surgery would relieve or cure the condition in Petitioner's left knee.

Relative to the right knee, Dr. Tonino initially testified the only reasonable procedure would be a knee replacement and not arthroscopic surgery. PX6, p. 13-14. This opinion seems reasonable given Petitioner's prior surgeries and the development of arthritis. Inexplicably, Dr. Tonino changes his opinion in December of 2013 and recommends yet another arthroscopic surgery for a possible meniscal repair. PX7. Dr. Tonino reviewed an MRI dated October 3, 2013 which indicated a possible meniscus tear. Dr. Tonino though notes in his report, surgery performed by Dr. Cole on March 30, 2011 evidenced an intact meniscus despite the MRI showing a possible meniscal tear. PX7. Dr. Tonino in formulating his opinion appears to completely ignore this fact. In contrast, Dr. Karlsson explained due to the prior surgeries, an artifact appears on an MRI which presents like a tear where no tear is present. RX10, p. 23. This was, in fact proven to be true by the surgery performed by Dr. Cole in March of 2011. It is unreasonable to compel Respondent to pay for a sixth surgery where it is more likely than not no tear exists and five prior arthroscopic surgeries have failed to provide any long-term relief for Petitioner. Accordingly, I dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

FERNANDEZ-CARRENO, JOSE
Employee/Petitioner

Case# 09WC023830

FETCO
Employer/Respondent

17IWCC0741

On 4/6/2016, 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 0.38% 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:

0247 HANNIGAN & BOTHA LTD
KEVIN S BOTHA
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0081 BRAUN LORENZ & BERGIN
JOHN P BERGIN
33 N LASALLE ST SUITE 1210
CHICAGO, IL 60602

17IWCC0741

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jose Fernandez-Carreno
Employee/Petitioner

v.

FETCO
Employer/Respondent

Case # **09** WC **23830**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Waukegan**, on **February 26, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0741

FINDINGS

On the date of accident, **October 10, 2006**, 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 **$44,667.48**; the average weekly wage was **$858.99**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **2** dependent children.

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

ORDER

Respondent shall authorize and pay the reasonable and necessary expenses associated with the arthroscopic surgeries as recommended by Dr. Pietro Tonino for both the Petitioner's left knee and right knee, 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.

Arbitrator Anthony C. Erbacci

April 5, 2016
Date

APR 6 - 2016

FACTS:

The Petitioner sustained an undisputed accidental injury arising out of and in the course of his employment with the Respondent on October 10, 2006. The Petitioner testified and the medical records indicate that the Petitioner was training another employee to operate a machine when he stepped off of a mat that had been placed in front of the machine and twisted his right knee. The Petitioner testified that he felt a "pop" in his knee and that he reported the incident at that time. Timely notice of the accident is, likewise, not disputed.

On October 19, 2006, the Petitioner came under the care of Dr. David M. Zoellick. Dr. Zoellick noted that the Petitioner was working for the Respondent and that he caught right foot on the edge of a rubber mat and rolled his right ankle to the outside twisting his right knee. Dr. Zoellick ordered an MRI and then diagnosed the Petitioner as having a right ACL tear and meniscal tear. Dr. Zoellick noted that the Petitioner may ultimately require surgical intervention consisting of a right knee arthroscopy with partial meniscectomy and/or ACL reconstruction but the Petitioner was reluctant to proceed with surgery. Thereafter, the Petitioner underwent a course of physical therapy and he continued to follow up with Dr. Zoellick.

On February 20, 2007 the Petitioner was evaluated by Dr. Troy Karlsson at the Respondent's request. Dr. Karlsson agreed with Dr. Zoellick that ACL reconstruction and evaluation of the Petitioner's meniscus was reasonable, necessary and causally related to the injury of October 10, 2006. During this evaluation, examination of the Petitioner's left knee was noted to be normal.

On June 16, 2008, the Petitioner underwent an arthroscopic surgery which included anterior cruciate ligament reconstruction using allograft and partial medial and partial lateral meniscectomies. The post-operative diagnosis was right knee anterior cruciate ligament insufficiency with posterior cruciate ligament attenuation/strain, a medial meniscal tear, a lateral meniscal tear and chondromalacia of the patella. The Petitioner followed up post operatively with Dr. Zoellick and underwent a course of physical therapy. On February 10, 2011 Dr. Zoellick ordered a new MRI of the Petitioner's right knee and indicated that the new MRI suggested a bucket-handle tear of the posterior horn of the medial meniscus and an attenuated anterior cruciate ligament which appeared to be nonfunctional. Dr. Zoellick recommended a repeat arthroscopy and ACL reconstruction.

On March 25, 2009 the Petitioner was again evaluated by Dr. Troy Karlsson at the request of the Respondent. Dr. Karlsson noted that the Petitioners diagnosis was laxity of the prior ACL graft with a possible new medial meniscal tear and he opined that the Petitioner's current symptoms and problems were related to the prior work injury. Dr. Karlsson recommended arthroscopic surgery with a probable revision of the prior ACL graft and possible treatment of a medial meniscal tear. He also opined that the Petitioner's medical treatment to date had been necessary and appropriate and that the Petitioner had not yet reached maximum medical improvement from his work injury.

The Petitioner then sought a second opinion from Dr. Christ Pavlatos on April 23, 2009. Dr. Pavlatos reviewed the history of the Petitioner's injury and treatment and recommended a repeat ACL reconstruction because of the severe instability. Following a course of physical therapy, Dr. Pavlatos performed an arthroscopic evaluation of the Petitioner's right knee, with debridement of the patella and revision ACL reconstruction using an autogenous patellar tendon graft on June 9, 2009. The

post-operative diagnosis was chondromalacia of the patella with failed ACL reconstruction. During the surgery, Dr. Pavlatos evaluated the medial compartment which showed evidence of normal articular surface with a previous partial meniscectomy which resected approximately 80% of the Petitioners previous meniscus. Postoperatively the Petitioner underwent a course of physical therapy and continued to follow up with Dr. Pavlatos.

The Petitioner continued to have complaints of pain on the medial side of his knee as well as some degree of instability. He was given a cortisone injection, and Dr. Pavlatos ordered a new MRI of the right knee. The MRI was performed on February 4, 2010 and was reported to show post-operative changes of ACL reconstruction with an intact graft. There was a diminutive posterior horn of the medial meniscus which suggested a previous meniscectomy and abnormal signal consistent with a nondisplaced tear. There was also irregularity of the patellar tendon consistent with post-operative changes and small joint knee effusion. On March 16, 2010, Dr. Pavlatos recommended arthroscopic evaluation of the Petitioner's right knee.

On February 25, 2010, the Petitioner was again evaluated by Dr. Troy Karlsson at the Respondent's request. Dr. Karlsson noted a possible medial meniscus tear which would warrant a repeat arthroscopy with possible partial medial meniscectomy. Dr. Karlsson opined that while most of the Petitioner's problem was related to atrophy of his quadriceps and chondromalacia of the patella, the Petitioner's medical treatment to date had been appropriate and his current diagnosis was related to his work injury.

On March 19, 2010, Dr. Pavlatos performed a right knee arthroscopy, a partial synovectomy and chondroplasty of the inferior aspect of the trochlear groove and lateral tibial plateau. The postoperative diagnosis was status post right anterior cruciate ligament reconstruction with some mild synovitis and chondromalacia.

On April 27, 2010 the Petitioner followed up with Dr. Pavlatos with continued complaints of pain especially along the medial side. Dr. Pavlatos noted that the Petitioner had lost about 85 to 90% of his meniscus in his initial surgery and opined that the Petitioner may be having medial joint line pain because of the loss of his meniscus. Dr. Pavlatos recommended an evaluation by Dr. Brian Cole for a possible meniscus transplant.

The Petitioner was seen for an initial consultation by Dr. Cole on May 6, 2010. Dr. Cole's impression was right knee medial sided pain due to a deficient medial meniscus with revision ACL reconstruction. Dr. Cole recommended a right knee arthroscopic evaluation and medial meniscal transplantation. On August 4, 2010 Dr. Cole performed right knee medial meniscal allograft transplantation. The Petitioner followed up with Dr. Cole and underwent a course of physical therapy. The Petitioner continued to have complaints of discomfort in the right knee and on January 20, 2011 Dr. Cole ordered a new MRI of the right knee. An MRI of the right knee was performed on January 31, 2011 and was reported to show tearing of the medial fibers of the ACL reconstruction graft. There was a post-surgical appearance of the medial meniscus, with a likely detached anterior root and superiorly flipped torn anterior horn. There was also a focal tear of the lateral meniscus free edge and posterior horn. Dr. Cole's review of the MRI revealed an intact meniscus with no abnormal signal or abnormalities seen on the study. Dr. Cole recommended a diagnostic right knee arthroscopy.

On March 30, 2011 Dr. Cole performed a right knee arthroscopy. The postoperative diagnosis was mild synovitis and suprapatellar pouch tightness and Dr. Cole noted that he found a slightly tight suprapatellar pouch and a completely normal medial meniscus.

On May 5, 2011 the Petitioner followed up with Dr. Cole and reported improvement since his right knee scope on March 30, 2010. The Petitioner complained of left knee pain and Dr. Cole opined that this might or could be related to over compensation as the Petitioner reported that it began just before the March 30, 2011 arthroscopic surgery. Dr. Cole recommended an MRI of the left knee which was performed on May 9, 2011, and was reported to demonstrate inflammatory changes/edema in the infrapatellar fat pad at the lateral inferior patellofemoral joint and some degenerative signals in the posterior horn of the medial meniscus.

The Petitioner followed up with Dr. Cole on May 16, 2011 and Dr. Cole opined that the Petitioner's left knee had possibly been injured secondary to compensation from his right sided surgeries. Dr. Cole noted that the MRI demonstrated a trace effusion, an intrameniscal signal that might be suggestive of a small tear, and no large meniscal pathology. Dr. Cole's impression was left knee pain likely compensatory due to his ongoing recovery process of the right knee and he gave the Petitioner a cortisone injection into the left knee and a referral for physical therapy. On June 16, 2011 Dr. Cole noted that the Petitioner was at maximum medical improvement for both his right and left knees.

On September 8, 2011 the Petitioner returned to Dr. Cole for evaluation of both knees. Dr. Cole noted that the right knee was doing okay, with some residual tenderness over the medial joint line and no effusion. The left knee was noted to be painful along the medial joint line and sometimes with weight bearing or walking activities. Dr. Cole opined that the Petitioner's right knee was at maximum medical improvement and he indicated that that if the left knee pain became intolerable or any mechanical symptoms developed, a left knee arthroscopy would be appropriate. The Petitioner last saw Dr. Cole on October 10, 2011 and reported continued complaints of left knee pain on the medial side with any twisting activities prolonged ambulation or climbing up and down stairs. Dr. Cole reviewed the imaging from May 2011 and opined that a diagnostic arthroscopy with partial medial meniscectomy versus debridement would be warranted for the Petitioner's left knee.

The Petitioner testified that his employment with the Respondent was terminated on October 10, 2011 but that he began working for a new employer, Midwest Optical Systems, engraving camera lenses. The Petitioner testified that he worked full-time but that the job required him to sit most of the time. The Petitioner testified that he worked at that position through 2015

On October 28, 2011, the Petitioner was again examined by Dr. Karlsson at the request of the Respondent. Dr. Karlsson's examination revealed that the Petitioner's left knee was stable, with no effusion, but there was medial joint line tenderness. Dr. Karlsson opined that the Petitioner did not require any treatment whatsoever for the left knee, had some minimal degenerative changes expected for his age and did not have a current problem within the left knee. Dr. Karlsson further opined that there was no correlation between the Petitioner's left knee complaints and the work injury of October 10, 2006 to the contralateral knee. He opined that the treatment of the Petitioner's right knee had not caused any of the subjective complaints or symptoms of the left knee and that the Petitioner was at maximum medical improvement regarding both knees.

On August 3, 2012, the Petitioner saw his primary care physician, Dr. Tracy Quinn, for complaints of left knee pain. The history of 5 total surgeries on the right knee was noted and the Petitioner reported that he was told that he might have a possible meniscus tear in the left knee. An MRI of the left knee was performed on August 9, 2012 and was reported to show a small joint effusion and a tear involving the posterior horn and body of the medial meniscus with extension to the inferior articular surface.

The Petitioner was then seen by Dr. Pietro Tonino on September 17, 2012. Dr. Tonino noted the history of the Petitioner's injury and subsequent medical treatment. His impression of the right knee was degenerative arthritis status post 4 surgeries for ACL reconstruction and medial meniscus injuries. The diagnosis for the left knee was a possible medial meniscus tear of the left knee. Dr. Tonino opined that the Petitioner was a candidate for left knee arthroscopy and partial medial meniscectomy. Dr. Tonino opined that the Petitioner's left knee condition was related to the initial work injury due to the fact that he was favoring his right knee due to multiple surgeries of the right knee. Dr. Tonino noted that the Petitioner had no other injuries to the left knee that could be contributing to his condition.

On September 20, 2013 the Petitioner returned to Dr. Quinn, his primary care physician, with complaints of right knee pain. A new MRI of the right knee was ordered and the Petitioner underwent the MRI on October 2, 2013. That MRI was reported to show a deformed mid-body portion of the medial meniscus with a superior low signal flap-like extension paired findings suggesting a horizontal tear at this location with a displaced meniscal flap.

The Petitioner was seen again by Dr. Tonino on December 30, 2013. Dr. Tonino reviewed the MRI of the right knee from October 2, 2013 and his impression was left knee medial meniscus tear and a right knee medial meniscus tear and degenerative arthritis. Dr. Tonino opined that based upon the Petitioner's ongoing complaints of the right knee and an MRI that showed some abnormality of his medial meniscus, he was a candidate for a right knee arthroscopy and a partial medial meniscectomy. Dr. Tonino opined that the recommended treatment for the Petitioner's right knee was causally related to his October 10, 2006 work injury of twisting the right knee and he noted that his opinion regarding causation for the Petitioner's left and right knees was unchanged from his prior correspondence.

On May 5, 2014 the Petitioner was again evaluated by Dr. Karlsson. Dr. Karlsson noted that the Petitioner had no relief whatsoever from his 5 prior knee surgeries and indicated that he is a poor candidate for further arthroscopic surgery to either knee. Dr. Karlsson also noted that the Petitioner had a prior MRI of the left knee in 2011 which did not show any signs of a tear. Dr. Karlsson opined that, at most, the Petitioner had a degenerative tear in the left knee which was unrelated to his accident of October 10, 2006. Dr. Karlsson remained of the opinion that the Petitioner was at maximum medical improvement and required no additional treatment, and that the left knee complaints were not in any way related to his prior right knee injury or treatment.

The Petitioner was most recently seen by Dr. Quinn on December 21, 2015 for complaints of worsening right knee pain. Dr. Quinn noted that the Petitioner was awaiting surgery and he gave the Petitioner a prescription for meloxicam.

The Petitioner testified that he currently continues to experience pain in his right knee as well as difficulty standing for more than 10 minutes, walking, and ascending and descending stairs. The Petitioner testified that he also continues to have pain in his left leg with weight bearing but that his left knee pain is not as bad as his right knee pain.

The deposition testimony of Dr. Tonino was admitted into the record as Petitioner's Exhibit 6. Dr. Tonino testified that he reviewed all of the Petitioner's medical records, including those of Dr. Brian Cole, Dr. Zoellick, Dr. Karlsson, and Dr. Pavlatos. He noted that the Petitioner began complaining of left knee pain on May 5, 2011 and that Dr. Cole opined that the left knee condition was due to persistent problems with the right knee and required arthroscopy. Dr. Tonino testified that the Petitioner complained of intermittent giving way of his left knee which is a problem that can be seen with medial meniscus tears and medial sided left knee pain and he also had significant medial joint line tenderness. Dr. Tonino opined that the Petitioner had a medial meniscus tear of the left knee and that on the right knee he had arthritis underneath his kneecap, the patellofemoral compartment and medial joint compromise. Dr. Tonino opined that the Petitioner needed the left knee arthroscopic meniscectomy which was previously recommended by Dr. Cole and that hat he may be a candidate for a right knee replacement in the future. Dr. Tonino opined that the Petitioner's left knee was causally related to the treatment to his right knee based on the fact that the Petitioner had multiple surgeries on the right knee. He indicated that with activities of daily living, the Petitioner had been preferentially using his left knee because of his right knee problems and was still having right knee problems.

On cross examination Dr. Tonino testified that the May 9, 2011 MRI of the Petitioner's left knee showed inflammatory changes of the infrapatellar fat pad and that the menisci looked unremarkable. Dr. Tonino noted that there were some degenerative signals in the posterior horn of the medial meniscus, which indicated that means that there was some abnormality of the medial meniscus, but that the radiologist didn't specifically say that there was a tear per se. Dr. Tonino further testified that the August 9, 2012 MRI of the Petitioner's left knee indicated a medial meniscus tear. He testified that there could have been a change in pathology however he did not have the films to look at.

The deposition testimony of Dr. Karlsson was admitted into the record as Respondent's Exhibits 9 and 10. In his first deposition taken on April 29, 2013, Dr. Karlsson noted the history of the Petitioner's medical treatment and testified that he disagreed with Dr. Tonino's opinion that the treatment to the Petitioner's right knee caused the condition of the left knee. Dr. Karlsson noted that when he saw the Petitioner for his examination, the Petitioner was walking with a normal gait and that the MRI in 2011 showed no meniscus tear in the left knee. Dr. Karlsson testified that there was no ongoing pathology in the left knee, other than a mild amount of degeneration in the joint which would be normal for some one of the Petitioner's age (44), and that he did not see any signs of abnormal pathology on the Petitioner's MRI scans. Dr. Karlsson opined that the Petitioner needed no treatment whatsoever for the left knee as it was a normal 44-year-old gentleman's knee. In his second evidence deposition taken on August 14, 2014, Dr. Karlsson opined that the Petitioner did not require any treatment to either one of his knees, and that there was no causal relationship between the Petitioners subjective complaints of pain in the left knee from over compensation and the work accident of October 10, 2006.

CONCLUSIONS: 17IWCC0741

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

It is undisputed that the Petitioner sustained injury to his right knee on October 10, 2006. The Petitioner was initially diagnosed with a torn anterior cruciate ligament and underwent ACL reconstruction with partial medial and lateral meniscectomies by Dr. Zoellick on July 16, 2008. The Petitioner then underwent a revision ACL reconstruction by Dr. Pavlatos on June 9, 2009. On March 19, 2010 he underwent a third surgery on the right knee in the form of an arthroscopy, partial synovectomy and chondroplasty. Dr. Pavlatos noted that the Petitioner had lost about 85-90% of his meniscus in the right knee and he referred the Petitioner to Dr. Brian Cole who performed a right medial meniscal allograft transplantation on August 4, 2010. On March 30, 2011 Dr. Cole then performed a right knee arthroscopy and a release of the suprapatellar pouch. The reasonableness, necessity, or causal relationship of those five right knee surgeries to the October 10, 2006 work injury is not disputed.

Petitioner was evaluated by Dr. Tonino on September 17, 2012 who recommended observation of the right knee at that time. Petitioner had ongoing complaints with his right knee and saw his primary care physician in September 2013 ordered a new MRI. On December 30, 2013 Petitioner was again evaluated by Dr. Tonino for right knee complaints who reviewed an MRI of the right knee which showed a medial meniscus tear with a possible flap displaced from the medial meniscus. Dr. Tonino recommended a right knee arthroscopy and a partial medial meniscectomy.

Dr. Karlsson agreed that all the treatment that the Petitioner received was reasonable and necessary but opined that no further treatment was warranted for the Petitioner's right knee as of May 5, 2014. Prior to the accident of October 10, 2006 the Petitioner never had any problems with the right knee. Subsequent to the undisputed right knee injury, the Petitioner has continued to receive medical treatment and to have problems with the right knee. While the Arbitrator notes the opinions of Dr. Karlsson, the Arbitrator finds that the medical opinions of Dr. Tonino with respect to the Petitioner's right knee condition are sufficiently credible, reliable and persuasive so as to satisfy the Petitioner's burden of proof and finds that the Petitioner's current condition of ill being as it relates to his right knee is causally related to the accident of October 10, 2006.

As it relates to the Petitioners left knee, the Arbitrator notes the opinions of Dr. Karlsson but finds the opinions of both Dr. Tonino, and Dr. Cole, the Petitioner's treating physician, are sufficiently credible, reliable and persuasive so as to satisfy the Petitioner's burden of proof.

On May 5, 2011, the Petitioner complained of over compensatory left knee pain to Dr. Cole who opined that this might or could be related to over compensation. Dr. Cole opined that absent the right knee condition, the Petitioner would likely not have come to the need for care of the left knee. While the MRI of the left knee was reported to demonstrate no large meniscal pathology, it was noted that there was an intrameniscal signal that might be suggestive of a small tear. Dr. Cole opined that the Petitioner's left knee had possibly been injured secondary to compensation from his right sided surgeries.

Dr. Tonino noted that the Petitioner began complaining of left knee pain on May 5, 2011 and that Dr. Cole opined that the left knee condition was due to persistent problems of the right knee. Following a course of unsuccessful conservative treatment Dr. Cole ultimately recommended a left knee arthroscopy. Dr. Tonino testified that the Petitioner complained of intermittent giving way of his left knee, a problem that can be seen with medial meniscus tears, and medial sided left knee pain. Dr. Tonino opined that the Petitioner needed arthroscopic meniscectomy which was previously recommended by Dr. Cole for his left knee. Dr. Tonino further opined that the Petitioner's left knee condition was causally related to the treatment to his right knee based on the fact that the Petitioner had multiple surgeries on the right knee. He testified that the Petitioner had been preferentially using his left knee because of his right knee problems and was still having right knee problems. He further testified that it is something that can occur with patient's that have prolonged treatment with one lower extremity and that the Petitioner had prolonged treatment on his right knee with 5 surgeries and was still having problems with his right knee. Dr. Tonino testified that the May 9, 2011 MRI showed an unremarkable meniscus, however noted that there were some degenerative signals in the posterior horn of the medial meniscus. He testified that this meant that there was some abnormality of the medial meniscus but not a tear per se.

The Arbitrator notes that Dr. Karlsson opined that the Petitioner did not need any further medical treatment for his left knee as it was a normal looking knee despite the fact that the MRIs taken in 2011 in 2012 indicate meniscal pathology in the left knee.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner has established by more than a preponderance of the evidence that the Petitioner's condition of ill-being as it relates to both his right and left knees is causally related to the injury and accident of October 10, 2006.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The dispute as to whether the Petitioner is entitled to prospective medical treatment under Section 8(a) is based upon the disputed issue of causal connection. Having found that the Petitioner's current condition of ill-being as it relates to both knees is causally related to the accident of October 10, 2006, and based upon the credible, unrebutted testimony of the Petitioner and the medical evidence, the Arbitrator finds that the Petitioner has established by more than a preponderance of the credible evidence that he is entitled to prospective medical treatment for both his right knee and his left knee, specifically the arthroscopic surgeries as recommended by Dr. Tonino for both the Petitioner's left knee and right knee.

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

DORIS KELLEY,
Petitioner,

vs.

NO: 14 WC 17931

17IWCC0742

STAFF MANAGEMENT,
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 causation, and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 3, 2015 is hereby affirmed and adopted.

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

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

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: NOV 21 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

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CJD/dmm
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KELLEY, DORIS
Employee/Petitioner

Case# **14WC017931**

14WC024306

STAFF MANAGEMENT INC
Employer/Respondent

17IWCC0742

On 10/3/2016, 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 0.42% 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:

0000 DORIS KELLEY
PO BOX 773
OAK PARK, IL 60303

0445 RODDY LAW LTD
ROBERT J DOHERTY
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

17IWCC0742

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

Doris Kelley
Employee/Petitioner

v.

Staff Management, Inc.
Employer/Respondent

Case # **14** WC **17931**

Consolidated cases: **14 WC 24306**

An *Application for Adjustment 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 **July 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 and average weekly wages?
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 **Travel expense reimbursement**

17IWCC0742

FINDINGS

On 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 year preceding the injury, Petitioner earned $**22,880.00**; the average weekly wage was $**440.00**.

On the date of accident, Petitioner was **62** 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 $**861.75** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**861.75**.

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

ORDER

See case number 14 WC 24306 regarding permanency, medical bills and the nature and extent of Petitioner's injuries.

Travel expenses are not awarded, pursuant to the Act.

Petitioner's current condition of ill-being is causally connected to this injury.

Petitioner's earnings are found to be $440.00 per week.

Respondent shall pay Petitioner temporary total disability in the amount of $293.33 for 3 & 4/7 weeks and shall be given a credit of $861.75 for benefits previously paid.

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

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

14 WC 17931
The petitioner is pro-se and the following issues are in dispute in case number 14 WC 17931: 1) causal connection; 2) average weekly wage; 3) earnings; 4) travel expenses; and 5) the nature and extent of her injuries. *See,* Ax1.

Petitioner's testimony
Petitioner was working for Respondent on April 4, 2014; testified that she was lifting bags and moving boxes when she felt an onset of pain in the lower back. While she was able to continue working and finish her shift, by the next morning she could barely get out of bed. She began receiving medical treatment on April 5, 2014. She presented to doctors at Circle Family Health Care on April 5, 2016, and also sought treatment at River Forest Chiropractic on the same date.

Petitioner gave a consistent history of an injury occurring on April 4, 2014; describing pain in the midline lumbar region, radiating through the buttock into her left thigh and calf. Petitioner began receiving a course of chiropractic care and treatment from River Forest Chiropractic. By May 27, 2014, her condition had improved and so they postponed her request for an MRI. Petitioner testified that she was still experiencing symptoms and receiving treatment as of mid-June, 2014. According to the medical records, she was receiving treatment approximately one time a week and as of June 12, 2014, her condition was improving. Petitioner testified on cross-examination, that the only part of her back that was injured in this accident was her lower back. PX A-2; T pp. 15-16, 24.

Petitioner suffered a subsequent accident while working for the respondent on June 16, 2014, which is the subject of case # 14 WC 24306; a companion claim to this accident and both claims were consolidated.

Petitioner testified that when she was hired, she was told she would make $11.00 an hour, based on a correspondence sent to her from an individual from Staff Management. The Arbitrator has reviewed the letter and notes that Petitioner was offered employment at 40 hours a week and making $11.00 an hour. T, pp.20; PX A4.

Petitioner testified that she was seeking travel expenses to cover her trips to and from her physicians and chiropractic therapy. At trial, Petitioner admitted that these physicians were her choice. There was no testimony from Petitioner that she could not secure treatment from any other facility and Petitioner presented no "proof" of the mileage reimbursement she was seeking. T, pp. 19, 57-58.

CONCLUSIONS OF LAW

G. What were Petitioner's earnings?
Petitioner testified that she was hired to make $11.00 an hour and work 40 hours a week. She provided documentation including a hire letter from Staff Management. Respondent presented a wage statement. Based on this testimony and the evidence, the Arbitrator finds that Petitioner's correct average weekly wage was $440.00 in a week in accordance with the *Sylvester v. Industrial Commission.* (PXA4, verification of employment letter) (RX 3, wage statement).

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

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).

Petitioner testified that as a result of her undisputed accident, she injured her lower back. She received chiropractic treatment from May 6, 2014 into June, 2016 for her lower back and was still receiving active medical treatment at the time of her second incident on June 16, 2014; which is the subject of case # 14 WC 24306. The medical records do not indicate whether Petitioner had reached maximum medical improvement ("MMI"). Petitioner specifically testified at trial that while her back condition was "better" however, she was still under active medical treatment at the time of the second accident; and was still experiencing pain in her back.

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

Petitioner suffered an accident on April 14, 2014. The Arbitrator further notes that, as a result of the accident, Petitioner suffered an injury to her lower back. That testimony is unrebutted. Petitioner presented medical evidence (Petitioner's Exhibit A, et. al.) documenting her medical care and treatment with River Forest Chiropractic subsequent to the April 14, 2014 incident. Petitioner continued to have complaints of pain in the lower back and was still under active medical treatment and had not reached MMI when she suffered a second accident on June 16, 2014. Consequently, the Arbitrator finds that any permanency to be awarded Petitioner as a result of her low back condition will be addressed in case # 14 WC 24306.

O. Should Petitioner be reimbursed for travel expenses?

Petitioner did not present any actual evidence indicating what travel expenses she was seeking. Moreover, Petitioner testified that she was seeking to recoup expenses covering her trips to and from her physicians including her chiropractor but no mileage was submitted and, more importantly, Petitioner acknowledged that she was seeking the expenses for travel to physicians who were of her own choosing. Consequently, the Arbitrator finds that Petitioner is not entitled to any mileage reimbursement.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DORIS KELLEY,

Petitioner,

vs. NO: 14 WC 24306

17IWCC0743

STAFF MANAGEMENT, 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 causation, medical, temporary total disability, and nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below but attaches the Decision of the Arbitrator for the Findings of Fact, which is made a part hereof with the modifications noted.

Petitioner sustained two un-disputed work-related accidents on April 4, 2014, and June 16, 2014. Petitioner alleges injuries to her low back as a result of the first accident, and injuries to her low back, right knee, left shoulder, and left wrist as a result of the second injury. The Commission finds that there is a causal connection between Petitioner's current condition of ill-being as it relates to her back and her left wrist, but reverses the Arbitrator regarding causal connection as to Petitioner's left shoulder. Petitioner's right knee injury was resolved by the time of hearing on Arbitration and was not at issue.

The first mention of a left rotator cuff tear was in the medical records of October 30, 2014. (PxC) The records immediately following the accident, and prior to the October 30, 2014 record, do not include any complaints regarding the left shoulder. The discharge diagnosis from June 17, 2014, was a right knee contusion, left wrist contusion and back strain. Additionally, there is no causation opinion from either of Petitioner's treating physicians, Dr. Beran or Dr. Romano, linking Petitioner's left rotator cuff tear and treatment thereto, to the work accident of June 16, 2014. Respondent's expert, Dr. Coe, provided a causation opinion that Petitioner's injury to her left shoulder was not related to the work injury of June 16, 2014. Based on these reasons, the Arbitrator is reversed regarding causal connection as to the left shoulder and

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Petitioner's award is reduced from 20% loss of person as a whole to an award for permanency in the amount of 5% loss of use of the person as a whole. As the medical records reflect continued problems with Petitioner's left wrist (PxC), the award of 5% loss of use to the left hand, based on the above factors, is affirmed.

Petitioner's accident occurred in 2014, so the factors set forth under §8.1b are applicable: i) Dr. Coe did an impairment rating regarding Petitioner's low back, issuing a final impairment rating of 2% of the whole person. He did not perform an impairment rating for Petitioner's neck, wrist, left shoulder, or knee; ii) Petitioner's occupation at the time of her injury was described as "office agent". Based on the testimony and records, it appears she held roles in a variety of clerical positions. She also obtained a job as an assembly worker for Ford for approximately 5 weeks; iii) Petitioner was 62 years old at the time of injury; iv) Petitioner's future earning capacity is unclear. She was making $11/hour while employed by Respondent. She was making $15/hour while employed by Ford. She had been unemployed at the time of her hearing at Arbitration; v) Petitioner had been released MMI without restrictions multiple times as early as 1/14/15. Although the medical records reflect problems Petitioner has with her sinuses, sleep patterns, left rotator cuff, and carpal/cubital tunnel, there has been no evidence presented to show that any of those conditions are causally related to Petitioner's injury. As Petitioner was 62 years old and unemployed as Ford felt she was unable to perform the job, the evidence shows Petitioner's employability may be limited as a result of her injuries. However, as the left shoulder rotator cuff was not related to her work injury, an award based on weighing the five aforementioned factors, is appropriate at 5% loss of use of the person as a whole and 5% loss of use of the left hand.

Medical bills pertaining to Petitioner's back strain, left wrist strain, or right knee contusion are the responsibility of the Respondent. However, all medical bills related to the left shoulder are the responsibility of the Petitioner. Additionally, the Arbitrator's award of $30.00 in medical bills for wrist splints is reversed. The Arbitrator denied causation regarding Petitioner's carpal and cubital tunnel syndromes, so the award to cover the cost of the braces for same should also therefore have been denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $293.33 per week for a period of 8 6/7 weeks, from June 17, 2014 to July 13, 2014 and from November 26, 2014 to December 30, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $264.00 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 a person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $264.00 per week for a period of 10.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 5% loss of use of the left hand.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,000.00. 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: NOV 21 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

CJD/dmm
O: 101117
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KELLEY, DORIS
Employee/Petitioner

Case# **14WC024306**

14WC017931

STAFF MANAGEMENT INC
Employer/Respondent

17IWCC0743

On 10/3/2016, 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 0.42% 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:

0000 DORIS KELLEY
PO BOX 773
OAK PARK, IL 60303

0445 RODDY LAW LTD
ROBERT J DOHERTY
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

Doris Kelley
14WC17931
14WC24306

17IWCC0743

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

Doris Kelly
Employee/Petitioner

v.

Staff Management
Employer/Respondent

Case # **14** WC **24306**

Consolidated cases: **14 WC 17931**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **7/22/16**. 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

B. ☐ 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 and average weekly wages?
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 **Travel expenses**

17IWCC0743

FINDINGS

On **June 16, 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 **$22,880.00**; the average weekly wage was **$440.00**.
On the date of accident, Petitioner was **62** 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 **$2,039.69** for TTD, $0 for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$2,039.69**. All TTD benefits are paid in full and are not in dispute.
Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Petitioner's correct average weekly wage is $440.00. The arbitrator has found that there is a causal relationship between petitioner's current condition of ill-being and both accidents on April 4, 2014 and June 16, 2014 as to her lower back. The Arbitrator also finds that there is a causal relationship between petitioner's left shoulder injury, left leg and wrist injuries, right knee contusion, cervical strain and oral injuries and the June 16, 2014 accident. The Arbitrator finds that there is no causal relationship between Petitioner's bilateral carpal and cubital tunnel syndromes.

Respondent shall pay Petitioner reimbursement for bilateral wrist splints, in the amount of $30.00 and the parties have agreed that Respondent is entitled to reimbursement benefits from Webster Dental in the amount of $3,464.26.

Respondent shall pay petitioner temporary total disability benefits of $293.33 for 8 & 6/7 weeks, from June 17, 2014 to July 13, 2014 and from November 26, 2024 to December 30, 2014; and receive a credit of $ 2,030.69 for benefits previously paid.

Respondent shall pay Petitioner $264.00 a week for 100 weeks, as the Petitioner's injuries caused 20% loss of a person as a whole total or $26,400.00, pursuant to section 8(d)(2). The Arbitrator further awards Petitioner 10.25 weeks of benefits at a rate of $264.00 a week or a total of $2,838.00 pursuant to section 8(e) as Petitioner has sustained 5% loss of use of the left hand. Respondent shall pay all benefits that have accrued as of the date of this decision. Petitioner's claim for maintenance benefits and travel expenses 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.

FINDINGS OF FACT

14 WC 24306

The disputed issues in this matter are: 1) causal connection; 2) average weekly wage; 3) earnings; 4) medical bills; 5) maintenance; 6) travel expenses; 7) a credit to Respondent for Dr. Springer's services, in the amount of $3,464.26 and 8) the nature and extent of her injuries. *See,* Ax2.

Petitioner was a 62 year old single female who suffered an accident while working for the respondent on June 16, 2014. Petitioner was sitting in a chair and as she attempted to turn to get out of the chair, she stepped in a open drawer; and fell to the ground striking the right side of her face, her right knee, left wrist and left shoulder. (T-26-28)

Immediately following the accident, Petitioner was seen at Advocate Hospital for her wrist. An x-ray was taken which showed no fracture. (Petitioner's Exhibit B-1) The records reveal a consistent history of the accident and note that Petitioner bumped her left leg on the drawer and fell forward and described experiencing pain in her right knee and left wrist. The medical history detailed in this visit described her primary problem as being pain and swelling in the right knee, which she considered to be severe; and she noted a bruise. Her second stated problem was pain in her left wrist, which she considered to be "moderate." Petitioner also thought she may have bumped her forehead but "not hard" because she landed on her outstretched hands before her head hit the floor. She reported "a mild headache earlier but not now." She also complained of lower back pain, which had been present since an injury in April. According to the patient, her back pain "got worse" following the fall yesterday. (Petitioner's Exhibit B-1)

X-rays were taken of Petitioner's right knee and left wrist but it is significant to note that there were no x-rays taken of Petitioner's left shoulder. It is also significant to note that Petitioner's pain on examination on June 7, 2014, was a 0 on a scale of 10, with regards to her left hand (Petitioner's Exhibit B-1). Petitioner testified that she went to the emergency department of West Suburban Medical Center on June 18, 2014. At that time, Petitioner gave a consistent history of tripping over an open drawer and falling. She was complaining of pain to the right side of the face, her neck and the right rib. She also complained of blurred vision in the right eye. The complaints of pain involving Petitioner's right knee were "mild diffuse tenderness with no swelling".

In the records, it is noted that she had been seen at Advocate the preceding day and x-rays had been taken on her left wrist and her right knee, which were negative. The examination of her right leg at that time revealed mild diffuse tenderness without swelling or redness and no lower extremity edema. Petitioner denied any upper back back pain during this evaluation. Due to Petitioner's complaints, she underwent a CT scan of her head and face and both were negative for any fractures. (Petitioner's Exhibit B-2).

Petitioner returned to Circle Family Health Care on June 23, 2014. At that time, she gave a consistent history of the second accident. She complained of right-sided headaches and neck pain from the occipit to the upper back and shoulder. The examination at that time revealed right occipit and right paraspinal cervical muscle trapezius and upper scapular muscles. She had decreased range of motion on the left wrist without swelling; and right knee swelling.

On June 23, 2014, when Petitioner presented to doctors at Circle Family Healthcare, the note states that she has "tenderness at R occipt and R paraspinal cervical numbness, trapezius and upper scapular numbness". The assessment/plan states "fall at work=contusion/sprain L knee; contusion/effusion R knee; cervical muscle strain-mechanism of injury similar to whiplash type, muscles spasms of neck/shoulder; R sided extremity weakness". Petitioner continued to treat with representatives at Circle Family Health Care through September 30, 2014. At that time, she was diagnosed with a continuing post-traumatic left shoulder pain and the examination revealed subacromial bursitis. (Petitioner's Exhibit B2).

She was referred by Dr. Beran to Hinsdale Orthopedics and Dr. Victor Romano. It is significant to note that Petitioner was authorized off work between June 17, 20014 and June 13, 2014. She received temporary total disability benefits during this time. Petitioner testified that on her first visit to Dr. Beran at Circle Family Care on June 23, 2014, she did not complain of injuring her left shoulder. (T-41)

Petitioner began treatment with Dr. Romano in October, 2014. (Petitioner's Exhibit C). Dr. Romano treated Petitioner left shoulder, diagnosing Petitioner, on October 30, 2014, as having a rotator cuff tear, bilateral carpal and cubital tunnel syndrome. He further recommended a "flexible wrist brace to be worn during the day and at night for support and relief of pain" and a "rigid volar wrist splint". The Petitioner received an injection into the left subacromial bursa, on this date. Petitioner was prescribed over-the-counter anti-inflammatories and analgesics. She was also instructed to "apply cortisone cream on the palmer sides of both wrist and the left inside elbow, and the right low back 2-3x day" [sic]. Petitioner was returned to modified duty with a ten pounds lifting restriction. While treating with Dr. Romano, she also treated with a chiropractor in his office, Dr. Nugent.

An MRI of the left shoulder was recommended and performed on November 11, 2014, which purportedly revealed a partial thickness tear of the supraspinatus tendon. Dr. Romano's records noted that Petitioner's right-sided sacroiliitis as of November 26th was improving nicely. The doctor authorized Petitioner off work between November 26th and December 30, 2016 and Petitioner testified that she was off work during these times. Ms. Kelley further testified that she was not restricted from work by any physician subsequent to that time. (T-33, 34) The medical records from Dr. Romano state that Petitioner could return to work full duty no restrictions. (Petitioner's Exhibit C dates of service. 1/4/15, 2/5/15, 9/15/15, 12/17/15).

Petitioner testified that her symptoms would be ongoing and she had multiple sessions of physical therapy (approximately 3 different sessions) with Dr. Nugent and AthletiCo at the recommendation of Dr. Romano, for her left arm, shoulder and neck. (T-49)

The Arbitrator has reviewed the medical records and does not find a definitive causation opinion from Dr. Romano tying Petitioner's numerous treatments to the left shoulder to Petitioner's accident of June 16, 2014. However, all of this petitioner's treatments were specifically designated as work injuries therefore, the Arbitrator takes judicial notice that Dr. Romano was apparently in contact with Respondent's adjuster, Gwendolyn Simmons at Gallagher Bassett WC throughout the treatment of Petitioner. It also appears that the insurance company authorized her treatment. (Petitioner's Exhibit C)

Petitioner testified that she was not reimbursed travel expenses to attend appointments with Dr. Romano and/or physical therapy providers including providers at AthletiCo and her chiropractor, Dr. Nugent.

Petitioner worked at Ford Motor Company for approximately five (5) weeks, earning over $15.00/hr. She testified that it was determined that she was not physically capable of performing the work and was terminated. (T-59)

At Arbitration, Petitioner testified that she currently has spasms in her left arm and hand as a result of the accident. (T-31) She is also having pain down the right side of her neck. (T-32)

On the issue of credit (Respondent's Exhibit 4), Petitioner testified that she has no problem with the Arbitrator ordering reimbursement for dental expenses as outlined in Respondent's Exhibit 4. Petitioner testified that she had to seek dental treatment, as a result of the accident, but no dental records were admitted into evidence at trial. (T-54) Petitioner also did not testify as to the extent of her medical care and treatment for her dental injuries and other than her unrebutted, credible testimony, there are no medical records supporting her testimony. However, Dr. Coe notes a general history of some dental work delineated in his report, without any specific records.

CONCLUSIONS OF LAW

G. What are Petitioner earnings and average weekly wages?

Petitioner testified that she was hired at a rate of $11.00 an hour and was scheduled to work 40 hours a week. While Respondent introduced a wage statement the Arbitrator finds that Petitioner proved that pursuant to *the Sylvester v, Industrial Commission*, her average weekly is $440.00 a week.

F. Is Petitioner's current condition of ill-being causally related to her June 16, 2014 accident?

It is undisputed that Petitioner suffered an initial injury on April 14, 2014 involving her lower back. (14 WC 17931) It is further undisputed that Petitioner suffered a second accident on June 16, 2014, resulting in an aggravation of her lower back condition, which is the subject of this case. The finding of a second, aggravating accident, due to an increase in her back complaints, is substantiated by the medical records from Advocate Medical Group (Petitioner's Exhibit B1). Petitioner testified that she still has occasional complaints of pain in her lower back. Petitioner has had treatment to her lower back at the behest of physicians at Circle Family Medical Group (Petitioner's Exhibit A2); River Forest Chiropractor (Petitioner's Exhibit A2) and Dr. Romano (Petitioner's Exhibit C). The Arbitrator notes Petitioner testified that she still has complaints of pain involving her lower back. As such, the Arbitrator finds there is a causal relationship between Petitioner's condition of ill-being with regards to her lower back and the accidents of April 14, 2014 and June 16, 2014.

The Arbitrator also finds that, as a result of Petitioner's fall on June 16, 2014, she suffered an injury to her left wrist. X-rays were taken at Advocate Medical Group (Petitioner's Exhibit B1). Similarly, Petitioner also complained of pain involving her right knee and had x-rays of her right knee. (Petitioner's Exhibit B1). At trial, Petitioner testified that her right knee is not causing her any symptoms at this time, and that her left wrist is causing her occasional pain.

The Arbitrator notes that Petitioner was ultimately diagnosed with a small tear of the left rotator cuff by Dr. Romano, in accordance with an MRI taken on November 11, 2014. She was also diagnosed with carpal tunnel and cubital tunnel syndrome in both elbows. The Arbitrator notes that Dr. Romano's December 17, 2015 report indicates that Petitioner's left shoulder pain began on June 23, 2014 with her initial treatment at Circle Family Care, when neck and shoulder spams were noted.

To that end, the Arbitrator does not find the opinions of Dr. Jeffery Coe, Respondent's evaluating physician, to be persuasive as to the issue of causation regarding the left shoulder. Specifically, in his March 29, 2016 report, Dr. Coe reviewed Petitioner's medical records and took her history. He concluded that Petitioner had two accidents which resulted in injuries to her lower back and an aggravation of prior injuries of her lower back. He also noted that Petitioner had right knee, left wrist, face and dental bridge injuries; however, he stated that there is no indication that Petitioner suffered any significant injury to her left shoulder; and that the nature of her accidents were inconsistent with traumatic nerve entrapments, possibly her later diagnosed carpal tunnel syndrome and cubital tunnel syndrome. While the Arbitrator finds Dr. Coe's opinions on the issue of the lack of a causal relationship between any injuries to Petitioner's left arm and shoulder to the accident of June 16, 2014 to be unpersuasive; with regard to his opinion regarding the cause of Petitioner's carpal and cubital tunnel syndrome, the Arbitrator agrees.

Dr. Coe noted that Petitioner had a right knee contusion and he found nothing in the later records suggesting any type of knee derangement or any other problems. At trial, Petitioner testified that she was not having any problems with regard to her right knee. Dr. Coe noted that Petitioner might have had a need for dental care and treatment but there is no specificity as to what the nature of the treatment was. Dr. Coe issued an impairment rating indicating that as a result of this accident, Petitioner has suffered an injury to her lower back to the amount of 2% of the whole person (Respondent's Exhibit 2). The Arbitrator further adopts the opinion of Dr. Coe that Petitioner's June 16, 2014 accident did not cause Petitioner to develop bilateral carpal tunnel and cubital tunnel syndromes.

J. Were the Petitioner's medical expenses reasonable and necessary? Has the Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner presented one medical bill in the amount of $30.00, for bilateral wrist splints. The Arbitrator awards this bill.

K. What temporary total disability benefits are in dispute? Maintenance

Petitioner claimed maintenance benefits from January 1, 2015 through the date of arbitration on July 22, 2016. Petitioner offered no medical evidence indicating that she was authorized off work or that she had any type of work restrictions during that time period that prohibited her from performing work activities. Moreover, Petitioner testified that she worked for approximately five (5) weeks at Ford Motor Company. She was ultimately let go from Ford Motor Company and she testified that it was determined that she could not perform the work duties as an assembler. However, Petitioner has failed to meet her burden of proving, by a preponderance of the evidence that she is entitled to maintenance benefits and therefore Petitioner's request for maintenance benefits between January 1, 2015 and July 22, 2016, is denied.

L. What is the nature and extent of the injuries?

The Arbitrator has found that Petitioner had an accident on April 14, 2014 and as a result, suffered an injury to her lower back. She was still treating for that injury when she suffered a second accident on June 16, 2014, while working for this same employer. The Arbitrator notes that Petitioner specifically testified that she had an aggravation of her lower back condition and her medical records from Advocate Hospital corroborate her testimony of an increase in pain in her low back following the second accident. Petitioner has had numerous treatments and modalities with regards to the lower back, since the accidents. The Arbitrator notes that Petitioner ultimately underwent a diagnostic study with regards to her cervical spine, which revealed a moderate disc protrusion at C5-6, but the Arbitrator notes that at the time of Petitioner's evaluation with Dr. Coe on March 29, 2016, she made no complaints of pain involving the right knee, neck or upper back. Petitioner did have complaints of pain across her lower back, left side greater than the right, with stiffness; numbness in the outer border of her right thigh and occasional swelling of her left lower leg; pain, stiffness and weakness of her left shoulder, made worse by reaching or lifting; some numbness of both hands; and pain to her right face. The Arbitrator further notes that Dr. Coe performed an impairment rating and found that Petitioner had suffered an impairment the equivalent of 2% of the person.

The Arbitrator specifically addresses Section 8.1B and finds as follows:

1. The Arbitrator has reviewed the reported level of impairment as found by Dr. Jeffrey Coe to be 2% loss of the use of the person.

2. As to Petitioner's occupation, the Arbitrator notes that Petitioner is currently unemployed. She had worked at Staff Management moving materials in the mail department, making $11.00 per hour. She has testified that she continues to look for work. Ms. Kelley worked briefly, for approximately 5 weeks, at Ford Motor Company on an assembly line. Petitioner testified that while she was terminated from that job because she could not do it; she felt she was physically able to perform the work activities on an assembly line.

3. The Arbitrator notes that at the time of Petitioner's accidents, she was a 62 year old, single female. The Petitioner is in the twilight of her working career and the Arbitrator puts significant weight on this factor.

4. The Arbitrator has also considered Petitioner's future earning capacity. The Arbitrator notes that Petitioner worked on an assembly line for approximately 5 weeks for Ford Motor Company and was making in excess of $15.00 an hour which is approximately $4.00 more/hr. than Petitioner was making at the time of the injury for the Respondent. However, the Arbitrator also notes that she was terminated for not being able to perform the work and finds that the petitioner has lost significant earning capacity.

5. Finally, the Arbitrator has reviewed the medical evidence presented from Petitioner's exhibits A, B, C and Respondent's Exhibit # 2; Dr. Jeffrey Coe's evaluating opinion analyzing the records in rendering her findings on the issue of permanency.

The Arbitrator finds that as a result of the accidents and pursuant to Section 8(d)2, Petitioner is entitled to permanency ("PPD") to the extent of 20% loss of use of a whole person, which equates to 100 weeks of PPD benefits at a rate of $264.00 a week; or $26,400.00. The Arbitrator further finds that Petitioner has also proven, by a preponderance of the evidence that she is entitled to permanency benefits for her left hand and wrist as a result of the contusion/sprain to the left wrist.

The Arbitrator has specifically found that Petitioner does not have carpal tunnel syndrome and/or cubital tunnel syndrome which was caused, exasperated or accelerated by the accident in accordance with the opinions of Dr. Coe. As such, the Arbitrator awards Petitioner 5% loss of use of the left hand which equates to 10.25 weeks of PPD benefits under Section 8(e) of the Illinois Workers' Compensation Act or $2,706.00.

The Arbitrator notes that there were references in Petitioner's testimony to oral injuries, dental care and treatment, due to this accident. Dr. Coe referenced Petitioner advising him that there was "bridge work" done for Petitioner's mouth. The Arbitrator takes judicial notice that the Respondent has requested reimbursement in the amount of $3,464.27, for dental work performed on Petitioner. Therefore, the Arbitrator awards PPD disability benefits for same.

N. Is Respondent due any credit?

Respondent introduced evidence Exhibit 4, seeking reimbursement for overpayment of medical expenses. In this exhibit, the Respondent had sent correspondence to Webster Dental seeking reimbursement of $3,464.27 in overpaid expenses. At trial, Petitioner testified that she had no objection to this request for reimbursement from Webster Dental. As such, the Arbitrator finds that Respondent is entitled to a credit from Webster Dental Clinic and not Petitioner, in the amount of $3,464.27.

O. Is Petitioner entitled to travel expenses?

Petitioner has not submitted any specific travel expenses or mileage information documenting her travel to and from her various providers. Moreover, Petitioner admitted that the travel expenses that she would be seeking were to and from her own treating physicians. There is nothing in the Act that provides for awarding travel expenses to Petitioner's chosen treating physician's; and there was no testimony indicating exigent circumstances requiring specific transportation to and from these facilities. As such, the Arbitrator denies all claims for travel expenses.

17IWCC0743

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC17931 & 14WC24306
SIGNATURE PAGE

Signature of Arbitrator

October 3, 2016
Date of Decision

OCT 3 - 2016

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☐ 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 Up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Amy Schilling,

Petitioner,

vs. NO: 15 WC 42596

Dollar General Corporation,

17IWCC0744

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

17IWCC0744

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

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

With regards to paragraph (i) of Section 8.1(b) of the Act:

i. In this case, an AMA impairment rating was offered by Respondent from Dr. Brown, who testified Petitioner's impairment rating was 2% of the upper extremity, which was equivalent to 2% of the hand. The Commission finds this factor to be mitigating.

With regards to paragraph (ii) of Section 8.1(b) of the Act:

ii. Petitioner is a store manager for Respondent and had been so since March of 2009. Her work duties included opening boxes with a knife, stocking and moving things, using the register and paperwork. The medical records evidence and Petitioner testified she subsequently returned to work in her usual and customary position with no restrictions. However, Petitioner testified she continues to drop items. The Commission finds this factor to be aggravating.

With regards to paragraph (iii) of Section 8.1(b) of the Act:

iii. Petitioner was 54 years old at the time her repetitive trauma injury manifested on October 2, 2015. The Commission finds this factor to be aggravating.

With regards to paragraph (iv) of Section 8.1(b) of the Act:

iv. There is no evidence that Petitioner's future earning capacity has diminished as a result of this injury. The Commission finds this factor to be mitigating.

With regards to paragraph (v) of Section 8.1(b) of the Act:

v. The medical records evidence Petitioner initially sought treatment for right hand and wrist pain, numbness and decreased grip strength. She was assessed with right hand pain and paresthesia. Dr. Goldring performed an EMG/NCV of her right upper extremity and found moderately severe right carpal tunnel syndrome. Dr. Mirly performed an open carpal tunnel release on February 26, 2016. On March 4, 2016 Dr. Mirly evaluated Petitioner for a final time. Petitioner reported good improvement in her preoperative symptoms other than her thumb which still felt a little funny, but she was able to use it and was doing better. There was good digital motion. It was Dr. Mirly's impression Petitioner was doing well with no postoperative

17IWCC0744

complication. Dr. Mirly released Petitioner to return to work on March 7, 2016 with restrictions of no lifting, pushing or pulling more than 5-10 pounds with her right hand and unrestricted at the six-week mark on April 11, 2016. Dr. Mirly released Petitioner from his care. Petitioner testified she returned to work quickly and missed almost no work at all. Petitioner testified she currently experiences residual numbness in her thumb and tingling in her right thumb, her right hand is not as strong and she continues to frequently drop items. For her pain and numbness, Petitioner takes Motrin several times a week. The Commission finds Petitioner's continued complaints and limitations are suffentiently corroborated by the records of Dr. Mirly. The Commission finds this factor to be aggravating.

The determination of permanent partial disability is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, after applying Section 8.1b of the Act, *820 ILCS 305/8.1b* (West 2013) and considering the relevance and weight of all these factors, the Commission modifies the Arbitrator's Decision finding 7.5% loss of the use of Petitioner's right hand under §8(e)9 of the Act. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $458.12 per week for a period of 14.25 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the permanent loss of use of the right hand to the extent of 7.5%.

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

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 $6,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 21 2017
LEC/maw
o11/01/17
43

L Elizabeth Coppoletti

L Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHILLING, AMY
Employee/Petitioner

Case# **15WC042596**

17IWCC0744

DOLLAR GENERAL CORPORATION
Employer/Respondent

On 4/11/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0000 WIEDNER & McAULIFFE LTD
JAMES A TELTHORST
8000 MARYLAND AVE SUITE 550
ST LOUIS, MO 63105

17IWCC0744

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

Amy Schilling
Employee/Petitioner

v.

Dollar General Corporation
Employer/Respondent

Case # **15** WC **42596**

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 **February 8, 2017**. By stipulation, the parties agree:

On the date of accident, **October 2, 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's earnings were **$39,704.08** and the average weekly wage was **$763.54**.

At the time of injury, Petitioner was **54** 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 **$581.75** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$581.75**.

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

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 **$458.12/week** for a period of **9.5 weeks**, as provided in **Section 8(e)** of the Act, because the injuries sustained caused **5% loss of use of the right hand.**

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. Pinc Gillman

Signature of Arbitrator

4/6/17

Date

APR 11 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Amy Schilling
Employee/Petitioner

Case # 15 WC 42596

v.

Consolidated cases: N/A

Dollar General Corporation
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that she is a right-hand dominant Store Manager for Respondent. The parties stipulated at the time of arbitration that Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent and that her condition of ill-being was causally related to the accident of October 2, 2015. (AX1).

Petitioner testified that despite the improvement from surgery, she continues to have residual numbness in her thumb and that she continues to frequently drop items. She testified that her hobby of sewing has been negatively affected as a result of her condition and that she takes Motrin for any pain she may have. She testified that she continues to work as a Store Manager for Respondent.

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The Medical Records List was entered into evidence at the time of arbitration as Petitioner's Exhibit 2.

The medical records of Steeleville Family Practice were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. Petitioner was seen on August 21, 2015 with complaints of pain in the right hand and wrist. It was noted that Petitioner reported no injury and that she reported that her hand went numb and that she had sharp pains. It was also noted that Petitioner had had complaints of numbness in the right hand for about a year, that she had some pain at times and that she noticed her grip strength had decreased quite a bit. The assessment was that of right hand pain and right hand paresthesias. Petitioner was recommended to undergo a nerve conduction study. (PX3).

The medical records of Dr. James Goldring were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. Petitioner underwent an EMG and nerve conduction study on September 15, 2015, which was interpreted as revealing moderately severe carpal tunnel syndrome on the right side. (PX4).

The medical records of Dr. Harvey Mirly were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. Petitioner was seen on November 13, 2015 for complaints of right hand pain, numbness and tingling. It was noted that Petitioner indicated that she had pain in the thumb and 2 or 3 fingers most of the time and all of the time when working the register, opening boxes and doing paperwork. It was noted that Petitioner had positive carpal tunnel provocative testing. Treatment options were discussed, including nighttime splints, an intratunnel injection and operative release. Petitioner indicated she wished to try the splints and it was noted that if her symptoms persisted, she would have the

option to do an intratunnel injection or consideration of operative release. At the time of the visit on March 4, 2016, it was noted that Petitioner was seven days from right open carpal tunnel release and that she was being seen for post-operative evaluation. It was noted that Petitioner demonstrated good digital motion, that she reported good improvement in her pre-operative symptoms and that she reported the thumb still felt a little "funny" but was able to use it and doing better. It was noted that Petitioner was allowed to return to work on March 7, 2016 with the restrictions on the use of the right hand and that she would be unrestricted at the six week mark which was that of April 11, 2016. Petitioner was instructed to return as needed. (PX5).

The medical records of Belleville Memorial Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The Operative Report reflects that Petitioner underwent a right open carpal tunnel release on February 26, 2016 for a pre- and post-operative diagnosis of right carpal tunnel syndrome. (PX6).

The transcript of the deposition of Dr. Mirly was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. Dr. Mirly testified that he is an orthopedic hand surgeon and is board-certified in orthopedic surgery and also has a certificate of added qualification in surgery of the hand. (PX7).

Dr. Mirly testified that he saw Petitioner on November 13, 2015 at the referral of Angela Albertini, a physician's assistant under Dr. Lowry. He testified that Petitioner completed a questionnaire providing a history that she had pain and numbness in her right hand, thumb and two or three fingers most of the time and all of the time when working the register, opening boxes and doing paperwork. He testified that Petitioner also reported that it was getting noticeably worse over the last two years. He testified that Petitioner reported that she was a store manager for Dollar General, but that he did not go into detail with her about her job description beyond noting her symptoms when doing activities including the register, opening boxes and doing paperwork. He testified that the nerve conduction study by Dr. Goldring indicated that both motor and sensory latencies showed moderately severe to severe carpal tunnel syndrome on the right side. He testified that Petitioner also had positive carpal tunnel provocative testing as well. (PX7).

Dr. Mirly testified that based on Petitioner's history, physical exam and the diagnostic studies, his diagnosis was that of right carpal tunnel syndrome for which he recommended conservative treatment initially and that Petitioner agreed and opted for the splints. He testified that they did not give her full resolution, so she subsequently wanted to proceed further with surgery. He testified that Petitioner called back on January 25, 2016 to schedule surgery as she was still having symptoms and wanted to proceed. He testified that Petitioner underwent a right open carpal tunnel release on February 26, 2016 at Belleville Memorial Hospital. (PX7).

Dr. Mirly testified that he kept Petitioner off work following surgery and saw her in follow-up on March 4, 2016. He testified that Petitioner was allowed to return to work on March 7, 2016 with restricted use of the right hand with a brace and no lifting, pushing or pulling more than five pounds. He testified that Petitioner was allowed to work full duty as of April 11th. He testified that Petitioner was a motivated person and went back right away. He testified that he has not seen Petitioner since and that she had good relief of her pre-operative symptoms and was quite pleased afterward. He testified that Petitioner reported that the thumb felt a little funny, but she was able to use it and was doing better and had a "nice, quick response." (PX7).

Dr. Mirly testified that he does not make the patients come back if they are doing well and that Petitioner had not called with any problems since her last visit. He testified that he would anticipate Petitioner to be at maximum medical improvement and that patients were usually at maximum medical improvement after they had gone back to full duty work for two months. He testified that he sometimes attributed the thumb issue to post-operative dressing, which put a little pressure on the digital nerve. He

testified that the nerves typically recovered at the rate of one inch per month, and that it was roughly six inches from the carpal tunnel to the tip of the finger. He testified that Petitioner may still possibly improve further, but he thought she certainly would be fully functional. (PX7).

Dr. Mirly testified that he had opportunity to review the job description that was prepared by Petitioner. He testified that he believed that Petitioner's job duties as she described them were a contributory factor to her development of carpal tunnel syndrome. He testified that Petitioner did not have a lot of non-occupational work factors other than her age, being female and also being over her ideal body mass index. He testified that the level of frequency that she described would be a contributory factor over 6½ years to aggravate or contribute to her carpal tunnel. (PX7).

On cross examination, Dr. Mirly agreed that he only provided treatment to Petitioner's right hand. He testified that he did not document any examination findings involving Petitioner's left hand. He agreed that Petitioner offered no complaints about her left hand and that he has no opinions or diagnosis concerning the left hand. He agreed that Dr. Goldring only did the EMG and nerve conduction study on the right hand, which was what had been ordered by the referring physician. (PX7).

On cross examination, Dr. Mirly agreed that he did not take Petitioner off work from November 13, 2015 up until the date of surgery. He testified that he took Petitioner off work the day of surgery and that when he saw her on March 4th, he released her to return to work on March 7th with some light duty modifications and then full duty as of April 11th. He agreed that he only saw Petitioner one time after the surgery and that on that date, it looked like she had a good result from the surgery. He testified that he encouraged Petitioner to call with any questions or problems and that they would not make an appointment unless a concern arose. He agreed that he did not anticipate that Petitioner would need any future treatment for the right carpal tunnel syndrome. He further agreed that as of April 11, 2016, Petitioner was released without any restrictions. (PX7).

On cross examination, Dr. Mirly testified that the written job description he was provided was given to him on a letter from Petitioner's attorney's office dated January 29, 2016. He testified that he did not ever have any discussion directly with Petitioner about the job description. He agreed it was not clear to him how many hours per day Petitioner worked and that there was a seven day schedule delineated. He agreed that he was not sure how many hours per day Petitioner worked, but that he assumed she did not work less than 40 hours per week. He agreed that it was a fair statement that it was not clear over what time span Petitioner stocked shelves. He further agreed that it was not clear whether Petitioner would do certain activities and then switch to another activity. He agreed that the description did not indicate that Petitioner was using any vibratory equipment. (PX7).

The Report of Injury was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The Job Description was entered into evidence at the time of arbitration as Petitioner's Exhibit 9.

The transcript of the deposition of Dr. David Brown was entered into evidence at the time of arbitration as Respondent's Exhibit 1. Dr. Brown testified that he is a hand surgeon at the Orthopedic Center of St. Louis. He testified that he had an opportunity to examine Petitioner on June 21, 2016. He testified that Petitioner reported that two years prior to seeing him, she had noticed some numbness and tingling in her right hand. He testified that Petitioner reported that she saw Dr. Mirly and underwent an open right carpal tunnel release in February of 2016, and that when he saw her she indicated to him that overall her symptoms were much better than they were before surgery. He testified that Petitioner reported that she was having no difficulty doing activities of daily living or her work activities and was working full duty without restrictions. (RX1).

Dr. Brown testified that the physical examination revealed that Petitioner had good active range of motion of the wrist and of the digits of the hand, that she had normal sensation and that there was no

intrinsic muscle atrophy. He testified that Petitioner had good grip strength in both hands including on the right, considering she was only four months out from her surgery. He testified that the examination was what he would anticipate it would be from someone who had a successful carpal tunnel release. (RX1).

Dr. Brown testified that he did not examine Petitioner's left hand but did it for comparison on grip strength values and key pinch on the left compared to the right. He testified that Petitioner specifically denied having any problems with her left hand. He testified that the x-rays performed were normal. He testified that his diagnosis was that of right carpal tunnel syndrome status post-surgery. He testified that based on the information that he had regarding Petitioner's job duties including her verbal description, the handwritten job description she provided as well as the job description from her employer, it was his opinion that her job duties at Dollar General were an aggravating factor to her right carpal tunnel syndrome and the need for treatment. He testified that Petitioner also had certain other non-work factors that would or could have contributed to the diagnosis as well. (RX1).

Dr. Brown testified that he did not believe that Petitioner was in need of any additional medical care for the right hand and wrist, nor did he believe she was in need for any medical care for her left hand or wrist given that she had no complaints with her left hand. He testified that he did not believe that, as of the time of the evaluation, any restrictions needed to be imposed on Petitioner's activities at all. He testified that he believed that he thought Petitioner could continue to work full duties in her position with Dollar General. He further testified that he believed that Petitioner had reached maximum medical improvement. (RX1).

Dr. Brown testified that he used the Sixth Edition of the *AMA Guides* to perform an AMA impairment rating. He testified that he is certified to perform AMA impairment ratings according to the Sixth Edition of the *AMA Guides*. He testified that Petitioner's impairment rating was 2% of the upper extremity which was equivalent to 2% of the hand. He testified that there was no need for any type of impairment rating in regards to the left hand because she had no complaints. He also testified that he felt the treatment provided by Dr. Mirly was appropriate. (RX1).

On cross examination, Dr. Brown agreed that he noted some mild tenderness over the scar on Petitioner's right palm and that the grip strength that she had in the right hand was reduced as compared to the left. He testified that the key pinch test on the right was slightly decreased as compared to the left. He agreed that those physical exam findings were taken into consideration in the grade modifier that he used. (RX1).

On cross examination, Dr. Brown agreed that on the QuickDASH Petitioner indicated that she had severe difficulty with opening a tight or a new jar and testified that he thought someone who was four months out from a carpal tunnel release might have difficulty performing that activity, but with time it should improve. He agreed that Petitioner also indicated that she had some moderate difficulty with heavy household chores and also recreational difficulties that required force through the arm, shoulder or hand. He agreed that Petitioner was right-hand dominant and that it was safe to assume that she used her right hand more to do various activities of daily living. He agreed that Petitioner reported that she used her right hand to do her work activities more than the left as well. He also agreed that Petitioner also reported that she had loss of strength in her right hand at that point as well. (RX1).

On cross examination, Dr. Brown testified that the *AMA Guides* were more focused on objective measures and that there were some subjective elements that were not excluded entirely. He agreed that it was fair to say that someone's injury could be highly disabling in one vocational context but non-disabling in another. He testified that Petitioner described not having any difficulty doing any activities of daily living or any of her work activities. He testified that Petitioner reported having difficulty with

two activities out of 11 on the QuickDASH. He testified that Petitioner indicated to him that she had no hobbies outside of work. (RX1).

On redirect, Dr. Brown testified that there was a subjective component from the patient in terms of the grip strength testing. (RX1).

CONCLUSIONS OF LAW

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 an AMA rating was offered by Respondent from Dr. David Brown, who testified that Petitioner's impairment rating was 2% of the upper extremity which was equivalent to 2% of the hand. (RX1). The Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that the record reveals that Petitioner was employed as a Store Manager at the time of the accident and that she has returned to her position on a full duty basis after the completion of her treatment. The Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 54 years old on her date of accident. Given the age of Petitioner and the fact that the medical records lack any reference to Petitioner having been placed under any 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 her work injury, Petitioner returned to her position as a Store Manager. As there was no direct evidence of reduced earning capacity contained in the record, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that despite the improvement from surgery, she continues to have residual numbness in her thumb and that she continues to frequently drop items. She testified that her hobby of sewing has been negatively affected as a result of her condition and that she takes Motrin for any pain she may have. At the time of the March 4, 2016 visit with Dr. Mirly, it was noted that Petitioner demonstrated good digital motion, that she reported good improvement in her pre-operative symptoms and that she reported the thumb still felt a little "funny" but was able to use it and doing better. It was noted that Petitioner was allowed to return to work on March 7, 2016 with the restrictions on the use of the right hand and that she would be unrestricted at the six week mark which was that of April 11, 2016. Petitioner was instructed to return as needed. (PX5). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration, namely her continued complaints and limitations, were somewhat corroborated by her treating records at the conclusion of her treatment with Dr. Mirly. The Arbitrator accordingly places lesser 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 right hand** as provided in Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STANCEY MENDENHALL,
Petitioner,

v.

NO: 06 WC 16773

17IWCC0745

INTERIM HEALTH CARE,
Respondent.

DECISION AND OPINION ON REVIEW

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

Temporary Total Disability/Maintenance

The Arbitrator awarded 252 weeks of temporary total disability benefits representing June 24, 2005 through July 17, 2009 and June 21, 2012 through March 26, 2013. The Commission notes Dr. Chien placed Petitioner at maximum medical improvement on February 8, 2007. PX2. As such, Petitioner's entitlement to temporary total disability benefits ended as of that date (*Matuszczak v. Illinois Workers' Compensation Commission*, 2014 IL App (2d) 130532WC, ¶14 - once an injured employee's condition stabilizes, *i.e.*, once the employee reaches MMI, he is no longer eligible for TTD benefits), and the remainder of the stipulated temporary benefits are properly classified as maintenance benefits, concomitant to vocational rehabilitation under Section 8(a).

An employer is obligated to pay maintenance benefits only "while a claimant is engaged in" a vocational rehabilitation program. *W.B. Olson v. Illinois Workers' Compensation Commission*, 2012 IL App (1st) 113129WC, ¶39, 981 N.E.2d 25. Petitioner testified she initially

17IWCC0745

performed a self-directed job search and then received job search assistance from Mr. Morgan. Consistent with Petitioner's testimony, Respondent stipulated Petitioner is entitled to benefits for these efforts through June 15, 2009. ArbX1. The Arbitrator awarded benefits through July 17, 2009, the date of Mr. Morgan's closure report. Examination of the vocational records, however, reveals Petitioner did not attend any vocational meetings after June 23, 2009, nor do her job search logs provide sufficiently detailed documentation of ongoing search efforts (the logs indicate "2009" with no month or day). RX3, July 7, 2009 Report; PX5. Therefore, the Commission finds Petitioner established entitlement to Section 8(a) maintenance benefits from February 9, 2007 through June 23, 2009.

A second period of job placement services commenced on June 6, 2012. The Arbitrator awarded associated benefits through March 26, 2013. The record demonstrates, however, job placement efforts continued until May 15, 2013. Petitioner conceded at trial she has not looked for work since vocational services were terminated in May of 2013. T.31. As such, her entitlement to maintenance benefits terminated as of May 15, 2013, the date stipulated to by Respondent. ArbX1. The Commission finds Petitioner entitled to maintenance benefits from June 6, 2012 through May 15, 2013.

The Commission notes the temporary total disability and maintenance benefits awarded total $31,490.16. The parties stipulated Respondent paid $48,387.47 in TTD benefits. The Commission finds the overpayment of $16,897.31 is to be credited against the permanence award.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $122.19 per week for a period of 84 6/7 weeks, representing June 25, 2005 through February 8, 2007, 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 maintenance benefits in the sum of $122.19 per week for a period of 172 6/7 weeks, representing February 9, 2007 through June 23, 2009 and June 6, 2012 through May 15, 2013. Respondent's overpayment shall be credited against the permanence award.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $109.97 per week for a period of 300 weeks, as provided in §8(d)2 of the Act, because the injuries sustained caused the 60% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $6,239.70 for medical expenses, as provided in §§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.

17IWCC0745

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 $22,500.00.

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: NOV 21 2017

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MENDENHALL, STANCEY
Employee/Petitioner

Case# **06WC016773**

INTERIM HEALTH CARE
Employer/Respondent

17IWCC0745

On 2/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
MICHAEL K BRANDOW
3100 N KNOXVILLE AVE
PEORIA, IL 61603

1454 THOMAS & PORTELA
DANA DJOKIC
500 W MADISON ST SUITE 2900
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Stancey Mendenhall
Employee/Petitioner

v.

Interim Health Care
Employer/Respondent

Case # 06 WC 16773

Consolidated cases: n/a

17IWCC0745

An *Application for Adjustment 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 Peoria, on January 19, 2017. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On June 23, 2005, 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 $9,531.08; the average weekly wage was $183.29.

On the date of accident, Petitioner was 26 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $48,387.47 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $48,387.47.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 11, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $122.19 per week for 252 weeks commencing June 24, 2005, through July 17, 2009, and June 21, 2012, through March 26, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner $109.97 per week for 300 weeks because the injuries sustained caused the 60% 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, 2017
Date

ICArbDec p. 2

FEB 27 2017

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 June 23, 2005. According to the Application, Petitioner was transferring a patient and sustained an injury to the back and neck (Petitioner's Exhibit 1). There was no dispute that Petitioner sustained a work-related injury; however, Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits for 604 weeks, commencing June 24, 2005, through the date of trial. Respondent disputed liability for that period of temporary total disability benefits and claimed Petitioner was entitled to temporary total disability benefits of 256 2/7 weeks, commencing June 26, 2005, through June 15, 2009, and June 7, 2012, through May 15, 2013 (Arbitrator's Exhibit 1). The primary basis for Respondent's termination of Petitioner's temporary total disability benefits in both June, 2009, and May, 2013, was Petitioner's alleged non-compliance with vocational rehabilitation/job placement services.

Petitioner worked for Respondent as a CNA. On June 23, 2005, Petitioner and another employee were in the process of moving a patient from a chair to a bed. While in the process of moving the patient, Petitioner experienced an onset of pain in her neck, left shoulder and low back.

Prior to the accident of June 23, 2005, Petitioner was treated by Dr. Joseph Couri for a variety of medical issues. In Dr. Couri's report of March 10, 2004, he noted Petitioner had continued significant complaints of pain and "She hurts all over as usual." He noted Petitioner had fibromyalgia tenderness in the neck, back, hips and shoulders. He diagnosed Petitioner with fibromyalgia and anxiety/depression (Petitioner's Exhibit 9).

Dr. Couri saw Petitioner on June 2, 2004, and September 29, 2004. Petitioner's condition was essentially the same as it had been previously; however, when Dr. Couri saw Petitioner on September 29, 2004, his primary diagnosis was "severe fibromyalgia" (Petitioner's Exhibit 9).

Petitioner testified that following the accident she was seen in the ER of Proctor Hospital. While the bills from Proctor Hospital and Proctor Emergency Physicians were tendered into evidence at trial, the ER record itself was not (Petitioner's Exhibit 11).

Petitioner was subsequently seen by Dr. Couri who ordered physical therapy and referred Petitioner to Dr. Gary Cohen, a physician with the Institute of Physical Medicine and Rehabilitation. Dr. Cohen ordered an MRI of Petitioner's cervical spine which was performed on August 25, 2005. The MRI revealed a small bulge at C5-C6. Dr. Cohen administered a trigger point injection on September 12, 2005, at the C1 to T2 levels which gave Petitioner relief from for neck symptoms (Petitioner's Exhibit 7).

Dr. Cohen subsequently ordered an MRI of Petitioner's lumbar spine which was performed on January 13, 2006. It was normal. Dr. Cohen treated Petitioner from August 16, 2005, through January 26, 2006. At that time, he referred Petitioner to Dr. Bruce Chien, a pain management specialist (Petitioner's Exhibit 7).

Petitioner continued to be treated by Dr. Couri who saw her on October 26, 2005, February 15, 2006, and June 7, 2006. Dr. Couri continued to see Petitioner for fibromyalgia type symptoms. When he saw Petitioner on October 26, 2005, and February 15, 2006, Petitioner advised she had some improvement in her symptoms and was going to school (Petitioner's Exhibit 9).

At the direction of Respondent, Petitioner was examined by Dr. Stephen Pineda, an orthopedic surgeon, on November 14, 2005. Dr. Pineda's report made reference to the work-related accident and the medical treatment Petitioner received thereafter; however, it appeared as though Dr. Pineda was not provided with Petitioner's medical records. Dr. Pineda noted Petitioner had a cervical MRI, but Dr. Pineda did not have it for his review (Petitioner's Exhibit 4).

When Dr. Pineda examined Petitioner, he asked her to stand and walk and observed she was able to do so without any signs of stress or discomfort. His findings on examination were benign; however, he noted Petitioner had complaints of pain in the cervical and lumbar regions on palpation. Dr. Pineda opined Petitioner probably had a pain syndrome without specific anatomic etiology which might be myofascial pain syndrome or fibromyalgia pain syndrome. He stated he wanted to review the cervical MRI and recommended Petitioner have a lumbar MRI (he was not aware Petitioner had, in fact, undergone a lumbar MRI). If both studies were normal, Petitioner would be at MMI. In regard to causality, Dr. Pineda stated Petitioner reported the accident and the pain began thereafter. She had persistent symptoms since then (Petitioner's Exhibit 4).

Dr. Pineda again saw Petitioner on February 7, 2006, and reviewed the MRIs of the cervical and lumbar spine. He opined the MRI of the cervical spine revealed a slight bulge at C5-C6 and the MRI of the lumbar spine was normal. He examined Petitioner and stated the findings were the same as they were previously. Dr. Pineda opined Petitioner had pain syndrome without any anatomic correlation and maybe a muscular pain syndrome (Petitioner's Exhibit 4).

Dr. Chien initially saw Petitioner on March 14, 2006, and opined Petitioner had "discal disease" not detected by MRI. Dr. Chien administered epidural steroid injections at C5-C6 on March 27 and April 24, 2006. According to his medical record, the next time he saw Petitioner was February 8, 2007. At that time, Dr. Chien opined Petitioner was at MMI and imposed a work restriction of no lifting over 10 pounds as well as no repetitive arm motion (Petitioner's Exhibit 2).

Subsequent to being discharged from care by Dr. Chien, Petitioner continued to be treated by Dr. Couri. Dr. Couri saw Petitioner periodically from October, 2006, through August, 2015. Dr. Couri has continued to treat Petitioner for her fibromyalgia symptoms as well as other conditions. On June 9, 2015, Dr. Couri prepared a letter directed "To Whom it May Concern." In that letter, Dr. Couri stated Petitioner continued to have chronic pain related to arthritis in her neck, chronic bursitis, tendinitis and rotator cuff tear in the left shoulder, and fibromyalgia. He noted he had treated Petitioner for several years and had performed multiple cortisone injections

to the neck and shoulders, prescribed multiple medications and had ordered physical therapy more than once. He further opined Petitioner was in need of left shoulder surgery. Dr. Couri stated he could continue to treat Petitioner with a "multidisciplinary approach" primarily with medication (Petitioner's Exhibit 10).

At trial, Petitioner testified she had continued to be seen and treated by Dr. Couri up to the present. However, the most recent medical record of Dr. Couri that was tendered into evidence was dated August 18, 2015. Petitioner stated Dr. Couri had continued to treat her primarily with medication.

At the direction of Respondent, Petitioner was evaluated by David Morgan, a rehabilitation/employment expert, on February 16, 2007. Morgan reviewed medical records provided to him by Respondent and reviewed Petitioner's education and employment history. He performed a transferable skills analysis and opined, even with Petitioner's work restrictions, Petitioner was employable. However, Petitioner informed him that she did not believe she was capable of working full time (Respondent's Exhibit 3).

Morgan subsequently saw Petitioner on April 2, 2009. At that time, Petitioner informed Morgan she was enrolled in classes and working toward an Associate degree in business management. Morgan again opined Petitioner was employable. From May through July 17, 2009, Morgan noted that Petitioner failed to keep appointments, did not provide documentation of her efforts to obtain employment, did not provide him with a copy of her college transcript and one employer Petitioner stated she had submitted an application to reported to Morgan that they did not receive her resume. At that time, vocational efforts were terminated because of Petitioner's lack of participation (Respondent's Exhibit 3). Respondent also terminated payment of temporary total disability benefits.

Petitioner was subsequently evaluated by Stephanie Powers, a vocational/employment expert, on June 21, 2012. This evaluation was also performed at the direction of Respondent who reinstated payment of temporary total disability benefits. Powers reviewed Petitioner's medical records and provided Petitioner with job leads; however, in her report dated July 9, 2012, Powers noted Petitioner had not contacted any of the potential employers and commented that "...her lack of progress appears to be due to non-compliance in her vocational rehabilitation." (Respondent's Exhibit 3).

Powers continued to see Petitioner through March, 2013. Her reports noted a significant lack of progress in Petitioner's attempts to secure employment. Powers noted Petitioner failed to contact employers, did not submit job applications, did not provide job logs and Petitioner did not attend one or more job fairs. In her final report dated March 26, 2013, Powers noted Petitioner had been non-compliant with vocational rehabilitation and referenced the fact that various potential employers had advised that Petitioner had not submitted applications. At that time, vocational services for Petitioner were withdrawn. For the second time, Respondent terminated payment of temporary total disability benefits.

At the request of Petitioner's counsel, Petitioner was evaluated by Bob Hammond, a vocational/employment expert, on July 15, 2013. In connection with his evaluation of Petitioner, Hammond reviewed medical reports/records and the reports of both prior vocational experts. Hammond noted, among other things, that Petitioner had a 10 pound lifting restriction and was dyslexic. He opined Petitioner could work at various minimum wage positions; however, after two prior attempts with vocational assistance and Petitioner was still not employed, Hammond opined Petitioner would not be able to find "medically appropriate employment" (Petitioner's Exhibit 3).

At trial, Stephanie Powers testified on behalf of Respondent. Powers testified she began working with Petitioner in June, 2012, and continued work with her through May, 2013. Powers agreed Petitioner was limited to sedentary type jobs and provided her with potential job leads, recommended Petitioner go to job fairs, contacted various potential employers, etc. Powers said she had worked with individuals who had dyslexia in the past and was able to find work for them. She did concede that she had not worked anyone who had dyslexia in connection with a workers' compensation case.

Powers testified she closed Petitioner's file because of Petitioner's non-compliance with efforts to provide her with vocational assistance. She stated there were one or more job fairs Petitioner did not attend. Further, Powers stated Petitioner only went on one job interview and had represented she submitted applications to various employers. However, when Powers contacted those prospective employers, she determined that Petitioner had not, in fact, submitted any applications.

At trial, Petitioner testified she graduated from high school, but had to take special classes for reading and math because she was dyslexic. Petitioner went to Illinois Central College and received an Associate degree in 2010. Petitioner began her studies for this degree before she was injured and previously wanted to become a nurse. She testified that, as a nurse, she would have to be able to lift 50 pounds, so she decided not to pursue that career choice.

Petitioner tendered into evidence job search logs from 2009 through 2013. The Arbitrator reviewed the job logs and noted that, in many cases, no specific information was provided as to the date of contact and the name and addresses of the employer were, in many instances, missing. Most of the entries simply contained the name of the city where the job is located and a one or two word description of the job (Petitioner's Exhibit 5).

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, in part, causally related to the accident of June 23, 2005.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner sustained a work-related injury to her back and neck.

Prior to the accident of June 23, 2005, Petitioner was diagnosed with and treated for fibromyalgia, but was able to work. Following the accident of June 23, 2005, Petitioner was again diagnosed with fibromyalgia, but was unable to work and received extensive medical treatment.

Petitioner was also diagnosed with other conditions including bilateral carpal tunnel syndrome and a torn rotator cuff in the left shoulder; however, there was no evidence tendered that these conditions were related to the accident of June 23, 2005.

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

The Arbitrator concludes that the medical services provided to Petitioner that were causally related to the accident of June 23, 2005, were reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 11, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

The medical bills in Petitioner's Exhibit 11 were for treatment Petitioner received shortly after the accident and were for medical services provided to Petitioner prior to her being at MMI.

The Arbitrator reviewed the medical bills in Petitioner's Exhibit 11 and noted that payments were made, presumably by the Respondent. The amounts paid were partial payments which the Arbitrator believes to be because of the application of the fee schedule and the remaining amounts may represent balance billing on the part of the medical providers. If this is the case, those portions of the medical bills are not awarded.

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

The Arbitrator concludes Petitioner is entitled to payment of 252 weeks of temporary total disability benefits commencing June 24, 2005, through July 17, 2009, and June 21, 2012, through March 26, 2013.

In support of this conclusion the Arbitrator notes the following:

Petitioner was provided with vocational rehabilitation services for two separate periods of time. In both instances, vocational rehabilitation services ceased and temporary total disability benefits were terminated because of Petitioner's non-compliance with vocational rehabilitation.

On both occasions, Petitioner failed to keep appointments, did not provide documentation regarding her efforts to obtain employment, did not follow up with prospective employers, did not attend job fairs and represented she had submitted job applications to employers when she had apparently not done so.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 60% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Subsequent to the accident of June 23, 2005, Dr. Chien imposed permanent work restrictions of no lifting in excess of 10 pounds and no repetitive arm motion. This restriction limited Petitioner to sedentary type positions.

When Petitioner was examined by Dr. Pineda, he did not opine as to any specific work restrictions; however, he observed Petitioner standing and walking without any signs of pain or discomfort. He ultimately opined Petitioner had pain syndrome but without any anatomic correlation.

Petitioner testified she was dyslexic and while there was no question that this limited Petitioner's ability to secure employment, Petitioner was non-compliant with efforts to provide her with vocational rehabilitation services. Further, even though Petitioner was dyslexic, she was able to complete high school and also obtained an Associate degree.

The Arbitrator is not persuaded by the opinion of Bob Hammond because he opined Petitioner was, in fact, employable in various minimum wage positions, but that Petitioner was not employable because of two unsuccessful attempts with vocational assistance. Hammond did not comment or address the issue of Petitioner's non-compliance with those prior efforts to provide her with vocational assistance.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WIESLAW ROGALSKI,
Petitioner,

vs.

NO: 10 WC 47231

17IWCC0746

RICK TRANS CO., AND
ILLINOIS STATE TREASURER
as Ex-Officio Custodian of
THE INJURED WORKERS'
BENEFIT FUND,
Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the April 28, 2016, "Opinion and Order" of Circuit Court of Cook County, which ordered:

A. The decision of the Illinois Workers' Compensation Commission is set aside.
B. The Commission is instructed to reinstate the decision of the Arbitrator but modify the award so as not to include medical expenses for the November 3, 2010 MRI. *Order at 6.*

The court specifically found that "it was against the manifest weight of the evidence for the Commission to cut off TTD benefits on April 13, 2010...," (*Id.* at 5), "the Commission's decision to lower the loss of person as a whole award is without support in the evidence and against the manifest weight of the evidence," and that "Rogalski is entitled to medical expenses incurred up to October 15, 2010 [but] is not entitled to medical expenses for the November 3, 2010 MRI, which took place after the second, unrelated injury." *Id.* at 6.

17IWCC0746

The Commission notes that we are obligated to issue this decision pursuant to *Noonan v. IWCC*, (2016 IL App (1st) 152300WC; 65 N.E.3d 530; 2016 Ill. App. LEXIS 724; 408 Ill. Dec. 308). Therefore, we affirm and adopt the Arbitrator's original decision, dated September 5, 2014, which is attached hereto and made a part hereof, with the modification that the $4,618.87 in charges for the November 3, 2010 MRI are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $423.02 per week for a period of 28-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses of $22,507.37 under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $380.72 per week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in §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.

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 $53,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 22 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 10/11/17
49

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DUNBAR,

Petitioner,

vs.

NO: 10 WC 13483
10 WC 25900

PEPSI,

17IWCC0747

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses, nature and extent, penalties and fees, "Evidentiary rulings," "8(j) calculation - gross vs. net," "Exhibit rulings," "Causal connection after 12/10/10 for lumbar spine," and "Causal connection of left shoulder," and being advised of the facts and law, modifies the Corrected Decision of the Arbitrator as stated below and otherwise affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

We generally affirm the Arbitrator's decision but write separately to provide supplemental reasoning for finding Petitioner to be not credible on the issues of accident and causal connection. We also modify the period of temporary total disability.

Petitioner has filed multiple workers' compensation claims dating back to 1982. In 2008, Petitioner alleged injuries to his right shoulder and cervical area while lifting CO2 tanks, which is a very similar mechanism of injury to what he is alleging in the current claim. Petitioner was off work for about a year and a half before returning to work in August 2009. He then went to his primary care physician, Dr. Hawkins, on March 9, 2010 for urinary problems. Petitioner was referred to Dr. Hoard, urologist, but he saw Dr. Neal instead on March 23, 2010.

Petitioner would have us believe that he sustained a work injury on the very day that he had a pre-scheduled appointment with Dr. Neal. Petitioner testified that while moving a CO2 tank on March 23, 2010, he felt "a sharp pain going all the way down my left side and my back, all the way down to my left leg." T.18. However, he also testified:

Q: Michael, is it your understanding that this pain that you felt occurred after a

specific event on March 23, or was it a culmination of events as a CO2 tank operator filler for 12 years?

A: It was both.

...

It had been going on for a while, certain kind of pain in my back, you know, just overlooking it, thought that it was like muscle spasms or something. And on the day of March 23, it just happened all of a sudden, the sharp pain, I couldn't do it anymore.

Q: Pain in your back?

A: Yes, my back and my left shoulder. *T28-29.*

On cross-examination, Petitioner testified that he left work early for a pre-scheduled follow up appointment with Dr. Neal for his prostate. T.53. On redirect, he testified:

Q: When you saw Dr. Neal on [3/23/10] did you leave work early because you had to make the appointment, or did you leave work early because you wanted him to see you for your back and left shoulder after what happened at work that day?

A: Both.

We find this disingenuous because Dr. Neal's record (Px3) does not reflect any specific injury on that date. His notes are mostly illegible but indicate:

c/o L hip & back, left leg & peroneal [illegible]
Heavy lifting 50lb x 8 yrs
c/o slow stream, frequency & nocturnal [?]
...
Needs prostiva [?] when ready
...
Prostate grade II
..
Dx BPH, L/S disease
Rx Motrin, Vicodin, [?]
Plan: MRI of L/S

In addition to not reflecting any specific injury on that date, this record makes no mention of any left shoulder "injury." Dr. Neal only ordered an MRI of the lumbar spine. Also, Dr. Neal's record on March 25th indicates that Petitioner needs a work form "filled out for back" and doesn't mention anything about the shoulder.

We find that Petitioner did not tell Dr. Neal anything about a specific injury to his low back or left shoulder but only that he had left hip, back, and leg pain, which was related to "Heavy lifting 50lb x 8 yrs." Dr. Neal recommended a Prostiva prostate procedure and ordered a lumbar MRI, which was performed the next day on March 24th. The MRI showed: 1) diffuse lumbar spondylosis with associated degenerative disc desiccation at L3-4. Mild grade 1 spondylolisthesis at L3-4; and 2) disc bulges from L2-3 through L4-5 which combine with prominent arthritic changes to produce central canal and neural foraminal stenosis. Dr. Neal interpreted the MRI as abnormal on March 25th. Petitioner went to work on March 26th and reported that he injured himself at work on March 23rd.

The March 26th record from Concentra Medical Center reflects that Petitioner reported he was lifting CO2 tanks and felt pain in his lower back. However, the Concentra physician noted two positive Waddell signs and that Petitioner indicated it was "of gradual onset, and not specifically related to one specific event." We are aware that the Concentra Employer's Authorization form, dated March 26th, has a handwritten note: "c/o back pain, saw PCP, L arm & L leg affected, had MRI, never brought up before." However, it is not clear who wrote this and just because Petitioner tried to incorporate some possibly ongoing left shoulder complaints into a claimed work injury, does not prove that it happened. The actual treating record from that date only addresses the low back. Furthermore, on March 29th, Petitioner returned to Dr. Neal for the Prostiva prostate procedure, which included a peroneal nerve block. Once again, there was no mention of any left shoulder problems.

Petitioner signed his Application for Adjustment of Claim (10 WC 13483) on April 2, 2010, and it was filed on April 7th by his attorney. Then, on April 13th, Dr. Neal wrote: "MRI if needed – left shoulder, referred to Dr. O'Keefe". The Commission notes that Dr. O'Keefe is the same orthopedic surgeon that Petitioner had seen for his previous workers' compensation claim in 2008 related to right shoulder and cervical injuries. We also point out that Dr. Neal actually referred Petitioner to Dr. O'Keefe only for the left shoulder and referred him to "Drs. Matz and Licht for L/S disease." However, Dr. O'Keefe apparently took over the treatment for the lumbar condition as well and it doesn't appear that Petitioner ever saw Dr. Matz or Dr. Licht.

Petitioner filed a second Application for Adjustment of Claim (10 WC 25900) with a second attorney on July 8, 2010, alleging a date of accident of March 28, 2010 (five days after the original alleged date of injury). Both of these Applications were eventually amended on February 19, 2016 by a third (current) attorney, who had substituted in, with one case being claimed as an acute injury and the other as a repetitive trauma on the same date (March 23, 2010). Petitioner's previous 2008 case was also settled by his current attorney on October 18, 2011.

On April 20, 2010, Petitioner began treating with Dr. O'Keefe's office and lumbar epidural steroid injections (ESIs) were eventually recommended on July 6, 2010. However, we are very concerned by the evidence that shows Petitioner already had two lumbar ESIs with a Dr. Rozynek on June 8, 2010 and July 2, 2010. *Rx7.* Who is Dr. Rozynek? His records are contained in the records of Dr. Hawkins (Rx7), which Petitioner tried to keep out of evidence. Petitioner first saw Dr. Rozynek on May 14, 2010, almost a month after he had begun seeing Dr. O'Keefe. This record indicates a history of low back and left leg pain after lifting CO2 tanks at work. There is no mention of any left shoulder problems. Dr. Rozynek's final record in evidence is dated July 19, 2010. Dr. Rozynek noted that Petitioner still complained of low back and left leg pain after his second lumbar ESI and he recommended a third injection. However, Dr. Rozynek's records abruptly stop at that point. Petitioner never testified about seeing Dr. Rozynek and we are left to wonder why? These treatments with Dr. Rozynek are significant, not only as they reflect on Petitioner's credibility, but also on the reliability of Dr. O'Keefe's causation opinion and treatment plan. According to Dr. O'Keefe's records, Petitioner's first ESI was performed on September 27, 2010, so Dr. O'Keefe was apparently unaware of Petitioner's two prior ESIs with Dr. Rozynek and the concurrent treatment that Petitioner was receiving from Dr. Rozynek.

Although there are causation opinions contained in the medical records of Dr. O'Keefe and Dr. Chami, we note that they did not testify in this case. Instead, Petitioner had Dr. Graf perform a records review only on June 11, 2014. Significantly, it appears that Dr. Graf was also

not given any records from Dr. Hawkins or Dr. Rozynek, since they are not included in the list that he testified he reviewed. *Px18 at 13-14.*

The Arbitrator found that Petitioner reached maximum medical improvement (MMI) on December 10, 2010 and we agree. Petitioner claims that he "was not placed at MMI status until February 15, 2012 by Dr. Chami." *P-brief at J.* However, this date is not supported by the records either. On February 1, 2012, Dr. Chami wrote that the majority of Petitioner's symptoms were in the bilateral hips but that his pain had improved with the facet joint injections. Petitioner's examination was "essentially within normal limits" and a second EMG test was negative for radiculopathy, but Dr. Chami still wanted to do medial branch blocks followed by a rhizotomy. He wrote that "addressing the facet joint syndrome should allow him to progress to MMI per an FCE to be performed one month after RF rhizotomy is ultimately performed." On February 15, 2012, Dr. Chami performed the medical branch blocks. However, there does not appear to be any "release" from Dr. Chami that Petitioner was at MMI on that date. We find it curious that the records in evidence of Dr. Chami end abruptly on that date.

Even more interesting, however, is that Petitioner returned to Dr. Hawkins on August 25, 2012, where it was noted that Petitioner "wants to see an Ortho specialist due to bilat hip pain, **pt was informed over yr ago after MVA 'that I may need hip surgery.'"** *(Emphasis added.)* Thus, it appears that Petitioner was in motor vehicle accident at some point in 2011 (or possibly earlier) and was told that he was going to need hip surgery because of that accident. However, Petitioner never testified about this and the records do not indicate that any of his other treating physicians were aware of this motor vehicle accident. An intervening motor vehicle accident, which Dr. O'Keefe and Dr. Chami were never made aware of, along with the previous ESIs with Dr. Rozynek, which they apparently did not know about either, seems like a plausible reason why they would not be willing to testify on Petitioner's behalf and why their treating records end abruptly on February 15, 2012. If that intervening motor vehicle accident caused such a serious bilateral hip problem that he was told he would need surgery (and ultimately had it performed in 2015), this could seriously undermine their causation opinions.

We also note that Petitioner still had his 2008 workers' compensation claim pending at the time of his alleged injury on March 23, 2010. Petitioner was off work beginning April 3, 2010, for that accident. However, he underwent a Functional Capacity Evaluation (FCE) on May 18, 2010, related to the 2008 case. We note that the actual FCE report (Rx5) was rejected by the Arbitrator because it wasn't certified.

Addressing the medical testimony regarding Petitioner's lumbar condition, Dr. Graf opined that Petitioner's lumbar condition is causally related to his work accident on March 23, 2010, and that he aggravated pre-existing stenosis and arthropathy at L3 through L5. However, Dr. Graf agreed that there were no acute findings on the MRI. Rather, his opinion was based on Petitioner having no history of prior treatment and a well-documented mechanism of injury. As discussed above, we find that Petitioner did not have a well-documented mechanism of injury. In contrast, Respondent's Section 12 examiner, Dr. Hsu, opined that Petitioner sustained only a lumbar sprain and that his left leg symptoms were not true radiculopathy because there was no MRI finding to support those symptoms. Rather, Petitioner had "referred pain" from the muscle sprain. He opined that Petitioner had reached maximum medical improvement in November 2010 when he was released to return to work. He opined that Petitioner's subsequent lumbar symptoms were solely related to the natural progression of his pre-existing conditions and had nothing to do with the March 23, 2010 work injury. Significantly, we note that it appears neither Dr. Graf nor Dr. Hsu had any indication that Petitioner was involved in an intervening motor vehicle accident in 2011.

Regarding Petitioner's alleged left shoulder injury, we agree with the Arbitrator and find that Petitioner failed to prove that he sustained a specific injury on March 23, 2010. The initial record of Dr. Neal on that date does not mention the left shoulder at all. Although Dr. O'Keefe's early notes include a causation opinion that the left shoulder condition was related to the March 23, 2010 injury, he did not testify, and we question whether his opinion would remain the same. There is no other medical causation opinion about the left shoulder because Dr. Graf and Dr. Hsu limited their opinions to the lumbar condition. Another interesting consideration that goes towards Petitioner's credibility is that he testified that he saw Dr. Charles Carroll for his left shoulder. *T.33.* However, there are no records from Dr. Carroll in evidence. We are left to wonder what Dr. Carroll's involvement was.

To summarize, we find Petitioner's credibility lacking both in terms of his alleged accident and his treatment history. Although Dr. O'Keefe initially provided a causation opinion, the fact that he was apparently unaware of Petitioner's concurrent treatment with Dr. Rozynek and Petitioner's apparent motor vehicle accident sometime in 2011 (possibly before he returned to Dr. O'Keefe in February 2011), causes us to question the basis of his opinion and the validity of the same. As for Dr. Graf's opinion, he did not have all of Petitioner's treating records either and he was unaware of the intervening motor vehicle accident. We are also concerned that the records of Dr. Carroll regarding the left shoulder were not submitted into evidence. Based on all of the above, we find that Petitioner sustained repetitive trauma injuries to his low back on March 23, 2010, which temporarily aggravated his pre-existing lumbar condition of ill-being. We find the opinion of Respondent's Dr. Hsu to be most persuasive on this issue. We affirm the Arbitrator's finding that Petitioner had reached MMI from this temporary aggravation as of December 10, 2010, and that Petitioner failed to prove any accident involving his left shoulder.

On the issue of temporary total disability (TTD), the Arbitrator's decision states that Petitioner did not work from April 3, 2010 through November 7, 2010 but TTD was only awarded beginning April 20, 2010. Perhaps this is because the April 20th record of Dr. O'Keefe indicates that Petitioner was taken off work on that date. However, there is also a work note from Dr. Neal, dated March 23, 2010, indicating "no heavy lifting for 4-6 weeks." Dr. Neal's March 25th record states that Petitioner needs a "worker related form filled out for back." Petitioner did not actually testify about what his first day of missed work was, but on the Request for Hearing form Petitioner claimed TTD beginning on April 3, 2010. This is supported by Respondent's short-term disability payment records (Rx9), which indicate that Petitioner's last day worked was April 2, 2010. Based on the above, we hereby modify the decision to award TTD from April 3, 2010 through November 7, 2010 for a period of 31-2/7 weeks.

Based on our findings regarding causation, we affirm the Arbitrator's denial of treatment for Petitioner's lumbar spine after December 10, 2010, and all left shoulder treatment.

Regarding permanency, the Arbitrator awarded 7% loss of the person as a whole for the low back. Petitioner's accident was prior to September 1, 2011, so the five factors in §8.1b of the Act do not apply. Petitioner argued on Review that this should be increased due to the left shoulder condition. Based on our affirmance of the Arbitrator's finding that Petitioner's left shoulder condition is not causally related, we affirm the permanency award.

Although Petitioner listed "evidentiary rulings" and "exhibit rulings" on the Petition for Review, his brief does not address these issues and we find that, without specific arguments to the contrary, the Arbitrator's rulings were appropriate. Petitioner also listed "8(j) calculation – gross vs. net" but, again, did not address this in his brief. We find that the Arbitrator properly awarded credit to Respondent based on the net amount of short-term disability payments received by Petitioner. We also affirm the Arbitrator's denial of penalties and attorney's fees.

All else is affirmed and adopted. 17IWCC0747

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $462.55 per week for a period of 31-2/7 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 $416.30 per week for a period of 35 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses related to his lumbar treatment only through December 10, 2010, under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act. All left shoulder treatment is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $1338.43 under §8(j) of the Act for the net short-term disability payments paid to Petitioner; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 22 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 11/1/17
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

DUNBAR, MICHAEL
Employee/Petitioner

Case# 10WC013483
10WC025900

PEPSI
Employer/Respondent

17IWCC0747

On 4/29/2016, 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 0.35% 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:

0926 LEONARD LAW GROUP LLC
MATTHEW J LEONARD ESQ
300 S ASHLAND AVE SUITE 101
CHICAGO, IL 60607

2337 INMAN & FITZGIBBONS LTD
G STEVEN MURDOCK ESQ
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

CORRECTED ARBITRATION DECISION

MICHAEL DUNBAR
Employee/Petitioner

Case #10 WC 13483
#10 WC 25900

V.

PEPSI
Employer/Respondent

17IWCC0747

An *Application for Adjustment 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 March 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 March 23, 2010, the respondent was operating under and subject to the provisions of the Act.
- March 23, 2010, is the date of injury for the repetitive claim # 10 WC 13483 and the traumatic claim #10 WC 25900.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $36,079.16; the average weekly wage was $693.83.
- At the time of injury, the petitioner was 50 years of age, single with no children under 18.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $462.55/week for 28-6/7 weeks, from April 20, 2010, through November 7, 2010, which is the period of temporary total disability for which compensation is payable. The respondent is entitled to a set-off of $1,338.43 against the TTD benefits.
- The respondent shall pay the petitioner the sum of $416.30/week for a further period of 35 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 7% loss of the man as a whole.
- The respondent shall pay the petitioner compensation that has accrued from March 23, 2010, through March 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 through December 10, 2010, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine after December 10, 2010, and his left shoulder was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- 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

April 29, 2016
Date

APR 29 2016

FINDINGS OF FACTS:

The petitioner, a CO_2 filler/handler, received medical care with Dr. Neal on March 23, 2010. The treatment records are mostly handwritten, illegible and prone to misinterpretation. What is legible are complaints with his left hip, back and left leg and a notation of heavy lifting 50 pounds for eight years. No report of a specific traumatic event can be clearly deciphered from the medical record. A lumbar MRI on March 24th showed diffuse lumbar spondylosis with associated degenerative disc desiccation at L3-4, a mild grade 1 spondylolisthesis at L3-4, disc bulges from L2-3 through L4-5 with prominent arthritic changes producing central canal and neural foraminal stenosis. The petitioner followed up several times with Dr. Neal through April 13th. He received medical care on March 26th at Concentra and reported a gradual onset of lower back pain radiating down his left extremity to his knee while lifting 50-pound CO_2 tanks on March 23rd. An MRI of his left shoulder on April 13th revealed supraspinatus tendinopathy. The petitioner started care at the Marian Orthopedics & Rehabilitation on April 20th for low back and left shoulder pain. He reported lifting a 50-lb tank, slinging it to his left side and feeling immediate left shoulder and low back pain with radiation to his left leg down to his calf. Their impressions were left shoulder impingement and a lumbar discal injury. The petitioner saw Dr. O'Keefe on May 4, 2010, who continued conservative care and the no work restriction. An electrodiagnostic test on May 21st was normal. He received a L4-5 lumbar epidural steroid injection on June 18th and a L5-S1 injection on July 2nd. The petitioner received L4-5 and L5-S1 transforaminal lumbar epidural steroid injections on September 27th and October 4th, 11th and 18th. He was given a 30-lb lifting restriction and a script to continue physical therapy on November 10th. At a follow-up at Marian on

December 10, 2010, the petitioner denied any radicular symptoms and reported doing relatively well overall.

The petitioner reported at a follow-up on February 11, 2011, that his back pain was slowly returning and on April 15th, that he had back pain and left-sided hip and leg pain with walking. At his last follow-up with Dr. O'Keefe on September 13, 2011, the petitioner was referred to Dr. Chami for pain management. A lumbar MRI on September 16, 2011, revealed a 2 mm annular disc bulge from L3-S1 with neural foraminal narrowing most prominent on the left at the L4-5 level and lumbar spondylosis. Dr. Chami saw the petitioner on September 28, 2011, and gave him bilateral facet joint injections at L3-4, L4-5 and L5-S1. An electrodiagnostic test on December 21, 2011, showed no evidence of left lumbar or lumbosacral radiculopathy. Dr. Chami gave the petitioner bilateral L2, L3 and L4 medical branch blocks and bilateral L5 dorsal ramus blocks on February 15, 2012. The petitioner returned to DH Medical Group on August 25, 2012, for pain medication and an ortho referral due to bilateral hip pain. The petitioner reported that he was informed over a year ago after MVA that he may need hip surgery and requested a second opinion.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF THE EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an aggravation of his pre-existing lumbar arthrosis on March 23, 2010, that arose out of and in the course of his employment with the respondent. The petitioner had diffuse lumbar spondylosis, degenerative disc desiccation and mild spondylolisthesis at L3-4 and arthritic central canal and neural foraminal stenosis. While he did not have a

specific traumatic injury to his back, moving 50-pound tanks could temporarily aggravate his pre-existing lumbar condition.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his lumbar spine through December 10, 2010, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine after December 10, 2010, and his left shoulder 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 the current condition of ill-being with his lumbar spine is partially causally related to his work duties on March 23, 2010. The petitioner failed to prove that his current condition of ill-being with his lumbar spine after December 10, 2010, or his left shoulder is causally related to his work duties on March 23, 2010. The petitioner temporarily aggravated his pre-existing degenerative lumbar condition on March 23, 2010. The legible parts of Dr. Neal's records do not indicate a left shoulder trauma. After receiving four lumbar injections, on November 10, 2010, the petitioner requested a release to work. He was given a 30-pound lifting restriction and a script to continue physical therapy. At a follow-up at Marian on December 10, 2010, he denied any radicular symptoms and reported doing relatively well overall. Also, it is noted that Dr. Hsu opined that the petitioner's injury on March 23, 2010, was limited to a lumbar strain and that he was at maximum medical improvement in November 2010.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The petitioner did not work from April 3, 2010, and was prevented from working through his return to work on November 7, 2010. The respondent shall pay the petitioner temporary total disability benefits of $462.55/week for 31-2/7 weeks, from April 20, 2010, through November 7, 2010, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner. The petitioner received net short-term disability benefits of $1,338.43 ($115.89 x 11 and $63.84). The respondent is entitled to a set-off of $1,338.43 against the TTD benefits.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of back pain with walking and picking up cases of pop. He has difficulty with playing basketball and bowling. He had a prior 30-pound lifting restriction for his right arm. The respondent shall pay the petitioner the sum of $416.30/week for a further period of 35 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 7% loss of the man as a whole.

FINDING REGARDING PENALTIES AND FEES:

The petitioner failed to prove that he is entitled to §19(l) and §19(k) penalties and fees. The evidence was insufficient to establish that the respondent's delay in the payment of temporary total disability benefits was without a good and just cause or their conduct was vexatious and unreasonable. There was genuine dispute regarding the issues of accident and causation. 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 Up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DUNBAR,

Petitioner,

vs.

NO: 10 WC 13483
10 WC 25900

PEPSI,

17IWCC0747

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses, nature and extent, penalties and fees, "Evidentiary rulings," "8(j) calculation - gross vs. net," "Exhibit rulings," "Causal connection after 12/10/10 for lumbar spine," and "Causal connection of left shoulder," and being advised of the facts and law, modifies the Corrected Decision of the Arbitrator as stated below and otherwise affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

We generally affirm the Arbitrator's decision but write separately to provide supplemental reasoning for finding Petitioner to be not credible on the issues of accident and causal connection. We also modify the period of temporary total disability.

Petitioner has filed multiple workers' compensation claims dating back to 1982. In 2008, Petitioner alleged injuries to his right shoulder and cervical area while lifting CO2 tanks, which is a very similar mechanism of injury to what he is alleging in the current claim. Petitioner was off work for about a year and a half before returning to work in August 2009. He then went to his primary care physician, Dr. Hawkins, on March 9, 2010 for urinary problems. Petitioner was referred to Dr. Hoard, urologist, but he saw Dr. Neal instead on March 23, 2010.

Petitioner would have us believe that he sustained a work injury on the very day that he had a pre-scheduled appointment with Dr. Neal. Petitioner testified that while moving a CO2 tank on March 23, 2010, he felt "a sharp pain going all the way down my left side and my back, all the way down to my left leg." T.18. However, he also testified:

Q: Michael, is it your understanding that this pain that you felt occurred after a

specific event on March 23, or was it a culmination of events as a CO2 tank operator filler for 12 years?

A: It was both.

...

It had been going on for a while, certain kind of pain in my back, you know, just overlooking it, thought that it was like muscle spasms or something. And on the day of March 23, it just happened all of a sudden, the sharp pain, I couldn't do it anymore.

Q: Pain in your back?

A: Yes, my back and my left shoulder. *T28-29.*

On cross-examination, Petitioner testified that he left work early for a pre-scheduled follow up appointment with Dr. Neal for his prostate. T.53. On redirect, he testified:

Q: When you saw Dr. Neal on [3/23/10] did you leave work early because you had to make the appointment, or did you leave work early because you wanted him to see you for your back and left shoulder after what happened at work that day?

A: Both.

We find this disingenuous because Dr. Neal's record (Px3) does not reflect any specific injury on that date. His notes are mostly illegible but indicate:

c/o L hip & back, left leg & peroneal [illegible]
Heavy lifting 50lb x 8 yrs
c/o slow stream, frequency & nocturnal [?]
...
Needs prostiva [?] when ready
...
Prostate grade II
..
Dx BPH, L/S disease
Rx Motrin, Vicodin, [?]
Plan: MRI of L/S

In addition to not reflecting any specific injury on that date, this record makes no mention of any left shoulder "injury." Dr. Neal only ordered an MRI of the lumbar spine. Also, Dr. Neal's record on March 25th indicates that Petitioner needs a work form "filled out for back" and doesn't mention anything about the shoulder.

We find that Petitioner did not tell Dr. Neal anything about a specific injury to his low back or left shoulder but only that he had left hip, back, and leg pain, which was related to "Heavy lifting 50lb x 8 yrs." Dr. Neal recommended a Prostiva prostate procedure and ordered a lumbar MRI, which was performed the next day on March 24th. The MRI showed: 1) diffuse lumbar spondylosis with associated degenerative disc desiccation at L3-4. Mild grade 1 spondylolisthesis at L3-4; and 2) disc bulges from L2-3 through L4-5 which combine with prominent arthritic changes to produce central canal and neural foraminal stenosis. Dr. Neal interpreted the MRI as abnormal on March 25th. Petitioner went to work on March 26th and reported that he injured himself at work on March 23rd.

The March 26th record from Concentra Medical Center reflects that Petitioner reported he was lifting CO2 tanks and felt pain in his lower back. However, the Concentra physician noted two positive Waddell signs and that Petitioner indicated it was "of gradual onset, and not specifically related to one specific event." We are aware that the Concentra Employer's Authorization form, dated March 26th, has a handwritten note: "c/o back pain, saw PCP, L arm & L leg affected, had MRI, never brought up before." However, it is not clear who wrote this and just because Petitioner tried to incorporate some possibly ongoing left shoulder complaints into a claimed work injury, does not prove that it happened. The actual treating record from that date only addresses the low back. Furthermore, on March 29th, Petitioner returned to Dr. Neal for the Prostiva prostate procedure, which included a peroneal nerve block. Once again, there was no mention of any left shoulder problems.

Petitioner signed his Application for Adjustment of Claim (10 WC 13483) on April 2, 2010, and it was filed on April 7th by his attorney. Then, on April 13th, Dr. Neal wrote: "MRI if needed – left shoulder, referred to Dr. O'Keefe". The Commission notes that Dr. O'Keefe is the same orthopedic surgeon that Petitioner had seen for his previous workers' compensation claim in 2008 related to right shoulder and cervical injuries. We also point out that Dr. Neal actually referred Petitioner to Dr. O'Keefe only for the left shoulder and referred him to "Drs. Matz and Licht for L/S disease." However, Dr. O'Keefe apparently took over the treatment for the lumbar condition as well and it doesn't appear that Petitioner ever saw Dr. Matz or Dr. Licht.

Petitioner filed a second Application for Adjustment of Claim (10 WC 25900) with a second attorney on July 8, 2010, alleging a date of accident of March 28, 2010 (five days after the original alleged date of injury). Both of these Applications were eventually amended on February 19, 2016 by a third (current) attorney, who had substituted in, with one case being claimed as an acute injury and the other as a repetitive trauma on the same date (March 23, 2010). Petitioner's previous 2008 case was also settled by his current attorney on October 18, 2011.

On April 20, 2010, Petitioner began treating with Dr. O'Keefe's office and lumbar epidural steroid injections (ESIs) were eventually recommended on July 6, 2010. However, we are very concerned by the evidence that shows Petitioner already had two lumbar ESIs with a Dr. Rozynek on June 8, 2010 and July 2, 2010. *Rx7.* Who is Dr. Rozynek? His records are contained in the records of Dr. Hawkins (Rx7), which Petitioner tried to keep out of evidence. Petitioner first saw Dr. Rozynek on May 14, 2010, almost a month after he had begun seeing Dr. O'Keefe. This record indicates a history of low back and left leg pain after lifting CO2 tanks at work. There is no mention of any left shoulder problems. Dr. Rozynek's final record in evidence is dated July 19, 2010. Dr. Rozynek noted that Petitioner still complained of low back and left leg pain after his second lumbar ESI and he recommended a third injection. However, Dr. Rozynek's records abruptly stop at that point. Petitioner never testified about seeing Dr. Rozynek and we are left to wonder why? These treatments with Dr. Rozynek are significant, not only as they reflect on Petitioner's credibility, but also on the reliability of Dr. O'Keefe's causation opinion and treatment plan. According to Dr. O'Keefe's records, Petitioner's first ESI was performed on September 27, 2010, so Dr. O'Keefe was apparently unaware of Petitioner's two prior ESIs with Dr. Rozynek and the concurrent treatment that Petitioner was receiving from Dr. Rozynek.

Although there are causation opinions contained in the medical records of Dr. O'Keefe and Dr. Chami, we note that they did not testify in this case. Instead, Petitioner had Dr. Graf perform a records review only on June 11, 2014. Significantly, it appears that Dr. Graf was also

not given any records from Dr. Hawkins or Dr. Rozynek, since they are not included in the list that he testified he reviewed. *Px18 at 13-14.*

The Arbitrator found that Petitioner reached maximum medical improvement (MMI) on December 10, 2010 and we agree. Petitioner claims that he "was not placed at MMI status until February 15, 2012 by Dr. Chami." *P-brief at J.* However, this date is not supported by the records either. On February 1, 2012, Dr. Chami wrote that the majority of Petitioner's symptoms were in the bilateral hips but that his pain had improved with the facet joint injections. Petitioner's examination was "essentially within normal limits" and a second EMG test was negative for radiculopathy, but Dr. Chami still wanted to do medial branch blocks followed by a rhizotomy. He wrote that "addressing the facet joint syndrome should allow him to progress to MMI per an FCE to be performed one month after RF rhizotomy is ultimately performed." On February 15, 2012, Dr. Chami performed the medical branch blocks. However, there does not appear to be any "release" from Dr. Chami that Petitioner was at MMI on that date. We find it curious that the records in evidence of Dr. Chami end abruptly on that date.

Even more interesting, however, is that Petitioner returned to Dr. Hawkins on August 25, 2012, where it was noted that Petitioner "wants to see an Ortho specialist due to bilat hip pain, **pt was informed over yr ago after MVA 'that I may need hip surgery.'"** *(Emphasis added.)* Thus, it appears that Petitioner was in motor vehicle accident at some point in 2011 (or possibly earlier) and was told that he was going to need hip surgery because of that accident. However, Petitioner never testified about this and the records do not indicate that any of his other treating physicians were aware of this motor vehicle accident. An intervening motor vehicle accident, which Dr. O'Keefe and Dr. Chami were never made aware of, along with the previous ESIs with Dr. Rozynek, which they apparently did not know about either, seems like a plausible reason why they would not be willing to testify on Petitioner's behalf and why their treating records end abruptly on February 15, 2012. If that intervening motor vehicle accident caused such a serious bilateral hip problem that he was told he would need surgery (and ultimately had it performed in 2015), this could seriously undermine their causation opinions.

We also note that Petitioner still had his 2008 workers' compensation claim pending at the time of his alleged injury on March 23, 2010. Petitioner was off work beginning April 3, 2010, for that accident. However, he underwent a Functional Capacity Evaluation (FCE) on May 18, 2010, related to the 2008 case. We note that the actual FCE report (Rx5) was rejected by the Arbitrator because it wasn't certified.

Addressing the medical testimony regarding Petitioner's lumbar condition, Dr. Graf opined that Petitioner's lumbar condition is causally related to his work accident on March 23, 2010, and that he aggravated pre-existing stenosis and arthropathy at L3 through L5. However, Dr. Graf agreed that there were no acute findings on the MRI. Rather, his opinion was based on Petitioner having no history of prior treatment and a well-documented mechanism of injury. As discussed above, we find that Petitioner did not have a well-documented mechanism of injury. In contrast, Respondent's Section 12 examiner, Dr. Hsu, opined that Petitioner sustained only a lumbar sprain and that his left leg symptoms were not true radiculopathy because there was no MRI finding to support those symptoms. Rather, Petitioner had "referred pain" from the muscle sprain. He opined that Petitioner had reached maximum medical improvement in November 2010 when he was released to return to work. He opined that Petitioner's subsequent lumbar symptoms were solely related to the natural progression of his pre-existing conditions and had nothing to do with the March 23, 2010 work injury. Significantly, we note that it appears neither Dr. Graf nor Dr. Hsu had any indication that Petitioner was involved in an intervening motor vehicle accident in 2011.

Regarding Petitioner's alleged left shoulder injury, we agree with the Arbitrator and find that Petitioner failed to prove that he sustained a specific injury on March 23, 2010. The initial record of Dr. Neal on that date does not mention the left shoulder at all. Although Dr. O'Keefe's early notes include a causation opinion that the left shoulder condition was related to the March 23, 2010 injury, he did not testify, and we question whether his opinion would remain the same. There is no other medical causation opinion about the left shoulder because Dr. Graf and Dr. Hsu limited their opinions to the lumbar condition. Another interesting consideration that goes towards Petitioner's credibility is that he testified that he saw Dr. Charles Carroll for his left shoulder. *T.33.* However, there are no records from Dr. Carroll in evidence. We are left to wonder what Dr. Carroll's involvement was.

To summarize, we find Petitioner's credibility lacking both in terms of his alleged accident and his treatment history. Although Dr. O'Keefe initially provided a causation opinion, the fact that he was apparently unaware of Petitioner's concurrent treatment with Dr. Rozynek and Petitioner's apparent motor vehicle accident sometime in 2011 (possibly before he returned to Dr. O'Keefe in February 2011), causes us to question the basis of his opinion and the validity of the same. As for Dr. Graf's opinion, he did not have all of Petitioner's treating records either and he was unaware of the intervening motor vehicle accident. We are also concerned that the records of Dr. Carroll regarding the left shoulder were not submitted into evidence. Based on all of the above, we find that Petitioner sustained repetitive trauma injuries to his low back on March 23, 2010, which temporarily aggravated his pre-existing lumbar condition of ill-being. We find the opinion of Respondent's Dr. Hsu to be most persuasive on this issue. We affirm the Arbitrator's finding that Petitioner had reached MMI from this temporary aggravation as of December 10, 2010, and that Petitioner failed to prove any accident involving his left shoulder.

On the issue of temporary total disability (TTD), the Arbitrator's decision states that Petitioner did not work from April 3, 2010 through November 7, 2010 but TTD was only awarded beginning April 20, 2010. Perhaps this is because the April 20th record of Dr. O'Keefe indicates that Petitioner was taken off work on that date. However, there is also a work note from Dr. Neal, dated March 23, 2010, indicating "no heavy lifting for 4-6 weeks." Dr. Neal's March 25th record states that Petitioner needs a "worker related form filled out for back." Petitioner did not actually testify about what his first day of missed work was, but on the Request for Hearing form Petitioner claimed TTD beginning on April 3, 2010. This is supported by Respondent's short-term disability payment records (Rx9), which indicate that Petitioner's last day worked was April 2, 2010. Based on the above, we hereby modify the decision to award TTD from April 3, 2010 through November 7, 2010 for a period of 31-2/7 weeks.

Based on our findings regarding causation, we affirm the Arbitrator's denial of treatment for Petitioner's lumbar spine after December 10, 2010, and all left shoulder treatment.

Regarding permanency, the Arbitrator awarded 7% loss of the person as a whole for the low back. Petitioner's accident was prior to September 1, 2011, so the five factors in §8.1b of the Act do not apply. Petitioner argued on Review that this should be increased due to the left shoulder condition. Based on our affirmance of the Arbitrator's finding that Petitioner's left shoulder condition is not causally related, we affirm the permanency award.

Although Petitioner listed "evidentiary rulings" and "exhibit rulings" on the Petition for Review, his brief does not address these issues and we find that, without specific arguments to the contrary, the Arbitrator's rulings were appropriate. Petitioner also listed "8(j) calculation – gross vs. net" but, again, did not address this in his brief. We find that the Arbitrator properly awarded credit to Respondent based on the net amount of short-term disability payments received by Petitioner. We also affirm the Arbitrator's denial of penalties and attorney's fees.

All else is affirmed and adopted. 17IWCC0747

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $462.55 per week for a period of 31-2/7 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 $416.30 per week for a period of 35 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses related to his lumbar treatment only through December 10, 2010, under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act. All left shoulder treatment is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $1338.43 under §8(j) of the Act for the net short-term disability payments paid to Petitioner; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 22 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 11/1/17
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

DUNBAR, MICHAEL
Employee/Petitioner

Case# 10WC013483
10WC025900

PEPSI
Employer/Respondent

17IWCC0747

On 4/29/2016, 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 0.35% 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:

0926 LEONARD LAW GROUP LLC
MATTHEW J LEONARD ESQ
300 S ASHLAND AVE SUITE 101
CHICAGO, IL 60607

2337 INMAN & FITZGIBBONS LTD
G STEVEN MURDOCK ESQ
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

CORRECTED ARBITRATION DECISION

MICHAEL DUNBAR
Employee/Petitioner

Case #10 WC 13483
#10 WC 25900

V.

PEPSI
Employer/Respondent

17IWCC0747

An *Application for Adjustment 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 March 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 March 23, 2010, the respondent was operating under and subject to the provisions of the Act.
- March 23, 2010, is the date of injury for the repetitive claim # 10 WC 13483 and the traumatic claim #10 WC 25900.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $36,079.16; the average weekly wage was $693.83.
- At the time of injury, the petitioner was 50 years of age, single with no children under 18.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $462.55/week for 28-6/7 weeks, from April 20, 2010, through November 7, 2010, which is the period of temporary total disability for which compensation is payable. The respondent is entitled to a set-off of $1,338.43 against the TTD benefits.
- The respondent shall pay the petitioner the sum of $416.30/week for a further period of 35 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 7% loss of the man as a whole.
- The respondent shall pay the petitioner compensation that has accrued from March 23, 2010, through March 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 through December 10, 2010, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine after December 10, 2010, and his left shoulder was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- 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

April 29, 2016

Date

APR 29 2016

FINDINGS OF FACTS:

The petitioner, a CO_2 filler/handler, received medical care with Dr. Neal on March 23, 2010. The treatment records are mostly handwritten, illegible and prone to misinterpretation. What is legible are complaints with his left hip, back and left leg and a notation of heavy lifting 50 pounds for eight years. No report of a specific traumatic event can be clearly deciphered from the medical record. A lumbar MRI on March 24th showed diffuse lumbar spondylosis with associated degenerative disc desiccation at L3-4, a mild grade 1 spondylolisthesis at L3-4, disc bulges from L2-3 through L4-5 with prominent arthritic changes producing central canal and neural foraminal stenosis. The petitioner followed up several times with Dr. Neal through April 13th. He received medical care on March 26th at Concentra and reported a gradual onset of lower back pain radiating down his left extremity to his knee while lifting 50-pound CO_2 tanks on March 23rd. An MRI of his left shoulder on April 13th revealed supraspinatus tendinopathy. The petitioner started care at the Marian Orthopedics & Rehabilitation on April 20th for low back and left shoulder pain. He reported lifting a 50-lb tank, slinging it to his left side and feeling immediate left shoulder and low back pain with radiation to his left leg down to his calf. Their impressions were left shoulder impingement and a lumbar discal injury. The petitioner saw Dr. O'Keefe on May 4, 2010, who continued conservative care and the no work restriction. An electrodiagnostic test on May 21st was normal. He received a L4-5 lumbar epidural steroid injection on June 18th and a L5-S1 injection on July 2nd. The petitioner received L4-5 and L5-S1 transforaminal lumbar epidural steroid injections on September 27th and October 4th, 11th and 18th. He was given a 30-lb lifting restriction and a script to continue physical therapy on November 10th. At a follow-up at Marian on

December 10, 2010, the petitioner denied any radicular symptoms and reported doing relatively well overall.

The petitioner reported at a follow-up on February 11, 2011, that his back pain was slowly returning and on April 15th, that he had back pain and left-sided hip and leg pain with walking. At his last follow-up with Dr. O'Keefe on September 13, 2011, the petitioner was referred to Dr. Chami for pain management. A lumbar MRI on September 16, 2011, revealed a 2 mm annular disc bulge from L3-S1 with neural foraminal narrowing most prominent on the left at the L4-5 level and lumbar spondylosis. Dr. Chami saw the petitioner on September 28, 2011, and gave him bilateral facet joint injections at L3-4, L4-5 and L5-S1. An electrodiagnostic test on December 21, 2011, showed no evidence of left lumbar or lumbosacral radiculopathy. Dr. Chami gave the petitioner bilateral L2, L3 and L4 medical branch blocks and bilateral L5 dorsal ramus blocks on February 15, 2012. The petitioner returned to DH Medical Group on August 25, 2012, for pain medication and an ortho referral due to bilateral hip pain. The petitioner reported that he was informed over a year ago after MVA that he may need hip surgery and requested a second opinion.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF THE EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an aggravation of his pre-existing lumbar arthrosis on March 23, 2010, that arose out of and in the course of his employment with the respondent. The petitioner had diffuse lumbar spondylosis, degenerative disc desiccation and mild spondylolisthesis at L3-4 and arthritic central canal and neural foraminal stenosis. While he did not have a

specific traumatic injury to his back, moving 50-pound tanks could temporarily aggravate his pre-existing lumbar condition.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his lumbar spine through December 10, 2010, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine after December 10, 2010, and his left shoulder 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 the current condition of ill-being with his lumbar spine is partially causally related to his work duties on March 23, 2010. The petitioner failed to prove that his current condition of ill-being with his lumbar spine after December 10, 2010, or his left shoulder is causally related to his work duties on March 23, 2010. The petitioner temporarily aggravated his pre-existing degenerative lumbar condition on March 23, 2010. The legible parts of Dr. Neal's records do not indicate a left shoulder trauma. After receiving four lumbar injections, on November 10, 2010, the petitioner requested a release to work. He was given a 30-pound lifting restriction and a script to continue physical therapy. At a follow-up at Marian on December 10, 2010, he denied any radicular symptoms and reported doing relatively well overall. Also, it is noted that Dr. Hsu opined that the petitioner's injury on March 23, 2010, was limited to a lumbar strain and that he was at maximum medical improvement in November 2010.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The petitioner did not work from April 3, 2010, and was prevented from working through his return to work on November 7, 2010. The respondent shall pay the petitioner temporary total disability benefits of $462.55/week for 31-2/7 weeks, from April 20, 2010, through November 7, 2010, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner. The petitioner received net short-term disability benefits of $1,338.43 ($115.89 x 11 and $63.84). The respondent is entitled to a set-off of $1,338.43 against the TTD benefits.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of back pain with walking and picking up cases of pop. He has difficulty with playing basketball and bowling. He had a prior 30-pound lifting restriction for his right arm. The respondent shall pay the petitioner the sum of $416.30/week for a further period of 35 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 7% loss of the man as a whole.

FINDING REGARDING PENALTIES AND FEES:

The petitioner failed to prove that he is entitled to §19(l) and §19(k) penalties and fees. The evidence was insufficient to establish that the respondent's delay in the payment of temporary total disability benefits was without a good and just cause or their conduct was vexatious and unreasonable. There was genuine dispute regarding the issues of accident and causation. The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Allen Geistdorfer,

Petitioner,

vs.

NO: 13WC025834

17IWCC0748

The American Coal Company,

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, occupational disease, causal connection and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2017 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: NOV 27 2017

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

SJM/sj
o-11/2/2017
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GEISTDORFER, ALLEN
Employee/Petitioner

Case# **13WC025834**

THE AMERICAN COAL CO
Employer/Respondent

17IWCC0748

On 5/15/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5236 CULLEY FEIST KUPPART & TAYLOR
ROMAN P KUPPART
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

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

17IWCC0748

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

ALLEN GEISTDORFER
Employee/Petitioner

v.

THE AMERICAN COAL CO.
Employer/Respondent

Case # 13 WC 25834

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 16, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Geistdorfer v. The American Coal Co., 13 WC 25834

FINDINGS

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

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

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

Timely notice of this accident *was* 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 **$Unknown**; the average weekly wage was **$1,166.44**.

On the date of accident, Petitioner was **62** years of age, *married* with **0** dependent children.

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

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

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

ORDER

The Petitioner has failed to prove that he sustained accidental injuries arising out of exposure to an occupational disease. The Petitioner has failed to prove that he has contracted an occupational disease, and therefore has failed to prove a causal connection of any such disease to an occupational exposure.

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.

Paul V. Gallagher

Signature of Arbitrator

May 11, 2017
Date

MAY 15 2017

STATEMENT OF FACTS

Petitioner, currently 66 years old, testified that he spent 24 years working in coal mines, spending about 18 years underground and 6 years above ground, the latter being the most recent. He testified that while performing work at the mines, he was regularly exposed to coal and rock dust, as well as glue and other chemical exposures. He last worked for the Respondent on 11/18/12 at the Galatia mine, at which time he was laid off at age 62. He testified that he was exposed to coal dust that day, and that he has not looked for work anywhere else since.

The Petitioner testified he worked: for Norge Corp. from 1971 to 1978; at the Old Ben Mine #26 from 1978 to 1996; was laid off and attended retraining for miners (JTPA) at John A. Logan College from 1996 to 1998; for First National Bank as network support tech from 1998 to 2002; self-employed as a computer tech from 2002 to 2006; and, for Respondent from 2006 to 2012. During his employment as a miner, Petitioner testified he worked as a shuttle car operator, a wall prep setter, a bottom laborer, and finally as a maintenance planner. He agreed that the only job he had with Respondent was as a maintenance planner. He testified that these jobs were physical and it caused him breathing problems, which he still has today. Petitioner testified he first started noticing respiratory problems in 1994/1995, and that they worsened and became more noticeable over time, particularly with activities like climbing stairs, walking and other physical activities.

In his last job with Respondent as maintenance planner, he worked above ground on the 2nd floor. He estimated he would have to go up and down the stairs to his office 20 times per day and had breathing problems doing so. Dust or anything like that in the air would also result in more noticeable breathing problems. Petitioner agreed he was able to complete his work tasks at the end of his employment, but it was getting harder. He doesn't think he could do it today given that he would have to climb stairs.

Petitioner estimated that currently he could walk approximately 1/8 of a mile on level ground before noticing breathing problems. On stairs, he notices it immediately. It impacts his daily life in that even walking to the mailbox (appox 600') causes problems. He likes to hunt and bank fish, as well as do hand carved woodworking, and he testified he walks very slow when hunting.

Petitioner testified that he treats with Dr. Brown, his primary care provider, for respiratory problems, and Petitioner testified that he was honest with him about his complaints and problems. They discussed that Petitioner worked in a dusty environment in the mine. Petitioner saw Dr. Tazbaz one time, on 11/24/13, on referral from his attorney. Petitioner acknowledged that he smoked a pack or less per day for about 30 years, quitting in 1990/1991.

On cross examination, Petitioner agreed that he previously signed up for a pension from his prior employment. The maintenance planning position with Respondent involved taking care of planning and maintenance activity, tracking equipment and staging parts to be used in maintenance. It is mainly performed via computer, with physical time in the warehouse looking things up. He testified that he worked on the second floor for Respondent in a large, two-story surface building, as well as the warehouse. The building housed other offices, including on the first floor. He would exit his office during the day. He testified that he did have coal dust exposure in the office, noting there would be dust on his desk and that the air filters in the air handler had to be changed a couple times per week. On cross exam, he agreed that the building had heating and air conditioning, and that custodial workers did work in his building.

There was one flight of stairs to his office, but Petitioner could not recall how many steps were involved. Physically, other than traversing the stairs, Petitioner testified he would have to check on parts and material in

the yard, which involved walking. As far as staging parts, if he was able to lift and move them, he would do so. Though he testified it is hard to say exactly how often he did this, he estimated it to be two to three times per month. The job involved no other physical exertion. The job did not require him to use any tools beyond the computer.

On further cross exam, Petitioner verified that following his 4/24/06 hire date with Respondent, he was laid off from 5/9/08 to 6/23/08, and worked thereafter until his final 11/8/12 lay off. Petitioner could not recall if he underwent chest x-rays for black lung via NIOSH while working for Old Ben. He agreed he had the opportunity to obtain such x-rays, and that he may have participated "maybe once." He did not recall if he received a letter indicating what the films revealed, and testified that he has no such letter in his possession currently. Petitioner testified that he currently still hunts, fishes and does woodworking. He does travel, living in Florida during winters, though he still considers Illinois home. Otherwise, he watches TV or works on his computer.

Dr. Tazbaz is a pulmonologist, and his deposition was obtained by the parties on 5/14/15. (Px3). He is board certified in internal medicine, pulmonary disease, critical care medicine and sleep medicine. At the time of his deposition he was affiliated with hospitals in Alton, Illinois, and prior to that was affiliated with hospitals in Carbondale, Herrin, Murphysboro and Marion, Illinois. He also did some work for Southern Illinois Respiratory Disease Clinic. Dr. Tazbaz testified that while in Carbondale, between 2% and 5% of his patients were coal miners or former coal miners. Prior to coming to Southern Illinois, Dr. Tazbaz worked at Stroger Hospital in Chicago under Dr. Robert Cohen. At that time, Dr. Cohen was the medical director for the black lung program in Chicago. Dr. Tazbaz worked with Dr. Cohen in the black lung clinic and did examinations for the Department of Labor. In the black lung clinic with he had the opportunity to have special training and gain specific experience regarding reading radiographic studies for occupational lung disease. Dr. Tazbaz has never taken the B-reader test. He also gained training and experience in performing pulmonary function studies and reading same. (Px3).

Dr. Tazbaz evaluated Petitioner at the request of his counsel on 11/4/13, at the Southern Illinois Respiratory Disease Clinic in Carbondale. Dr. Tazbaz took a history from Petitioner, performed a physical examination and evaluated the available records and x-rays. Petitioner reported that he had a dry cough every day that was sometimes productive. The cough was the same as it was when he was in the coal mines. He would occasionally wake himself from coughing. Petitioner was able to walk about 10 to 15 minutes before becoming short of breath. He would become short of breath when climbing or doing work. (Px3).

Petitioner reported smoking an average of a pack of cigarettes a day for 20 years, quitting in 1995. Physical examination of Petitioner's chest was within normal limits, but Dr. Tazbaz testified that this would not be unusual with someone who has simple coal workers' pneumoconiosis (CWP). Spirometry was performed, and while Dr. Tazbaz testified that there was submaximal effort, he testified the testing showed what looked like an obstructive defect, and that a restrictive defect could not be ruled out. Dr. Tazbaz testified that in a person with category 1 CWP, spirometry can show a restrictive defect, and that some people also develop COPD from exposure to coal mine dust which could result in an obstructive defect. At the same time, he testified that it also would not be unusual for a person with simple CWP to have normal spirometry, and that being within the range of normal does not mean that there has been no lung damage at all. He testified that a person could have lung damage or even a certain amount of a lung lobe removed and still have normal overall global function of the lungs. (Px3).

Dr. Tazbaz testified that he customarily reads and interprets chest x-rays in providing care and treatment to his patients. He agreed he is not a B-reader and has not taken the class for B-reading, and is not board certified in radiology, indicating he would defer to board certified radiologists in interpreting chest films for CWP. He did,

however, review Petitioner's 1/11/13 chest x-ray films, and testified that, in his opinion, Petitioner had CWP caused by his exposure to coal mine dust. He testified that when the coal dust is deposited in the lung, it creates an area of inflammation which can cause the nodules seen on the chest x-ray. He also opined that it is a chronic slowly progressive disease. He agreed that not every coal miner that is exposed to coal dust gets CWP. The scar tissue of CWP is permanent in nature, and he testified that this scarring impairs lung function at the scar site(s). Dr. Tazbaz testified that Petitioner had radiographically apparent changes that represented pulmonary impairment, and opined that the cause of that impairment would be exposure to coal mine dust. Dr. Tazbaz testified that he agreed with the American Thoracic Society that there is no safe level of additional exposure to coal dust for someone with CWP, and opined that Petitioner couldn't be further exposed without endangering his health and worsening his condition. (Px3).

On cross examination, Dr. Tazbaz agreed that he has seen multiple individuals at the request of Petitioner's counsel, estimating he has done 15 to 20 independent exams for attorneys, all on the claimants side. Dr. Tazbaz agreed, with regard to Petitioner's report of post-nasal drip and GERD, that those conditions can be associated with cough. Petitioner had a significant history of tobacco use, and Dr. Tazbaz testified that if tobacco use causes an impairment in pulmonary function, that typically would be an obstruction. If an individual develops an obstruction from significant tobacco use and ceases smoking, he would not typically return to having normal spirometry results. He opined that significant tobacco use is associated with exertional dyspnea, cough and sputum. (Px3).

Dr. Tazbaz testified he did not review any of Petitioner's prior medical records. Petitioner did not tell Dr. Tazbaz that he left coal mining as a result of a pulmonary disease - he reported that the mine closed. Petitioner did not indicate to Dr. Tazbaz that he was unable to perform the duties of his last job at the coal mine. (Px3).

Dr. Tazbaz agreed that, for spirometry testing to be valid, it needs to be reproducible. He testified that while the FVC reading was reproducible, the FEV1 was not. He testified that the FEV1 was a measure of how much or what volume of air the patient blows out in the first second of the forced vital capacity maneuver. Dr. Tazbaz testified that when one looks to spirometry to make a diagnosis of obstruction, one looks to the FEV1/FVC ratio to see whether it is reduced or not. If the individual puts forth less than full effort in the first second of the forced vital capacity maneuver, he agreed this will artificially lower the FEV1. (Px3).

Asked further questions on cross exam, Dr. Tazbaz agreed that his respiratory testing could not be relied upon to make a diagnosis of obstruction. Dr. Tazbaz testified that Petitioner's initial forced vital capacity was 3.54 liters, and when he was tested later it was 4.71, which is within the normal range. Petitioner's FEV1 when Dr. Tazbaz measured it was 2.57 liters. When it was measured later, it was 3.65 liters. Dr. Tazbaz testified that these were significantly different values. On the later testing the ratio for forced vital capacity and FEV1 was 78%, which is a normal ratio, and thus those results did not reveal the presence of an obstruction. Petitioner had a total lung capacity of 5.93, which is within normal limits. Dr. Tazbaz testified this ruled out a restriction in Petitioner as well. His diffusion capacity of 21, which is 91%, was within normal limits. This ruled out the presence of a gas exchange abnormality. Petitioner was not taking any medication for breathing impairment and testified he never has. (Px3).

Dr. Tazbaz agreed that when coal dust exposure ceases for a CWP patient, it is more likely than not that the disease will not progress, as well as with the American Thoracic Society that an older worker with mild CWP may be at low risk for working in currently permissible exposure levels until he reaches retirement age. Dr. Tazbaz testified that it was based upon the interpretation of Petitioner's chest x-ray as positive and his history of exposure, he made a diagnosis of coal workers' pneumoconiosis. If either one of those two things were missing,

he would not have made that diagnosis. Dr. Tazbaz also agreed on cross exam that you cannot determine pulmonary impairment just from looking at a chest x-ray. (Px3).

- Dr. Afzal Ahmed interpreted a 1/11/13 chest x-ray as positive for pneumoconiosis, profusion 1/1 with P/P opacities in all lung zones. (Px1). Dr. Ahmed's CV indicates he is a board certified radiologist and B-reader. (Px2).

Dr. Meyer is a board certified radiologist and has been a B-reader since 1999. On 3/4/14, on behalf of Respondent pursuant to Section 12, Dr. Cristopher Meyer reviewed Petitioner's 1/11/13 PA and lateral chest x-ray films. Dr. Meyer testified that had been was asked to take the B-reading exam by Dr. Jerome Wiot, one of the original committee that designed the B-reader training program, and that he more recently was asked to have a more active academic role with the B-reading program. Dr. Meyer is on the American College of Radiology Pneumoconiosis Task Force which is engaged in redesigning the course and the exam and submitting cases for the B-reading training module and exam. He performs 30 to 40 B-readings per week. (Rx1).

- Dr. Meyer opined that the 1/11/13 films were of quality 2 because of quantum mottle, which occurs when there are not enough x-rays or photons going through the patient so one does not get as complete an image, and it gives the image a grainy appearance. Asked about Dr. Castle indicating the same films were quality 2 due to "underexposure", Dr. Meyer testified that mottling was essentially the same thing as underexposure. Dr. Meyer testified that his review of the films indicated the lungs were clear, and he found no radiographic evidence of CWP, rating the Petitioner's perfusion at 0/0. (Rx1).

Dr. Meyer testified that a B-reader looks at the films of the lungs to decide whether there are any small nodular opacities or linear opacities and, based on the size and appearance of the small opacities, they are given a letter score. Specific occupational lung diseases are described by specific opacity types. CWP is characteristically described by small round opacities. The distribution of opacities is also described because different pneumoconioses are seen in different regions of the lung, and CWP is, at least in the early stages, primarily an upper zone process. The last component of the interpretation is the extent of the lung involvement, i.e. the profusion ratio, which is basically a determination of the density of the small opacities in the lung. In Dr. Meyer's opinion, noting that radiologists have about a 10% higher pass rate on the B-reading exam, radiologists have a better sense of what the variation of normal is than other specialties due to their experience with reading films. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making a distinction between the 0/1 and 1/0 profusion on a film – 0/1 means the reader doesn't think there is CWP, but that it was borderline and there could be CWP, while 1/0 means the reader thinks there is CWP, but its borderline and there may not be CWP. (Rx1).

- On cross examination, Dr. Meyer indicated that he disagreed with Dr. Ahmed that Petitioner had small round opacities in the lower lobes. He also testified that Dr. Ahmed's findings of a 1/1 CWP perfusion in all lung zones are a perfect example of film noise (i.e., the mottling) being incorrectly read as opacities. With regard to a recent study which indicated that CWP may be more widespread throughout the lung zones than once thought, Dr. Meyer testified that the study used the last x-rays taken of its subjects, which would typically be the ones with the worst level of findings for each subject. He agreed that CWP is spread throughout the zones when it is in more severe categories, but that with level 1 CWP, the findings would very typically be in the upper zones only. Dr. Meyer did agree with the same study's indication that individual coal macules would not normally be visible on x-rays, unless they consolidate with other macules, and that autopsies support the fact that people with no x-ray findings indicating CWP can still have pathological evidence of CWP. (Rx2).

With regard to whether any other abnormal findings were indicated in Petitioner's x-rays, Dr. Meyer testified: "If these films were to come through on a regular clinical workday, it would be read as no acute cardiopulmonary disease. There would be no additional findings." As a radiologist, he had no opinions with regard to Petitioner's pulmonary function. (Rx1).

At the request of Respondent's counsel, Dr. James R. Castle reviewed medical records and chest x-ray regarding Petitioner. His deposition was obtained on 8/14/15. (Rx2). Dr. Castle is a pulmonologist, board certified in internal medicine and the subspecialty of pulmonary disease, and his practice was limited to pulmonary disease and chest disease, which encompassed critical care medicine. He treated patients with occupational lung disease, including some who had CWP. Dr. Castle also has been certified as a B-reader since 1985. He has essentially retired other than performing independent medical reviews. (Rx2).

Dr. Castle reviewed Petitioner's 1/11/13 chest x-ray films and testified that he saw no abnormalities consistent with CWP. Dr. Castle testified that there is no such thing as radiographically apparent pulmonary impairment. His understanding of the Coal Workers' X-ray Surveillance Program is that when chest x-rays are taken as part of that program, the results are to then determine abnormalities in the x-rays and notify the miner. There was no indication Petitioner had any records in this regard. (Rx2).

Dr. Castle reviewed the respiratory and pulmonary testing performed at Respondent's request at Methodist Hospital on 6/19/14. He testified that the spirometry was normal and ruled out the presence of an obstruction. The lung volumes, in particular the total lung capacity, also ruled out the presence of a restriction. Dr. Castle testified that the diffusion capacity was totally normal which would indicate no abnormality in gas exchange. Petitioner's exercise testing was normal, and he had a normal response to exertion in terms of his pulmonary function. No ventilatory limit was indicated by the testing. Dr. Castle testified that, based on this functional capacity testing, the Petitioner was capable of heavy manual labor. (Rx2).

Based upon his review of all the medical data in this claim, Dr. Castle opined that Petitioner did not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure. He agreed that Petitioner's 24 years or more in and around the underground mining industry would involve significant enough coal dust exposure to cause him to develop CWP if he were a susceptible host. He also testified that Petitioner's 20 year pack-a-day history of smoking was a sufficient enough exposure history to have caused him to develop chronic obstructive pulmonary disease (COPD), again if he were a susceptible host. Dr. Castle noted that Petitioner had an essentially normal physical examination of the chest and did not demonstrate any consistent physical findings indicating the presence of an interstitial pulmonary process. (Rx2).

Dr. Castle testified that the 11/14/13 pulmonary function studies performed by Dr. Tazbaz were invalid as it demonstrated less than maximal effort from Petitioner during the forced vital capacity maneuver. He testified that this thus did not represent Petitioner's maximum physiologic effort, and the most that could accurately be stated about the testing is that Petitioner's true physiologic function was at least as good as that represented, and is likely even better. The 6/19/14 pulmonary function study, on the other hand, was a valid and reproducible study, and based on this more recent and valid testing, Dr. Castle opined that that Petitioner did not demonstrate any evidence of pulmonary impairment from any cause including coal mine dust exposure. The resting arterial blood gas test from that study did demonstrate a mild degree of hypoxemia at rest, but after exercise the PO2 was entirely normal, which is a normal response to exercise. Dr. Castle testified that this minimal degree of hypoxemia therefore was transient and due to ventilation/perfusion mismatching. Dr. Castle opined that Petitioner had no respiratory impairment from any cause including CWP. (Rx2).

Dr. Castle testified CWP is defined as a chronic dust disease brought about by the inhalation of coal mine dust over a period of time working in or around coal mines, and that it manifests by the presence of an abnormal chest x-ray with small, round/regular-type opacities primarily in the upper lung zones. Depending on the severity, it could involve the middle and occasionally lower lung zones. Dr. Castle testified that the scarring and fibrosis that is caused by CWP cannot generally participate in gas exchange or physiologic function. Dr. Castle testified that according to the American Thoracic Society, individuals with minimal degrees of abnormality on chest x-ray can continue to work without any significant risk of further significant progression. (Rx2).

On cross-examination, Dr. Castle agreed that his record review examinations since his semi-retirement have generally been on behalf of employers and insurance companies. Dr. Castle conceded that he had never met, spoken to, or physically examined the Petitioner. He agreed it is fair to say that similarly qualified physicians can, and do, disagree as to the findings on chest x-rays, particularly in the lower perfusion categories of CWP like 0/1 and 1/0. Dr. Castle agreed that the scarring and fibrosis that occurs in the lungs from CWP impairs lung function and is irreversible and permanent. Dr. Castle acknowledged that there are contradictory opinions as to whether or not there is a "safe" level of coal dust exposure, but even exposure to the alleged "safe" levels of coal dust are still causing some worker's to develop pneumoconiosis if they are susceptible to same. He agreed that a person with normal pulmonary function testing can have shortness of breath and/or CWP, and that a person with some levels of lung damage can still have normal testing, noting that the testing encompasses the bilateral lungs together. Dr. Castle did indicate that older workers with low levels of CWP were at low risk of worsening so long as such "safe" levels of exposure occur, including things like using proper respiratory protection.

The records of Brown Family Practice were admitted into evidence. (Rx4). Petitioner was seen on 12/20/10 to establish care. On 3/21/11 he denied any problems. Physical examination of the chest revealed the lungs to be clear to auscultation bilaterally. On 9/21/11, Petitioner complained of having to take over the counter Claritin for the past four days because of ragweed, as well as a runny nose and occasional non-productive cough. Physical examination of the chest revealed no abnormality. On 2/14/12, Dr. Makhdoom noted Petitioner was recorded that he was a former tobacco user, having smoked 15 years prior. His review of systems respiratory revealed no cough, dyspnea or shortness of breath with exercise. At a 6 month follow up on 3/21/12, Petitioner denied any problems, and chest exam showed the lungs clear to auscultation and percussion bilaterally without adventitious sounds. Based on fever and body aches, Petitioner underwent a PA and lateral chest x-ray on 6/19/12, which was noted to be normal. Petitioner was seen on 3/26/13 in follow up for hyperlipidemia and pre-diabetes mellitus. His examination of the chest was clear to auscultation bilaterally with no adventitious sounds. On 9/16/13, Petitioner complained of sores in his mouth from acid and related that his hands had been hurting him in the mornings. Physical examination of the chest revealed the lungs were clear to auscultation bilaterally without adventitious sounds. (Rx4).

At his 3/18/14, 9/8/14 and 12/12/14 checkups, the Petitioner was doing well with no respiratory complaints, and examination reflected the chest was clear to auscultation bilaterally. Petitioner again denied any complaints on 4/21 and 8/11/15, and the lungs were clear on examination. On 11/10/15, Petitioner reported that he did not have any acute problems at that time, but he did report that he had cough with shortness of breath which had been present for years. His lungs were clear on examination. Dr. Brown ordered a chest x-ray for Petitioner and referred him to a pulmonologist for further evaluation and treatment. (Rx4).

Petitioner was seen for routine follow up on 2/3/16. He did not have any acute problems at that time. Physical examination of the lungs showed that they were clear. At his next visit on 4/20/16, Petitioner complained of joint pain, insomnia, GERD and glucose intolerance. Physical examination of the lungs showed the chest was

clear. Review of systems respiratory showed no shortness of breath or cough. His remaining visits on 5/10/16 and 9/29/16 again indicate normal chest exams and no respiratory complaints. (Rx4 & 5).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the preponderance of the evidence supports the finding that the Petitioner failed to prove that he has contracted the disease or CWP. The Petitioner has also failed to prove that he sustained any objective respiratory impairment. Given these findings, the Petitioner has also failed to prove that he sustained any occupational disease that is causally related to his employment with the Respondent.

The Arbitrator initially notes that it appears that the only real respiratory disease that is being alleged by Petitioner is CWP. Petitioner's examining physician, Dr. Tazbaz, testified that Petitioner had normal physical exam of the chest. None of Dr. Brown's records indicate examination findings supporting a respiratory disease, but rather repeatedly indicate chest exams reflected no abnormal findings. He did refer the Petitioner to a pulmonologist in November 2015, however there are no further records which indicate any findings were made based on that referral.

Dr. Tazbaz initially testified that spirometry showed what looked like an obstructive defect, and a restrictive defect could not be ruled. However, he also noted that there was submaximal effort, and on cross examination agreed that his testing couldn't be relied upon to determine either a restrictive or an obstructive defect existed. Further, this was significantly based on spirometry testing indicating a lack of full effort by Petitioner, which is what he initially relied on. This backtracking in his determination is problematic with regard to the persuasiveness of his opinions. It also appears that, based on the lack of full effort issue, the subsequent testing at Methodist Hospital was more likely to be a valid representation of the Petitioner's respiratory abilities and pulmonary function. While he testified that the Petitioner could have chronic bronchitis based on a dry cough that was sometimes productive, the Arbitrator notes that the Petitioner never sought treatment for respiratory problems prior to being referred by his attorney for an examination. This would tend, in the Arbitrator's mind, to indicate that any symptoms he may have had weren't significant enough for him to have looked for medical help, despite his testimony that he had been having noticeable breathing problems since 1994/1995.

The physicians who reviewed this case on behalf of Respondent, Dr. Meyer and Dr. Castle, indicated that, based on a review of all the medical evidence in this case, including the x-ray films, there is no evidence that Petitioner has impaired respiratory function. Thus, it appears that a solid preponderance of the evidence supports the fact that the Petitioner had no provable respiratory function impairment.

The question becomes whether the Petitioner, regardless of the results of pulmonary function testing, actually has a CWP condition. All of the physicians involved in this case agree that CWP can exist despite normal pulmonary function and spirometry testing. As indicated by Dr. Tazbaz, if the CWP condition exists, there is by definition some level of lung impairment, as the scarred areas would not perform proper air exchange. Again, all physicians in this case agree that CWP scarring is permanent and results in at least some level of lung impairment.

Dr. Ahmed, a B-reader, read the same films as Dr. Tazbaz, and his impression was category 1/1 simple CWP. He noted minute, soft rounded parenchymal densities up to 1.5 mm scattered throughout the lungs. His testimony was not obtained in this case, and his report does not discuss the quality of the films or the issue of possible underexposure.

- Dr. Tazbaz is not a B-reader, and testified that he would defer to an experienced radiologist in the review of x-ray films in determining the presence of CWP.

Dr. Meyer's testimony indicated significant experience and credentials in the field of radiology and the reading of films. He testified that he performs 30 to 40 B-readings per week. His testimony was important with regard to the importance of experience in reading films for CWP, particularly in the 1/0 versus 0/1 perfusion category. His testimony was credible in describing how mottled or underexposed x-rays can cause difficulty in CWP readings. While Petitioner's counsel cited a recent study indicating CWP was a more dispersed disease throughout the lung zones, Dr. Meyer credibly testified that the study appeared to only use the latest x-rays of a patient with more likely higher perfusion rates, and that with category 1 CWP the upper lobes would have higher perfusion levels. Here, Dr. Ahmed found a category 1 perfusion throughout all zones, which doesn't make sense given this testimony, at a category 1 CWP level. The evidence does not reflect the frequency of which Dr. Ahmed reviews films for CWP. Dr. Castle testified to fairly significant experience as a B-reader for CWP.

Dr. Meyer's experience level combined with his explanations for his opinions leads the Arbitrator to conclude that his opinions are more persuasive in this case than that of Dr. Tazbaz. His indication that the films read by the physicians in this case being less than optimal quality is supported by Dr. Castle. Plus, Dr. Castle also opined that, despite the issues with the film, he saw no evidence in the films that would support a diagnosis of CWP.

It should also be noted that, in this particular case, the claimant's exposure to underground mining ended in 1996 until he returned to work for Respondent in 2006. When he returned it was to an above ground, second floor office position. The evidence certainly indicates that the Petitioner was likely still exposed to coal dust just being at the mine site, and he noted he would have to go down to the warehouse area at times, and obviously came and went from his office. However, it appears that any exposure he had was significantly less than what he may have been exposed to while performing underground mining.

Overall, the greater weight of the evidence indicates that the Petitioner does not have CWP, or any other respiratory condition. Given that no such condition has been shown, the Petitioner has also failed to prove causal connection.

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

Based on the Arbitrator's finding that the Petitioner failed to prove that he sustained an accidental injury which arose out of an occupational exposure, this issue is moot.

WITH RESPECT TO ISSUE (O), THE APPLICABILITY OF SECTIONS 1(d) and 1(f) OF THE OCCUPATIONAL DISEASES ACT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that the Petitioner failed to prove that he sustained an accidental injury which arose out of an occupational exposure, this issue is moot. The Petitioner has failed to prove disablement, much less whether such disablement was timely under the OD Act.

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

Charles Downes,

Petitioner,

17IWCC0749

vs. NO. 13 WC006603

State of Illinois Centralia Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, 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 May 4, 2017 is hereby affirmed and adopted.

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: NOV 27 2017
SJM/sj
o-11/02/2017
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

DOWNES, CHARLES
Employee/Petitioner

Case# **13WC006603**

16WC009432
16WC009433

SOI/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

17IWCC0749

On 5/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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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BUREAU OF RISK MANAGEMENT
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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

MAY 4 - 2017

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

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHARLES DOWNES
Employee/Petitioner

v.

Case # **13** WC **6603**

Consolidated cases: **16 WC 9432 & 16 WC 9433**

STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **September 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 _____

17IWCC0749

FINDINGS

On the date of accident, **November 18, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,080.00**; the average weekly wage was **$1,116.92**.

On the date of accident, Petitioner was **39** 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 $**ANY AND 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 he sustained an accident that arose out of and in the course of his employment on November 18, 2012. All benefits are hereby denied. All other issues are moot and the Arbitrator makes no conclusions as to those issues.

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 24, 2017
Date

ICArbDec19(b)

MAY 4 - 2017

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

17IWCC0749

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHARLES DOWNES
Employee/Petitioner

v.

Case #: 13 WC 06603
16 WC 09432
16 WC 09433

STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner alleges he injured his back while playing basketball on three separate occasions, November 18, 2012 (13 WC 6603), October 9, 2014 (16 WC 9433), and June 11, 2015 (16 WC 9432). With regard to the first accident of November 18, 2012 (13 WC 6603), Respondent disputed accident, causal connection, and liability for past and prospective medical care. Respondent stipulated, however, that in the event the Arbitrator found that Petitioner met his burden of proof in establishing accident, causal connection would follow and the dispute as to causation would be moot. Respondent did not obtain a Section 12 examination, and all of Petitioner's physicians causally connected Petitioner's current condition of ill-being to this accidental injury. With regard to the accidents of October 9, 2014 (16 WC 9433) and June 11, 2015 (16 WC 9432), Respondent disputed all issues, including notice.

On the date of arbitration Petitioner was 42 years old and had been employed by Respondent as a Correctional Officer for 15 years. Petitioner testified he receives an unpaid 30-minute lunch break every day, during which he is required to remain on Respondent's premises. He is not allowed to leave, as he must be available to respond to any code calls. He is allowed to go to certain areas over his lunch break, including the staff dining area, the multi-purpose building, roll call, and the smoking area. Petitioner testified that on all three dates of accident (November 18, 2012, October 9, 2014, and June 11, 2015) he was playing basketball over his lunch break in Respondent's multi-purpose gym. This is something he has always done over his lunch break and he testified that Respondent acquiesced in the activity and that his supervisors played as well. The basketballs used were provided by Respondent through the inmate benefit fund and he was never told by Respondent not to play basketball. He testified he played to stay

healthy for his family and to stay healthy and in shape for his employer, so that he can effectively respond to inmate/staff altercations.

Petitioner testified that on November 18, 2012, he jumped up for a rebound, came down, and was hit by a fellow staff member and hurt his back. He denied any prior back injuries or treatment. He testified that as soon as it happened he stopped playing and everyone in the gym knew he had hurt himself. He reported the incident to Respondent. He subsequently underwent care and treatment for his back and eventually resumed his normal activities, including playing basketball. However, the pain in his back never went away and it has been consistent since 2012, with good days and bad days. On bad days he takes Ibuprofen or Aleve.

Petitioner testified that on October 9, 2014, he again was playing basketball, went up for a rebound, came down, and was hit and hurt his back. There were other officers present, as well as staff members. He again stopped playing after he was injured. He testified that this incident made his back condition worse, but it eventually returned to baseline of where it was after the 2012 injury.

Petitioner testified that on June 11, 2015, he once again was playing basketball, went up for a rebound, came down, got hit again, and hurt his back. He stopped playing after the incident and testified that all of the officers in the gym knew he was hurt, including lieutenants and above, but he could not recall if he actually said anything to the lieutenants and above.

Petitioner testified that he did not fill out accident reports for the 2014 and 2015 incidents, as he did not believe he needed to. He testified that the June 11, 2015, injury made his condition worse and he ultimately saw Dr. Raskas upon referral by his attorney. He underwent an MRI and two rounds of lower back injections, which helped temporarily. He was scheduled to return to Dr. Raskas on September 23, 2016, at which time he believed they would discuss proceeding with surgery. He testified that since his first accident of November 18, 2012, his back pain has been the same. He has tried exercises, stretches, and over the counter medications, which helped only temporarily. He has not suffered any other injuries to his back other than the three accidents while playing basketball. He reviewed the witness reports from Jimmy Leek, Jeff Stewart, and Major McAbee and testified they were accurate.

On cross-examination, Petitioner acknowledged there was no official mandate or memorandum asking the correctional officers to work out or to play basketball on their lunch breaks. He testified he underwent a physical at the time he was hired, but admitted that since then he had never been asked to undergo any physical fitness testing in his 15 years with the Department of Corrections. He acknowledged that there are officers at the facility who are overweight and/or out of shape, as well as officers who are physically fit and in shape. He is not given any kind of incentive or monetary bonus to stay physically fit or to work out over his lunch break. He does not have to report to anyone if he chooses to work out or play basketball on his lunch break, and the facility does not know whether he is eating his lunch or playing basketball.

Petitioner testified he was unaware of who actually provides the basketballs, but he knows they are available in the multipurpose room. He admitted the multipurpose room was for the inmates' use and that it was a courtesy for the officers to be able to use the basketballs on

their lunch break. He further admitted there are other areas where he can spend his lunch break other than the multipurpose room.

Continuing on cross-examination, Petitioner reiterated that he was playing basketball at work on October 9, 2014, when he was injured. He testified he was working that day and was present at the facility. He was then presented with Respondent's Exhibit 8, which was identified as his employee time sheet for 2014. After reviewing, Petitioner conceded that his time sheet showed that he was, in fact, off work on October 9, 2014. When asked again if he was actually at the facility on that date, playing basketball on his lunch break, Petitioner testified that he did not recollect.

Petitioner testified that following his initial claim of November 18, 2012, he filled out a worker's compensation packet, including the Employee's Notice of Injury form, and also had his supervisor fill out a report. He admitted this was the procedure that employees were to follow if they were injured at work, and further admitted that he did not follow this procedure for the other two alleged dates of accident. He could not recall if he told any lieutenants or anyone else above him that he was injured while playing basketball on June 11, 2015. He testified that Dr. Raskas indicated that he foresees surgery, but admitted there was no mention of such surgery in his medical records.

Petitioner called Respondent's representative Major Ted McAbee as a witness. Major McAbee testified he has known Petitioner since he started working at the facility and that he is a good employee. He testified that correctional officers, staff, and other personnel are allowed to use the multipurpose room to play basketball and that he has participated in such activities himself on a regular basis. The basketball equipment is provided through the inmate benefit fund, which was set up for that purpose. The multipurpose building and equipment are actually for the inmates, but officers are allowed to use both. He agreed that Respondent benefits by Petitioner, himself, and other correctional officers being in shape.

On cross-examination, Major McAbee testified that correctional officers are paid for 37.5 hours a week and are not paid for their lunch break. The officers are not allowed to leave the facility on their lunch break; however, what they do on their lunch break is their own time. He testified there is no mandate from the Department of Corrections or from the Centralia Correctional Center for the officers to do any physical activities in order to stay in shape for their job. There are both overweight officers and physically fit officers, and it is each officer's own choice. He testified that the inmate benefit fund was used to purchase items for the inmates to use, including basketballs, and the officers are allowed to use the equipment as a courtesy. Major McAbee testified that if an employee alleges they were injured at work, there is a policy they must follow in reporting the alleged injury. The employee is to report the alleged injury to their immediate supervisor and to the shift supervisor, go to healthcare, and fill out a worker's comp package. Any employee who may have been a witness is then given a witness report to fill out. All the information is then forwarded to HR and to the wardens. He testified it is a definitive policy that if you get hurt you must report it to the shift supervisor.

Respondent called Gina Feazel as a witness. Ms. Feazel testified that she is the Human Resources Representative at Centralia Correctional Center and is in charge of worker's

compensation cases at the facility. She identified Respondent's Exhibit 8 as Petitioner's time sheet from 2014, and testified that it showed that October 9, 2014, was his day off. It further showed that October 2 and 3 were his days off, October 4 through 8 he was on vacation, and October 9 and 10 were his days off. Ms. Feazel testified that if a correctional officer claimed to have been injured at work, she would be aware of it. The employee is sent to healthcare and given a worker's compensation packet, and incident reports and supervisor's reports are completed. The completed packets are then given to her. If an injury is reported to a supervisor, it is his or her duty to initiate the worker's compensation policy within a 24 hour timeframe. She testified that she never received notice that Petitioner reported an injury for October 9, 2014, or June 11, 2015. She checked her worker's compensation files and searched the incident reports for the facility for those dates, but found nothing. She also contacted Petitioner's shift supervisor, Gregory Schwartz, to see if any alleged injury had been reported to him and he advised he had no record of any such injuries being reported for those dates.

Following the incident on November 18, 2012, Petitioner presented to Williams Chiropractic Office on November 19, 2012, and was seen by Dr. Burger. He completed a Worker's Compensation Questionnaire as part of his intake, on which he indicated he was playing basketball at work the day before and was shoved in his lower back. The record that day indicated the pain was in the lower back, more on the right side and right hip, and that it was constant and so intense he could not walk. He reported sharp pain when beginning to walk and stabbing pain in his right hip when moving from sitting to standing. It was further noted, "Has had hips out before, but after an adjustment was ok—when playing basketball." On examination he had tenderness and pain to palpation in the left S1 area. He returned to Dr. Burger on November 21 and reported his back was still very bad and it was tough to get around. There was still tenderness in the left S1 area. The Arbitrator notes that Dr. Burger's notes throughout his records are handwritten and are difficult to read and decipher. PX3.

On November 21, 2012, Petitioner completed an Employee's Notice of Injury and indicated he had hurt his back on November 18 while playing basketball on lunch break. He noted he had taken two sick/personal days for the injury. Witnesses were listed as Jim Leck, Jeff Stewart, and Ted McAbee. RX1. A Supervisor's Report of Injury was completed the same day by Major Greg Schwartz, who indicated Petitioner reported on November 21 that had hurt his back while playing basketball in the gym on November 18. RX2. A Witness Report was completed that day by Theodore McAbee. He stated he did not witness an injury, but that Petitioner mentioned after they finished playing that he had hurt his back during the game. RX5. On November 28, 2012, a Witness Report was completed by Jimmy Leek. He stated he did not witness any accident, but that Petitioner had stated he hurt his back. RX4. A Witness Report was also completed by Jeffrey Stewart that day, who stated he did not witness any injury. RX6.

On November 26, 2012, Petitioner returned to Dr. Burger and reported his back felt better than it had since the injury and that he could move better. He followed up on December 3, December 7, and December 19, and reported his back was feeling stronger. Complaints and findings were documented in the S1 area. He was released on December 19, 2012. PX3.

The next treatment record with Dr. Burger is February 23, 2013. While the handwritten note is difficult to read, it appears to state that Petitioner reported he "fell when drunk". The complaints and findings were documented in the L4-5 area. PX3.

Petitioner returned to Dr. Burger on May 14, 2013, with complaints to his low back and findings were noted at L5-S1. He followed up with Dr. Burger throughout May and June, and was seen once a month in July, August, September and October 2013. Petitioner was last seen by Dr. Burger on October 16, 2013. PX3.

The next medical treatment was **October 2, 2014**, nearly one year later, when Petitioner presented to Dr. Creighton Engel at Engel Chiropractic. He reported frequent moderate bilateral sacroiliac symptoms which were achy and dull with no radiation. He stated the symptoms began the previous Sunday after playing basketball. It was noted he had a past history of similar problems several years ago, and it was further noted he had no past treatment for the problem. On examination, straight leg raise was negative bilaterally, and strength, reflexes and sensation were normal. There was moderate tenderness to palpation in the sacroiliac area bilaterally. Joint dysfunctions were observed at L4, L5, the right sacroiliac joint, and the sacrum. Dr. Engel noted Petitioner's diagnosis was SI strain and that his overall prognosis was good. He recommended treatment twice a week for two to three weeks. The Arbitrator notes this is the only record admitted from Dr. Engel. The Arbitrator further notes this treatment took place seven days prior to the alleged second accident date of October 9, 2014. PX5.

On October 9, 2014, Petitioner presented to Bowman Chiropractic. He completed an intake history form and indicated his current condition began on October 2, 2014. The form included different boxes, to mark if the condition was job related, auto accident, home injury, fall, or other. Petitioner left the "job related" box blank and instead checked the "other" box and wrote in "sports". He reported he was playing basketball and got undercut, causing him to fall ("slammed") to the ground. The Arbitrator notes there was no mention that he had been injured while at work. His complaints were to the hips and right lumbosacral paraspinal regions. Petitioner followed up with Dr. Bowman on October 10, 13, 15, and 17, 2014. He was released on October 17, 2014. PX4.

The next medical treatment was **June 18, 2015**, eight months later and seven days after the alleged third accident date of June 11, 2015. Petitioner presented to Smith Chiropractic and Wellness Center and was examined by Dr. Richard Smith. He completed a patient intake form, which included boxes to mark whether the nature of the injury was automobile, work, or other. Petitioner left the "work" box blank, checked the "other" box, and wrote "hurt playing basketball". He reported to Dr. Smith that he had a gradual onset of symptoms in his left sacroiliac and pelvic regions, left piriformis, and left leg/knee/calf/ankle. He reported he was playing basketball the week before and played too hard, and that he had had this problem in the past but this time was worse. Following an examination, Dr. Smith's impression was lumbosacral strain and radiculopathy. Petitioner followed up with Dr. Smith on June 22, 2015, and reported he was still really tight but was significantly better. He reported a decrease in mid and low back pain following treatment. The Arbitrator notes this is the final treatment record from Dr. Smith. PX6.

The next medical treatment was **February 26, 2016**, eight months later, when Petitioner presented to Dr. David Raskas at Orthopedic Sports Medicine and Spine Care Institute, upon referral by his attorney. He reported he had injured his back during a basketball game at work on November 18, 2012, and had persistent left-sided low back and radiating leg pain since that time. On examination, there was no pain to palpation, hip range of motion was full and non-tender bilaterally, straight leg raise was positive on the left and negative on the right, strength and muscle tone were normal, and sensation was intact. PX7. A lumbar MRI was ordered, which was completed on March 4, 2016. It revealed L5-S1 annular disc bulge with a superimposed left lateral recess epicenter, annular tear and protrusion, left lateral recess stenosis, moderate foraminal stenosis greater on the left, and no central canal stenosis. PX8.

On March 4, 2016, Petitioner returned to Dr. Raskas and reported he had been playing basketball at work on Saturday, six days prior, when he felt a pop in his left heel and calf. He had been diagnosed with an Achilles tendon rupture, was in a cast boot, and was using a scooter. With regard to his back, he continued to have pain which went down into his legs. Dr. Raskas referred Petitioner to Dr. Solman for evaluation of his Achilles, and referred him to Dr. Feinberg for two to three epidural injections for his lumbar pain. The Arbitrator notes this is the final treatment record from Dr. Raskas. PX7.

On July 21 and 28, 2016, Petitioner underwent epidural steroid injections at L5-S1. They were performed by Dr. Tong Zhu at Injury Specialists. PX9, PX10.

Respondent's Exhibit 8, Petitioner's 2014 timesheet, was discussed during testimony by both Petitioner and Respondent's witness Gina Feazel. However, in reviewing the transcript the Arbitrator notes that the exhibit was not actually tendered or admitted at the time of trial. Nonetheless, the testimony established that Petitioner did not work from October 2, 2014, through October 10, 2014, including the alleged second date of accident of October 9, 2014.

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57 (1989).

For an injury to "arise out of" employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the

employment and the injury. Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts that he was instructed to perform by his employer, acts that he had a common law or statutory duty to perform, or acts that he might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment if it belongs to, or is connected with, what an employee has to do in performing his duties. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203-204 (2003).

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. 805 ILCS 305/11.

Whether, under the facts of a particular case, an activity is a "voluntary recreational program" under Section 11 of the Act and whether the claimant's injuries arose out of his employment are questions of fact for the Commission. *Pickett v. Industrial Comm'n*, 252 Ill.App.3d 355, 357 (1st Dist. 1993).

In the instant case, the Arbitrator finds that Petitioner's participation in basketball games during his lunch break was voluntary, and thus falls under the voluntary recreational activity exclusion of Section 11. As such, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that the accidental injuries he sustained on November 18, 2012, on October 9, 2014, and on June 11, 2015, arose out of his employment.

The Arbitrator is mindful of the recent Appellate Court decision of *Calumet School District #132 v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 153034WC. In that case, the Appellate Court found that claimant's participation in a student/teacher basketball game in the employer's gymnasium after school was not a voluntary recreational activity. The Court found significant that the evidence established that the claimant was not a basketball player, did not want to participate in the games, repeatedly tried to avoid having to play, and would not have played were it not for the repeated pressuring by his principal to participate. The evidence established that claimant's participation in the basketball games was not a voluntary recreational activity under Section 11 of the Act.

The Arbitrator finds the facts of the case at bar to be distinguishable. Petitioner's participation in frequent lunch break basketball games was purely voluntary. He admitted there was no mandate or memorandum asking correctional officers to play basketball or otherwise work out on their lunch breaks, and he admitted he did not receive any kind of monetary bonus or incentive to do so. He further testified he did not have to report to anyone whether he was eating lunch, playing basketball or working out on his lunch break. Further, there was no testimony to indicate that Petitioner was pressured by his co-workers or superiors to play. In fact, he testified he had always played basketball and continued doing so even after these incidents because he loved playing. Although he played basketball to help keep in shape, he agreed it was his personal choice to do so. He further agreed that many correctional officers did not choose to stay in shape, and admitted he had not been required to take a physical test since he was hired 15 years ago. While his employer may have acquiesced to the correctional officers

playing basketball on their lunch break, that acquiescence does not change the character of the activity from a voluntary recreational activity pursuant to Section 11.

Based on the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that he sustained an accidental injury which arose out of and in the course of his employment on November 18, 2012, on October 9, 2014, and on June 11, 2015. The remaining issues are moot and the Arbitrator makes no conclusion as to those issues.

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

Charles Downes,

Petitioner,

17IWCC0750

vs.

NO. 16 WC009433

State of Illinois Centralia Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, 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 May 4, 2017 is hereby affirmed and adopted.

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.

NOV 2 7 2017

DATED:
SJM/sj
o-11/02/2017
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

17IWCC0750

DOWNES, CHARLES
Employee/Petitioner

Case# **16WC009433**

13WC006603
16WC009432

SOI/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

On 5/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
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CHICAGO, IL 60601-3227

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

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

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

MAY 4 = 2017

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

17IWCC0750

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)

CHARLES DOWNES
Employee/Petitioner

v.

STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

Case # **16** WC **9433**

Consolidated cases: **13 WC 6603**
16 WC 9432

An *Application for Adjustment 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 **September 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, **October 9, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**58,080.00**; the average weekly wage was $**1,116.92**.

On the date of accident, Petitioner was **39** 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 $**ANY AND 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 he sustained an accident that arose out of and in the course of his employment on June 11, 2015. All benefits are hereby denied. All other issues are moot and the Arbitrator makes no conclusions as to those issues.

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 24, 2017
Date

ICArbDec19(b)

MAY 4 - 2017

17IWCC0750

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHARLES DOWNES
Employee/Petitioner

v.

Case #: 13 WC 06603
16 WC 09432
16 WC 09433

STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner alleges he injured his back while playing basketball on three separate occasions, November 18, 2012 (13 WC 6603), October 9, 2014 (16 WC 9433), and June 11, 2015 (16 WC 9432). With regard to the first accident of November 18, 2012 (13 WC 6603), Respondent disputed accident, causal connection, and liability for past and prospective medical care. Respondent stipulated, however, that in the event the Arbitrator found that Petitioner met his burden of proof in establishing accident, causal connection would follow and the dispute as to causation would be moot. Respondent did not obtain a Section 12 examination, and all of Petitioner's physicians causally connected Petitioner's current condition of ill-being to this accidental injury. With regard to the accidents of October 9, 2014 (16 WC 9433) and June 11, 2015 (16 WC 9432), Respondent disputed all issues, including notice.

On the date of arbitration Petitioner was 42 years old and had been employed by Respondent as a Correctional Officer for 15 years. Petitioner testified he receives an unpaid 30-minute lunch break every day, during which he is required to remain on Respondent's premises. He is not allowed to leave, as he must be available to respond to any code calls. He is allowed to go to certain areas over his lunch break, including the staff dining area, the multi-purpose building, roll call, and the smoking area. Petitioner testified that on all three dates of accident (November 18, 2012, October 9, 2014, and June 11, 2015) he was playing basketball over his lunch break in Respondent's multi-purpose gym. This is something he has always done over his lunch break and he testified that Respondent acquiesced in the activity and that his supervisors played as well. The basketballs used were provided by Respondent through the inmate benefit fund and he was never told by Respondent not to play basketball. He testified he played to stay

healthy for his family and to stay healthy and in shape for his employer, so that he can effectively respond to inmate/staff altercations.

Petitioner testified that on November 18, 2012, he jumped up for a rebound, came down, and was hit by a fellow staff member and hurt his back. He denied any prior back injuries or treatment. He testified that as soon as it happened he stopped playing and everyone in the gym knew he had hurt himself. He reported the incident to Respondent. He subsequently underwent care and treatment for his back and eventually resumed his normal activities, including playing basketball. However, the pain in his back never went away and it has been consistent since 2012, with good days and bad days. On bad days he takes Ibuprofen or Aleve.

Petitioner testified that on October 9, 2014, he again was playing basketball, went up for a rebound, came down, and was hit and hurt his back. There were other officers present, as well as staff members. He again stopped playing after he was injured. He testified that this incident made his back condition worse, but it eventually returned to baseline of where it was after the 2012 injury.

Petitioner testified that on June 11, 2015, he once again was playing basketball, went up for a rebound, came down, got hit again, and hurt his back. He stopped playing after the incident and testified that all of the officers in the gym knew he was hurt, including lieutenants and above, but he could not recall if he actually said anything to the lieutenants and above.

Petitioner testified that he did not fill out accident reports for the 2014 and 2015 incidents, as he did not believe he needed to. He testified that the June 11, 2015, injury made his condition worse and he ultimately saw Dr. Raskas upon referral by his attorney. He underwent an MRI and two rounds of lower back injections, which helped temporarily. He was scheduled to return to Dr. Raskas on September 23, 2016, at which time he believed they would discuss proceeding with surgery. He testified that since his first accident of November 18, 2012, his back pain has been the same. He has tried exercises, stretches, and over the counter medications, which helped only temporarily. He has not suffered any other injuries to his back other than the three accidents while playing basketball. He reviewed the witness reports from Jimmy Leek, Jeff Stewart, and Major McAbee and testified they were accurate.

On cross-examination, Petitioner acknowledged there was no official mandate or memorandum asking the correctional officers to work out or to play basketball on their lunch breaks. He testified he underwent a physical at the time he was hired, but admitted that since then he had never been asked to undergo any physical fitness testing in his 15 years with the Department of Corrections. He acknowledged that there are officers at the facility who are overweight and/or out of shape, as well as officers who are physically fit and in shape. He is not given any kind of incentive or monetary bonus to stay physically fit or to work out over his lunch break. He does not have to report to anyone if he chooses to work out or play basketball on his lunch break, and the facility does not know whether he is eating his lunch or playing basketball.

Petitioner testified he was unaware of who actually provides the basketballs, but he knows they are available in the multipurpose room. He admitted the multipurpose room was for the inmates' use and that it was a courtesy for the officers to be able to use the basketballs on

their lunch break. He further admitted there are other areas where he can spend his lunch break other than the multipurpose room.

Continuing on cross-examination, Petitioner reiterated that he was playing basketball at work on October 9, 2014, when he was injured. He testified he was working that day and was present at the facility. He was then presented with Respondent's Exhibit 8, which was identified as his employee time sheet for 2014. After reviewing, Petitioner conceded that his time sheet showed that he was, in fact, off work on October 9, 2014. When asked again if he was actually at the facility on that date, playing basketball on his lunch break, Petitioner testified that he did not recollect.

Petitioner testified that following his initial claim of November 18, 2012, he filled out a worker's compensation packet, including the Employee's Notice of Injury form, and also had his supervisor fill out a report. He admitted this was the procedure that employees were to follow if they were injured at work, and further admitted that he did not follow this procedure for the other two alleged dates of accident. He could not recall if he told any lieutenants or anyone else above him that he was injured while playing basketball on June 11, 2015. He testified that Dr. Raskas indicated that he foresees surgery, but admitted there was no mention of such surgery in his medical records.

Petitioner called Respondent's representative Major Ted McAbee as a witness. Major McAbee testified he has known Petitioner since he started working at the facility and that he is a good employee. He testified that correctional officers, staff, and other personnel are allowed to use the multipurpose room to play basketball and that he has participated in such activities himself on a regular basis. The basketball equipment is provided through the inmate benefit fund, which was set up for that purpose. The multipurpose building and equipment are actually for the inmates, but officers are allowed to use both. He agreed that Respondent benefits by Petitioner, himself, and other correctional officers being in shape.

On cross-examination, Major McAbee testified that correctional officers are paid for 37.5 hours a week and are not paid for their lunch break. The officers are not allowed to leave the facility on their lunch break; however, what they do on their lunch break is their own time. He testified there is no mandate from the Department of Corrections or from the Centralia Correctional Center for the officers to do any physical activities in order to stay in shape for their job. There are both overweight officers and physically fit officers, and it is each officer's own choice. He testified that the inmate benefit fund was used to purchase items for the inmates to use, including basketballs, and the officers are allowed to use the equipment as a courtesy. Major McAbee testified that if an employee alleges they were injured at work, there is a policy they must follow in reporting the alleged injury. The employee is to report the alleged injury to their immediate supervisor and to the shift supervisor, go to healthcare, and fill out a worker's comp package. Any employee who may have been a witness is then given a witness report to fill out. All the information is then forwarded to HR and to the wardens. He testified it is a definitive policy that if you get hurt you must report it to the shift supervisor.

Respondent called Gina Feazel as a witness. Ms. Feazel testified that she is the Human Resources Representative at Centralia Correctional Center and is in charge of worker's

compensation cases at the facility. She identified Respondent's Exhibit 8 as Petitioner's time sheet from 2014, and testified that it showed that October 9, 2014, was his day off. It further showed that October 2 and 3 were his days off, October 4 through 8 he was on vacation, and October 9 and 10 were his days off. Ms. Feazel testified that if a correctional officer claimed to have been injured at work, she would be aware of it. The employee is sent to healthcare and given a worker's compensation packet, and incident reports and supervisor's reports are completed. The completed packets are then given to her. If an injury is reported to a supervisor, it is his or her duty to initiate the worker's compensation policy within a 24 hour timeframe. She testified that she never received notice that Petitioner reported an injury for October 9, 2014, or June 11, 2015. She checked her worker's compensation files and searched the incident reports for the facility for those dates, but found nothing. She also contacted Petitioner's shift supervisor, Gregory Schwartz, to see if any alleged injury had been reported to him and he advised he had no record of any such injuries being reported for those dates.

Following the incident on November 18, 2012, Petitioner presented to Williams Chiropractic Office on November 19, 2012, and was seen by Dr. Burger. He completed a Worker's Compensation Questionnaire as part of his intake, on which he indicated he was playing basketball at work the day before and was shoved in his lower back. The record that day indicated the pain was in the lower back, more on the right side and right hip, and that it was constant and so intense he could not walk. He reported sharp pain when beginning to walk and stabbing pain in his right hip when moving from sitting to standing. It was further noted, "Has had hips out before, but after an adjustment was ok—when playing basketball." On examination he had tenderness and pain to palpation in the left S1 area. He returned to Dr. Burger on November 21 and reported his back was still very bad and it was tough to get around. There was still tenderness in the left S1 area. The Arbitrator notes that Dr. Burger's notes throughout his records are handwritten and are difficult to read and decipher. PX3.

On November 21, 2012, Petitioner completed an Employee's Notice of Injury and indicated he had hurt his back on November 18 while playing basketball on lunch break. He noted he had taken two sick/personal days for the injury. Witnesses were listed as Jim Leck, Jeff Stewart, and Ted McAbee. RX1. A Supervisor's Report of Injury was completed the same day by Major Greg Schwartz, who indicated Petitioner reported on November 21 that had hurt his back while playing basketball in the gym on November 18. RX2. A Witness Report was completed that day by Theodore McAbee. He stated he did not witness an injury, but that Petitioner mentioned after they finished playing that he had hurt his back during the game. RX5. On November 28, 2012, a Witness Report was completed by Jimmy Leek. He stated he did not witness any accident, but that Petitioner had stated he hurt his back. RX4. A Witness Report was also completed by Jeffrey Stewart that day, who stated he did not witness any injury. RX6.

On November 26, 2012, Petitioner returned to Dr. Burger and reported his back felt better than it had since the injury and that he could move better. He followed up on December 3, December 7, and December 19, and reported his back was feeling stronger. Complaints and findings were documented in the S1 area. He was released on December 19, 2012. PX3.

The next treatment record with Dr. Burger is February 23, 2013. While the handwritten note is difficult to read, it appears to state that Petitioner reported he "fell when drunk". The complaints and findings were documented in the L4-5 area. PX3.

Petitioner returned to Dr. Burger on May 14, 2013, with complaints to his low back and findings were noted at L5-S1. He followed up with Dr. Burger throughout May and June, and was seen once a month in July, August, September and October 2013. Petitioner was last seen by Dr. Burger on October 16, 2013. PX3.

The next medical treatment was **October 2, 2014**, nearly one year later, when Petitioner presented to Dr. Creighton Engel at Engel Chiropractic. He reported frequent moderate bilateral sacroiliac symptoms which were achy and dull with no radiation. He stated the symptoms began the previous Sunday after playing basketball. It was noted he had a past history of similar problems several years ago, and it was further noted he had no past treatment for the problem. On examination, straight leg raise was negative bilaterally, and strength, reflexes and sensation were normal. There was moderate tenderness to palpation in the sacroiliac area bilaterally. Joint dysfunctions were observed at L4, L5, the right sacroiliac joint, and the sacrum. Dr. Engel noted Petitioner's diagnosis was SI strain and that his overall prognosis was good. He recommended treatment twice a week for two to three weeks. The Arbitrator notes this is the only record admitted from Dr. Engel. The Arbitrator further notes this treatment took place seven days prior to the alleged second accident date of October 9, 2014. PX5.

On October 9, 2014, Petitioner presented to Bowman Chiropractic. He completed an intake history form and indicated his current condition began on October 2, 2014. The form included different boxes, to mark if the condition was job related, auto accident, home injury, fall, or other. Petitioner left the "job related" box blank and instead checked the "other" box and wrote in "sports". He reported he was playing basketball and got undercut, causing him to fall ("slammed") to the ground. The Arbitrator notes there was no mention that he had been injured while at work. His complaints were to the hips and right lumbosacral paraspinal regions. Petitioner followed up with Dr. Bowman on October 10, 13, 15, and 17, 2014. He was released on October 17, 2014. PX4.

The next medical treatment was **June 18, 2015**, eight months later and seven days after the alleged third accident date of June 11, 2015. Petitioner presented to Smith Chiropractic and Wellness Center and was examined by Dr. Richard Smith. He completed a patient intake form, which included boxes to mark whether the nature of the injury was automobile, work, or other. Petitioner left the "work" box blank, checked the "other" box, and wrote "hurt playing basketball". He reported to Dr. Smith that he had a gradual onset of symptoms in his left sacroiliac and pelvic regions, left piriformis, and left leg/knee/calf/ankle. He reported he was playing basketball the week before and played too hard, and that he had had this problem in the past but this time was worse. Following an examination, Dr. Smith's impression was lumbosacral strain and radiculopathy. Petitioner followed up with Dr. Smith on June 22, 2015, and reported he was still really tight but was significantly better. He reported a decrease in mid and low back pain following treatment. The Arbitrator notes this is the final treatment record from Dr. Smith. PX6.

The next medical treatment was **February 26, 2016**, eight months later, when Petitioner presented to Dr. David Raskas at Orthopedic Sports Medicine and Spine Care Institute, upon referral by his attorney. He reported he had injured his back during a basketball game at work on November 18, 2012, and had persistent left-sided low back and radiating leg pain since that time. On examination, there was no pain to palpation, hip range of motion was full and non-tender bilaterally, straight leg raise was positive on the left and negative on the right, strength and muscle tone were normal, and sensation was intact. PX7. A lumbar MRI was ordered, which was completed on March 4, 2016. It revealed L5-S1 annular disc bulge with a superimposed left lateral recess epicenter, annular tear and protrusion, left lateral recess stenosis, moderate foraminal stenosis greater on the left, and no central canal stenosis. PX8.

On March 4, 2016, Petitioner returned to Dr. Raskas and reported he had been playing basketball at work on Saturday, six days prior, when he felt a pop in his left heel and calf. He had been diagnosed with an Achilles tendon rupture, was in a cast boot, and was using a scooter. With regard to his back, he continued to have pain which went down into his legs. Dr. Raskas referred Petitioner to Dr. Solman for evaluation of his Achilles, and referred him to Dr. Feinberg for two to three epidural injections for his lumbar pain. The Arbitrator notes this is the final treatment record from Dr. Raskas. PX7.

On July 21 and 28, 2016, Petitioner underwent epidural steroid injections at L5-S1. They were performed by Dr. Tong Zhu at Injury Specialists. PX9, PX10.

Respondent's Exhibit 8, Petitioner's 2014 timesheet, was discussed during testimony by both Petitioner and Respondent's witness Gina Feazel. However, in reviewing the transcript the Arbitrator notes that the exhibit was not actually tendered or admitted at the time of trial. Nonetheless, the testimony established that Petitioner did not work from October 2, 2014, through October 10, 2014, including the alleged second date of accident of October 9, 2014.

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57 (1989).

For an injury to "arise out of" employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the

employment and the injury. Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts that he was instructed to perform by his employer, acts that he had a common law or statutory duty to perform, or acts that he might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment if it belongs to, or is connected with, what an employee has to do in performing his duties. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203-204 (2003).

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. 805 ILCS 305/11.

Whether, under the facts of a particular case, an activity is a "voluntary recreational program" under Section 11 of the Act and whether the claimant's injuries arose out of his employment are questions of fact for the Commission. *Pickett v. Industrial Comm'n*, 252 Ill.App.3d 355, 357 (1st Dist. 1993).

In the instant case, the Arbitrator finds that Petitioner's participation in basketball games during his lunch break was voluntary, and thus falls under the voluntary recreational activity exclusion of Section 11. As such, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that the accidental injuries he sustained on November 18, 2012, on October 9, 2014, and on June 11, 2015, arose out of his employment.

The Arbitrator is mindful of the recent Appellate Court decision of *Calumet School District #132 v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 153034WC. In that case, the Appellate Court found that claimant's participation in a student/teacher basketball game in the employer's gymnasium after school was not a voluntary recreational activity. The Court found significant that the evidence established that the claimant was not a basketball player, did not want to participate in the games, repeatedly tried to avoid having to play, and would not have played were it not for the repeated pressuring by his principal to participate. The evidence established that claimant's participation in the basketball games was not a voluntary recreational activity under Section 11 of the Act.

The Arbitrator finds the facts of the case at bar to be distinguishable. Petitioner's participation in frequent lunch break basketball games was purely voluntary. He admitted there was no mandate or memorandum asking correctional officers to play basketball or otherwise work out on their lunch breaks, and he admitted he did not receive any kind of monetary bonus or incentive to do so. He further testified he did not have to report to anyone whether he was eating lunch, playing basketball or working out on his lunch break. Further, there was no testimony to indicate that Petitioner was pressured by his co-workers or superiors to play. In fact, he testified he had always played basketball and continued doing so even after these incidents because he loved playing. Although he played basketball to help keep in shape, he agreed it was his personal choice to do so. He further agreed that many correctional officers did not choose to stay in shape, and admitted he had not been required to take a physical test since he was hired 15 years ago. While his employer may have acquiesced to the correctional officers

playing basketball on their lunch break, that acquiescence does not change the character of the activity from a voluntary recreational activity pursuant to Section 11.

Based on the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that he sustained an accidental injury which arose out of and in the course of his employment on November 18, 2012, on October 9, 2014, and on June 11, 2015. The remaining issues are moot and the Arbitrator makes no conclusion as to those issues.

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

Charles Downes,

Petitioner,

vs.

NO. 16 WC009432

State of Illinois Centralia Correctional Center,

17IWCC0751

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, 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 May 4, 2017 is hereby affirmed and adopted.

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: NOV 2 7 2017
SJM/sj
o-11/02/2017
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

DOWNES, CHARLES
Employee/Petitioner

Case# **16WC009432**

13WC006603
16WC009433

SOI/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

17IWCC0751

On 5/4/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
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CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
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1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

MAY 4 = 2017

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

17IWCC0751

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)

CHARLES DOWNES
Employee/Petitioner

v.

Case # 16 WC 9432

Consolidated cases: 13 WC 6603
16 WC 9433

STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **September 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, **June 11, 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 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 **$58,080.00**; the average weekly wage was **$1,116.92**.

On the date of accident, Petitioner was **39** 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 **$ANY AND 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 he sustained an accident that arose out of and in the course of his employment on June 11, 2015. All benefits are hereby denied. All other issues are moot and the Arbitrator makes no conclusions as to those issues.

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 24, 2017
Date

ICArbDec19(b)

MAY 4 - 2017

17IWCC0751

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHARLES DOWNES
Employee/Petitioner

v.

Case #: 13 WC 06603
16 WC 09432
16 WC 09433

STATE OF ILLINOIS/CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner alleges he injured his back while playing basketball on three separate occasions, November 18, 2012 (13 WC 6603), October 9, 2014 (16 WC 9433), and June 11, 2015 (16 WC 9432). With regard to the first accident of November 18, 2012 (13 WC 6603), Respondent disputed accident, causal connection, and liability for past and prospective medical care. Respondent stipulated, however, that in the event the Arbitrator found that Petitioner met his burden of proof in establishing accident, causal connection would follow and the dispute as to causation would be moot. Respondent did not obtain a Section 12 examination, and all of Petitioner's physicians causally connected Petitioner's current condition of ill-being to this accidental injury. With regard to the accidents of October 9, 2014 (16 WC 9433) and June 11, 2015 (16 WC 9432), Respondent disputed all issues, including notice.

On the date of arbitration Petitioner was 42 years old and had been employed by Respondent as a Correctional Officer for 15 years. Petitioner testified he receives an unpaid 30-minute lunch break every day, during which he is required to remain on Respondent's premises. He is not allowed to leave, as he must be available to respond to any code calls. He is allowed to go to certain areas over his lunch break, including the staff dining area, the multi-purpose building, roll call, and the smoking area. Petitioner testified that on all three dates of accident (November 18, 2012, October 9, 2014, and June 11, 2015) he was playing basketball over his lunch break in Respondent's multi-purpose gym. This is something he has always done over his lunch break and he testified that Respondent acquiesced in the activity and that his supervisors played as well. The basketballs used were provided by Respondent through the inmate benefit fund and he was never told by Respondent not to play basketball. He testified he played to stay

healthy for his family and to stay healthy and in shape for his employer, so that he can effectively respond to inmate/staff altercations.

Petitioner testified that on November 18, 2012, he jumped up for a rebound, came down, and was hit by a fellow staff member and hurt his back. He denied any prior back injuries or treatment. He testified that as soon as it happened he stopped playing and everyone in the gym knew he had hurt himself. He reported the incident to Respondent. He subsequently underwent care and treatment for his back and eventually resumed his normal activities, including playing basketball. However, the pain in his back never went away and it has been consistent since 2012, with good days and bad days. On bad days he takes Ibuprofen or Aleve.

Petitioner testified that on October 9, 2014, he again was playing basketball, went up for a rebound, came down, and was hit and hurt his back. There were other officers present, as well as staff members. He again stopped playing after he was injured. He testified that this incident made his back condition worse, but it eventually returned to baseline of where it was after the 2012 injury.

Petitioner testified that on June 11, 2015, he once again was playing basketball, went up for a rebound, came down, got hit again, and hurt his back. He stopped playing after the incident and testified that all of the officers in the gym knew he was hurt, including lieutenants and above, but he could not recall if he actually said anything to the lieutenants and above.

Petitioner testified that he did not fill out accident reports for the 2014 and 2015 incidents, as he did not believe he needed to. He testified that the June 11, 2015, injury made his condition worse and he ultimately saw Dr. Raskas upon referral by his attorney. He underwent an MRI and two rounds of lower back injections, which helped temporarily. He was scheduled to return to Dr. Raskas on September 23, 2016, at which time he believed they would discuss proceeding with surgery. He testified that since his first accident of November 18, 2012, his back pain has been the same. He has tried exercises, stretches, and over the counter medications, which helped only temporarily. He has not suffered any other injuries to his back other than the three accidents while playing basketball. He reviewed the witness reports from Jimmy Leek, Jeff Stewart, and Major McAbee and testified they were accurate.

On cross-examination, Petitioner acknowledged there was no official mandate or memorandum asking the correctional officers to work out or to play basketball on their lunch breaks. He testified he underwent a physical at the time he was hired, but admitted that since then he had never been asked to undergo any physical fitness testing in his 15 years with the Department of Corrections. He acknowledged that there are officers at the facility who are overweight and/or out of shape, as well as officers who are physically fit and in shape. He is not given any kind of incentive or monetary bonus to stay physically fit or to work out over his lunch break. He does not have to report to anyone if he chooses to work out or play basketball on his lunch break, and the facility does not know whether he is eating his lunch or playing basketball.

Petitioner testified he was unaware of who actually provides the basketballs, but he knows they are available in the multipurpose room. He admitted the multipurpose room was for the inmates' use and that it was a courtesy for the officers to be able to use the basketballs on

their lunch break. He further admitted there are other areas where he can spend his lunch break other than the multipurpose room.

Continuing on cross-examination, Petitioner reiterated that he was playing basketball at work on October 9, 2014, when he was injured. He testified he was working that day and was present at the facility. He was then presented with Respondent's Exhibit 8, which was identified as his employee time sheet for 2014. After reviewing, Petitioner conceded that his time sheet showed that he was, in fact, off work on October 9, 2014. When asked again if he was actually at the facility on that date, playing basketball on his lunch break, Petitioner testified that he did not recollect.

Petitioner testified that following his initial claim of November 18, 2012, he filled out a worker's compensation packet, including the Employee's Notice of Injury form, and also had his supervisor fill out a report. He admitted this was the procedure that employees were to follow if they were injured at work, and further admitted that he did not follow this procedure for the other two alleged dates of accident. He could not recall if he told any lieutenants or anyone else above him that he was injured while playing basketball on June 11, 2015. He testified that Dr. Raskas indicated that he foresees surgery, but admitted there was no mention of such surgery in his medical records.

Petitioner called Respondent's representative Major Ted McAbee as a witness. Major McAbee testified he has known Petitioner since he started working at the facility and that he is a good employee. He testified that correctional officers, staff, and other personnel are allowed to use the multipurpose room to play basketball and that he has participated in such activities himself on a regular basis. The basketball equipment is provided through the inmate benefit fund, which was set up for that purpose. The multipurpose building and equipment are actually for the inmates, but officers are allowed to use both. He agreed that Respondent benefits by Petitioner, himself, and other correctional officers being in shape.

On cross-examination, Major McAbee testified that correctional officers are paid for 37.5 hours a week and are not paid for their lunch break. The officers are not allowed to leave the facility on their lunch break; however, what they do on their lunch break is their own time. He testified there is no mandate from the Department of Corrections or from the Centralia Correctional Center for the officers to do any physical activities in order to stay in shape for their job. There are both overweight officers and physically fit officers, and it is each officer's own choice. He testified that the inmate benefit fund was used to purchase items for the inmates to use, including basketballs, and the officers are allowed to use the equipment as a courtesy. Major McAbee testified that if an employee alleges they were injured at work, there is a policy they must follow in reporting the alleged injury. The employee is to report the alleged injury to their immediate supervisor and to the shift supervisor, go to healthcare, and fill out a worker's comp package. Any employee who may have been a witness is then given a witness report to fill out. All the information is then forwarded to HR and to the wardens. He testified it is a definitive policy that if you get hurt you must report it to the shift supervisor.

Respondent called Gina Feazel as a witness. Ms. Feazel testified that she is the Human Resources Representative at Centralia Correctional Center and is in charge of worker's

compensation cases at the facility. She identified Respondent's Exhibit 8 as Petitioner's time sheet from 2014, and testified that it showed that October 9, 2014, was his day off. It further showed that October 2 and 3 were his days off, October 4 through 8 he was on vacation, and October 9 and 10 were his days off. Ms. Feazel testified that if a correctional officer claimed to have been injured at work, she would be aware of it. The employee is sent to healthcare and given a worker's compensation packet, and incident reports and supervisor's reports are completed. The completed packets are then given to her. If an injury is reported to a supervisor, it is his or her duty to initiate the worker's compensation policy within a 24 hour timeframe. She testified that she never received notice that Petitioner reported an injury for October 9, 2014, or June 11, 2015. She checked her worker's compensation files and searched the incident reports for the facility for those dates, but found nothing. She also contacted Petitioner's shift supervisor, Gregory Schwartz, to see if any alleged injury had been reported to him and he advised he had no record of any such injuries being reported for those dates.

Following the incident on November 18, 2012, Petitioner presented to Williams Chiropractic Office on November 19, 2012, and was seen by Dr. Burger. He completed a Worker's Compensation Questionnaire as part of his intake, on which he indicated he was playing basketball at work the day before and was shoved in his lower back. The record that day indicated the pain was in the lower back, more on the right side and right hip, and that it was constant and so intense he could not walk. He reported sharp pain when beginning to walk and stabbing pain in his right hip when moving from sitting to standing. It was further noted, "Has had hips out before, but after an adjustment was ok—when playing basketball." On examination he had tenderness and pain to palpation in the left S1 area. He returned to Dr. Burger on November 21 and reported his back was still very bad and it was tough to get around. There was still tenderness in the left S1 area. The Arbitrator notes that Dr. Burger's notes throughout his records are handwritten and are difficult to read and decipher. PX3.

On November 21, 2012, Petitioner completed an Employee's Notice of Injury and indicated he had hurt his back on November 18 while playing basketball on lunch break. He noted he had taken two sick/personal days for the injury. Witnesses were listed as Jim Leck, Jeff Stewart, and Ted McAbee. RX1. A Supervisor's Report of Injury was completed the same day by Major Greg Schwartz, who indicated Petitioner reported on November 21 that had hurt his back while playing basketball in the gym on November 18. RX2. A Witness Report was completed that day by Theodore McAbee. He stated he did not witness an injury, but that Petitioner mentioned after they finished playing that he had hurt his back during the game. RX5. On November 28, 2012, a Witness Report was completed by Jimmy Leek. He stated he did not witness any accident, but that Petitioner had stated he hurt his back. RX4. A Witness Report was also completed by Jeffrey Stewart that day, who stated he did not witness any injury. RX6.

On November 26, 2012, Petitioner returned to Dr. Burger and reported his back felt better than it had since the injury and that he could move better. He followed up on December 3, December 7, and December 19, and reported his back was feeling stronger. Complaints and findings were documented in the S1 area. He was released on December 19, 2012. PX3.

The next treatment record with Dr. Burger is February 23, 2013. While the handwritten note is difficult to read, it appears to state that Petitioner reported he "fell when drunk". The complaints and findings were documented in the L4-5 area. PX3.

Petitioner returned to Dr. Burger on May 14, 2013, with complaints to his low back and findings were noted at L5-S1. He followed up with Dr. Burger throughout May and June, and was seen once a month in July, August, September and October 2013. Petitioner was last seen by Dr. Burger on October 16, 2013. PX3.

The next medical treatment was **October 2, 2014**, nearly one year later, when Petitioner presented to Dr. Creighton Engel at Engel Chiropractic. He reported frequent moderate bilateral sacroiliac symptoms which were achy and dull with no radiation. He stated the symptoms began the previous Sunday after playing basketball. It was noted he had a past history of similar problems several years ago, and it was further noted he had no past treatment for the problem. On examination, straight leg raise was negative bilaterally, and strength, reflexes and sensation were normal. There was moderate tenderness to palpation in the sacroiliac area bilaterally. Joint dysfunctions were observed at L4, L5, the right sacroiliac joint, and the sacrum. Dr. Engel noted Petitioner's diagnosis was SI strain and that his overall prognosis was good. He recommended treatment twice a week for two to three weeks. The Arbitrator notes this is the only record admitted from Dr. Engel. The Arbitrator further notes this treatment took place seven days prior to the alleged second accident date of October 9, 2014. PX5.

On October 9, 2014, Petitioner presented to Bowman Chiropractic. He completed an intake history form and indicated his current condition began on October 2, 2014. The form included different boxes, to mark if the condition was job related, auto accident, home injury, fall, or other. Petitioner left the "job related" box blank and instead checked the "other" box and wrote in "sports". He reported he was playing basketball and got undercut, causing him to fall ("slammed") to the ground. The Arbitrator notes there was no mention that he had been injured while at work. His complaints were to the hips and right lumbosacral paraspinal regions. Petitioner followed up with Dr. Bowman on October 10, 13, 15, and 17, 2014. He was released on October 17, 2014. PX4.

The next medical treatment was **June 18, 2015**, eight months later and seven days after the alleged third accident date of June 11, 2015. Petitioner presented to Smith Chiropractic and Wellness Center and was examined by Dr. Richard Smith. He completed a patient intake form, which included boxes to mark whether the nature of the injury was automobile, work, or other. Petitioner left the "work" box blank, checked the "other" box, and wrote "hurt playing basketball". He reported to Dr. Smith that he had a gradual onset of symptoms in his left sacroiliac and pelvic regions, left piriformis, and left leg/knee/calf/ankle. He reported he was playing basketball the week before and played too hard, and that he had had this problem in the past but this time was worse. Following an examination, Dr. Smith's impression was lumbosacral strain and radiculopathy. Petitioner followed up with Dr. Smith on June 22, 2015, and reported he was still really tight but was significantly better. He reported a decrease in mid and low back pain following treatment. The Arbitrator notes this is the final treatment record from Dr. Smith. PX6.

The next medical treatment was **February 26, 2016**, eight months later, when Petitioner presented to Dr. David Raskas at Orthopedic Sports Medicine and Spine Care Institute, upon referral by his attorney. He reported he had injured his back during a basketball game at work on November 18, 2012, and had persistent left-sided low back and radiating leg pain since that time. On examination, there was no pain to palpation, hip range of motion was full and non-tender bilaterally, straight leg raise was positive on the left and negative on the right, strength and muscle tone were normal, and sensation was intact. PX7. A lumbar MRI was ordered, which was completed on March 4, 2016. It revealed L5-S1 annular disc bulge with a superimposed left lateral recess epicenter, annular tear and protrusion, left lateral recess stenosis, moderate foraminal stenosis greater on the left, and no central canal stenosis. PX8.

On March 4, 2016, Petitioner returned to Dr. Raskas and reported he had been playing basketball at work on Saturday, six days prior, when he felt a pop in his left heel and calf. He had been diagnosed with an Achilles tendon rupture, was in a cast boot, and was using a scooter. With regard to his back, he continued to have pain which went down into his legs. Dr. Raskas referred Petitioner to Dr. Solman for evaluation of his Achilles, and referred him to Dr. Feinberg for two to three epidural injections for his lumbar pain. The Arbitrator notes this is the final treatment record from Dr. Raskas. PX7.

On July 21 and 28, 2016, Petitioner underwent epidural steroid injections at L5-S1. They were performed by Dr. Tong Zhu at Injury Specialists. PX9, PX10.

Respondent's Exhibit 8, Petitioner's 2014 timesheet, was discussed during testimony by both Petitioner and Respondent's witness Gina Feazel. However, in reviewing the transcript the Arbitrator notes that the exhibit was not actually tendered or admitted at the time of trial. Nonetheless, the testimony established that Petitioner did not work from October 2, 2014, through October 10, 2014, including the alleged second date of accident of October 9, 2014.

CONCLUSIONS OF LAW

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

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

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57 (1989).

For an injury to "arise out of" employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the

employment and the injury. Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts that he was instructed to perform by his employer, acts that he had a common law or statutory duty to perform, or acts that he might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment if it belongs to, or is connected with, what an employee has to do in performing his duties. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203-204 (2003).

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. 805 ILCS 305/11.

Whether, under the facts of a particular case, an activity is a "voluntary recreational program" under Section 11 of the Act and whether the claimant's injuries arose out of his employment are questions of fact for the Commission. *Pickett v. Industrial Comm'n*, 252 Ill.App.3d 355, 357 (1st Dist. 1993).

In the instant case, the Arbitrator finds that Petitioner's participation in basketball games during his lunch break was voluntary, and thus falls under the voluntary recreational activity exclusion of Section 11. As such, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that the accidental injuries he sustained on November 18, 2012, on October 9, 2014, and on June 11, 2015, arose out of his employment.

The Arbitrator is mindful of the recent Appellate Court decision of *Calumet School District #132 v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 153034WC. In that case, the Appellate Court found that claimant's participation in a student/teacher basketball game in the employer's gymnasium after school was not a voluntary recreational activity. The Court found significant that the evidence established that the claimant was not a basketball player, did not want to participate in the games, repeatedly tried to avoid having to play, and would not have played were it not for the repeated pressuring by his principal to participate. The evidence established that claimant's participation in the basketball games was not a voluntary recreational activity under Section 11 of the Act.

The Arbitrator finds the facts of the case at bar to be distinguishable. Petitioner's participation in frequent lunch break basketball games was purely voluntary. He admitted there was no mandate or memorandum asking correctional officers to play basketball or otherwise work out on their lunch breaks, and he admitted he did not receive any kind of monetary bonus or incentive to do so. He further testified he did not have to report to anyone whether he was eating lunch, playing basketball or working out on his lunch break. Further, there was no testimony to indicate that Petitioner was pressured by his co-workers or superiors to play. In fact, he testified he had always played basketball and continued doing so even after these incidents because he loved playing. Although he played basketball to help keep in shape, he agreed it was his personal choice to do so. He further agreed that many correctional officers did not choose to stay in shape, and admitted he had not been required to take a physical test since he was hired 15 years ago. While his employer may have acquiesced to the correctional officers

playing basketball on their lunch break, that acquiescence does not change the character of the activity from a voluntary recreational activity pursuant to Section 11.

Based on the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that he sustained an accidental injury which arose out of and in the course of his employment on November 18, 2012, on October 9, 2014, and on June 11, 2015. The remaining issues are moot and the Arbitrator makes no conclusion as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANAGMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Kiel,

Petitioner,

vs. NO: 13WC 26936

Tri County Coal, LLC.

Respondent.

17IWCC0752

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, causal connection, legal error, evidentiary error, Section 1(d), Section 1(f), 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 December 23, 2016 is hereby affirmed and adopted.

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

DATED: NOV 27 2017

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

SJM/sj
o-11/2/2017
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KIEL, LARRY
Employee/Petitioner

Case# **13WC026936**

TRI COUNTY COAL LLC
Employer/Respondent

17IWCC0752

On 12/23/2016, 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 0.64% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LARRY KIEL
Employee/Petitioner

v.

TRI COUNTY COAL, LLC
Employer/Respondent

Case # 13WC 26936

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **November 21, 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 **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **September 2, 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 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 N/A causally related to the accident.

In the year preceding the injury, Petitioner's average weekly wage was **$996.63**.

On the date of accident, Petitioner was **53** 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

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

12-20-2016
Date

DEC 23 2016

17IWCC0752

STATE OF ILLINOIS)
) SS:
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Larry Kiel,
Employee/Petitioner

v. Case #13 WC 026936

Tri County Coal, LLC,
Employer/Respondent

Findings of Fact:

Petitioner was 59 years old at the time of arbitration. He was married and lived in Auburn, Illinois. He graduated from Virden High School. He went to welding school at Lincoln Land Community College but was called back to the mine before he received his certificate. Petitioner worked in coal mining for 28 years with all those years being underground. Petitioner testified that, in addition to coal dust, he was exposed to and breathed silica dust, roof bolting glue fumes and diesel fumes.

Petitioner last worked in coal mine employment on September 2, 2010, at Respondent's Crown III mine. He was 53 years old on that date. His job classification was roof bolter. Petitioner testified he was exposed to coal dust every day of his coal mine employment. This was his last day working in the mine because he was sick with a blood disorder and had to undergo a stem cell transplant. The doctor would not let him go back to the mines after that so he retired. He has not had any employment since the coal mine.

Petitioner started working in the coal mine for Consolidation Coal Company in 1978. His first job classification was as a laborer. His job duties included shoveling on the belt. He testified that at the belt head there was always dust because one belt was always dumping coal onto another belt. As a laborer he sprayed the rock dust in order to fireproof the mine. Petitioner worked at Consolidation until 1981. Then he went to the Crown III mine where he worked until he retired. When he started at Crown III he was a laborer for a short time. After that he started running the scoop and the buggy. The buggies would haul the coal from where it was being mined to the belt and dump it. Petitioner was a roof bolter for the last 15 years of his coal mining career. As a roof bolter, he would drill a hole in the ceiling and insert roof bolts to keep the top from falling in. He testified that when he was drilling a hole there was a lot of dust that came down on top of him. Petitioner testified the roof bolts were held in place with roof bolting glue and when the glue pins would break there would be a smell that would take his breath away.

Petitioner first noticed breathing difficulties when he had to walk out of the mine as part of safety drills. He testified that towards the end of his career he could not walk out without having to stop and rest. He testified that his breathing problems worsened from the first time he noticed them until he left the mine. Petitioner testified that since leaving

the mine up until the time of arbitration he has not done much. He tinkers around in his garage and has a recliner and big screen TV there where he watches Cardinals baseball games. He testified that some of his lack of activity is due to his blood condition. Petitioner testified that he had a disease called POEMS which is a blood disorder that was treated with a stem cell transplant. He has been in remission for six years. He testified that he feels pretty good from that condition. He testified that he has neuropathy in his legs a bit. Petitioner testified that because of his shortness of breath he cannot shovel for a long period. He testified that he does not do any physical labor.

Petitioner testified that he has never been a smoker. He smoked a cigar every now and then. Petitioner testified that he sometimes uses his wife's inhaler if he gets in a situation where he has trouble. He testified that he gets anxiety attacks every now and then and uses the inhaler. Petitioner testified that he also has an inhaler. He testified that he uses whichever inhaler he grabs out of the cabinet. He testified that Dr. Mosquera prescribed the inhaler for him. Dr. Mosquera took over for Dr. Suchomoski. These physicians practice with Chatham Family Practice. In addition to the medications for his blood disorder, Petitioner takes medication for his thyroid and B-12 shots for a vitamin deficiency.

Petitioner testified that when he left the coal mine on September 2, 2010, he was having breathing problems. He testified that he was taken off the roof bolter because he could not keep up any more. He testified that he was put on a scoop. He had a buddy and they worked together. He testified that if it had not been for his co-worker he would not have made it through the last year at the mine. He testified that his problems included his breathing as well as his blood disorder.

Petitioner testified that his medical condition began to go downhill during the spring/summer 2010. He started developing neurologic problems. By the fall he had gotten to the point that he could not work anymore. After he went off work on September 2, 2010, Petitioner applied for and received sickness and accident benefits through the mine. He received same up until April 30, 2011. He testified that all of his medical was paid through the employer's group health until he was put on disability. The problems that he was suffering included neuropathies. He also suffered from ascites. When he was first diagnosed with POEMS, he would have to have the fluid drained from his abdomen two or three times a week. Petitioner was treated by Dr. Abenour in Indianapolis. Petitioner applied for Social Security Disability in February 2011 and was awarded same in April 2011. At that point his accident and sickness benefits stopped. He has been receiving Social Security Disability ever since. Petitioner signed a

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resignation from Respondent on May 27, 2011. When he resigned it severed all of his rights of employment with Respondent.

Petitioner testified that from time to time he would undergo screening for black lung by NIOSH. Sometimes he would receive a letter telling him what the interpretation was. He could not recall the last time he underwent such screening. He did not bring any of those records with him to arbitration. Petitioner testified that the mine he was working at has now closed.

Petitioner saw Dr. Paul at the request of his attorney. He testified that he also complained to Dr. Suchomoski about his breathing problems. He admitted Dr. Suchomoski may have also recommended that he see Dr. Paul. Petitioner testified that he normally walks with a cane. He testified that he has fallen because of trouble with his legs. Petitioner testified that he still has a license, but he does not drive very much. His wife does most of the driving.

Dr. Glennon Paul is the Director of St. John's Respiratory Therapy and Clinical Assistant Professor of Medicine at SIU Medical School. (Petitioner's Exhibit No. 1, p. 6). Dr. Paul is the senior physician at the Central Illinois Allergy & Respiratory Clinic. Those physicians specialize in allergy and pulmonary diseases. They take care of patients with respiratory diseases, critical care, allergic diseases and some internal medicine problems. Dr. Paul reads 15 to 20 chest x-rays per day. He interprets about the same number of pulmonary function tests. (Petitioner's Exhibit No. 1, pp. 7-8). Dr. Paul is board certified in internal medicine, allergy, immunology and asthma. (Petitioner's Exhibit No. 1, p. 39). Dr. Paul testified that at the time he did his fellowship in 1970 to 1972 there were not any pulmonary fellowships developed. He testified that it was strictly in allergy, asthma and respiratory disease. (Petitioner's Exhibit No. 1, p. 10). Dr. Paul is not an A-reader or B-reader of films, and he is not board certified in pulmonary disease. (Petitioner's Exhibit No. 1, p. 50).

Dr. Paul examined Petitioner one time on November 11, 2013. (Petitioner's Exhibit No. 1, p. 41, Deposition Exhibit No. 2). Dr. Paul has seen hundreds of individuals for Petitioner's counsel and has seen as many as 50 individuals a year for him. (Petitioner's Exhibit No. 1, p. 41). Petitioner complained of shortness of breath on exertion for the past four to five years. Dr. Paul testified that dyspnea on exertion can be due to causes other than respiratory disease. (Petitioner's Exhibit No. 1, p. 45). Petitioner did not relate to Dr. Paul any history of cough or sputum. (Petitioner's Exhibit No. 1, p. 46). Dr. Paul did not review medical records regarding Petitioner. He testified that there was not any

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pathologic evidence of pneumoconiosis in Petitioner. (Petitioner's Exhibit No. 1, pp. 47-48).

Dr. Paul testified that Petitioner had POEMS Syndrome which was treated with stem cell transplant. Dr. Paul testified that deconditioning sometimes affects the breathing capacity although that is not very common. Dr. Paul testified that Petitioner had been cured of POEMS. (Petitioner's Exhibit No. 1, p. 12).

Dr. Paul testified that Petitioner's pulmonary function testing revealed moderate obstruction and moderate restrictive lung disease. Petitioner had a marked decrease in his diffusing capacity. Dr. Paul testified that the decreased diffusing capacity could be due to obstruction which would therefore make the obstruction compatible with emphysema or could be due to the restrictive disease which would make the restrictive disease secondary to the pneumoconiosis. (Petitioner's Exhibit No. 1, p. 13).

Dr. Paul testified that Petitioner's chest x-ray had fibronodular lesions throughout all lung fields, mild to moderate degree. (Petitioner's Exhibit No. 1, p. 13). Dr. Paul testified that Petitioner had coal workers' pneumoconiosis caused by coal dust and the coal mine environment. He testified that Petitioner also had a moderate to severe obstructive ventilatory defect, chronic obstructive pulmonary disease, emphysema and a moderate restrictive impairment caused by coal dust and the coal mine environment. He also had a marked decreased in diffusing capacity caused by coal workers' pneumoconiosis, emphysema or both. (Petitioner's Exhibit No. 1, pp. 15-16). Dr. Paul testified that in light of these diagnoses, Petitioner could have no further exposure to the environment of a coal mine without endangering his health. (Petitioner's Exhibit No. 1, p. 16). Dr. Paul testified that Petitioner had clinically significant pulmonary impairment in the form of pulmonary symptoms and complaints. He had radiographically apparent pulmonary impairment and physiologically significant pulmonary impairment as demonstrated on pulmonary function testing. (Petitioner's Exhibit No. 1, pp. 17-18).

Dr. Paul further testified that in order to have pneumoconiosis, one must have, in addition to coal mine dust deposited in his lungs, a tissue reaction to it. That tissue reaction can be called scarring or fibrosis. The scarring of coal workers' pneumoconiosis cannot perform the function of normal healthy lung tissue. (Petitioner's Exhibit No. 1, p. 20). By definition, if one has coal workers' pneumoconiosis, he has an impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. (Petitioner's Exhibit No. 1, pp. 20-21). Dr. Paul testified that a person could have coal workers' pneumoconiosis that is radiographically significant but not have shortness of breath, have normal pulmonary function testing, and blood gases and normal physical

examination of the chest. (Petitioner's Exhibit No. 1, p. 24). Dr. Paul testified that a person could have coal workers' pneumoconiosis and have a normal chest x-ray. He testified that it is something that could be found on pathology or autopsy and not show up on the chest x-ray. (Petitioner's Exhibit No. 1, pp. 37-38). A negative chest x-ray could never rule out the existence of coal workers' pneumoconiosis. (Petitioner's Exhibit No. 1, p. 38). Dr. Paul testified that simple coal workers' pneumoconiosis classically presents itself without symptoms. Dr. Paul testified that it is less likely that simple coal workers' pneumoconiosis will progress once exposure ceases. (Petitioner's Exhibit No. 1, p. 48).

Dr. Paul testified that with regard to the diffusing capacity testing that was performed on Petitioner, the inspired volume for the tracer gas was not listed on the report. The technician did not list the inhalation time or the hold time for the tracer gas. (Petitioner's Exhibit No. 1, p. 49). Dr. Paul did not know the date of the film he reviewed. He testified that the opacity type present were fibronodular lesions that coalesce into coal dust nodules that become most any type of configuration. Dr. Paul did not give the film a profusion rating. (Petitioner's Exhibit No. 1, pp. 49-50).

Dr. Paul testified that Petitioner did not have any problems with POEMS when he saw him. Same was cured. Petitioner did not have any residual from POEMS. (Petitioner's Exhibit No. 1, pp. 46-47). Dr. Paul testified that Petitioner probably left work because of his shortness of breath. Dr. Paul testified that he did not know otherwise. (Petitioner's Exhibit No. 1, p. 48).

Dr. Henry K. Smith, board certified radiologist and B-reader, interpreted chest x-ray of August 8, 2013, as positive for pneumoconiosis, profusion 1/0 with P/S opacities in all lung zones. (Petitioner's Exhibit No. 2). Dr. Michal S. Alexander, board certified radiologist and B-reader, interpreted chest x-ray of August 8, 2013, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. (Petitioner's Exhibit No. 3).

Dr. Jeff Selby, board certified pulmonologist and B-reader, interpreted chest x-ray of August 8, 2013, as having no parenchymal abnormalities consistent with pneumoconiosis. (Respondent's Exhibit No. 3). Records from NIOSH for the Coal Workers' Health Surveillance Program were admitted into evidence. A chest x-ray of July 18, 1978, was interpreted by a B-reader as being completely negative. A chest x-ray of September 6, 2000, was interpreted by two B-readers as being completely negative. (Respondent's Exhibit No. 4, pp. 2-4).

Dr. Cristopher Meyer reviewed a single PA and lateral chest x-ray dated August 8, 2013. Dr. Meyer found the film to be quality 1. He testified that the lungs were clear and there were no findings of coal workers' pneumoconiosis. (Respondent's Exhibit No. 1, p. 40). Dr. Meyer has been board certified in radiology since 1992. (Respondent's Exhibit No. 1, p. 7). Dr. Meyer has been a B-reader since 1999. Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot. (Respondent's Exhibit No. 1, pp. 19-20). Dr. Wiot was part of the original committee that designed the training program which is called the B-reading program. (Respondent's Exhibit No. 1, pp. 21-22). Dr. Meyer has recently been asked to have a more active academic role with the B-reading program. Dr. Meyer is on the American College of Radiology Pneumoconiosis Task Force which is engaged in redesigning the course and the exam and submitting cases for the B-reading training module and exam. (Respondent's Exhibit No. 1, p. 32).

Dr. Meyer testified that the B-reader looks at the films of the lung to decide whether there are any small nodular opacities or linear opacities and based on the size and appearance of the small opacities, they are given a letter score. (Respondent's Exhibit No. 1, p. 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities. (Respondent's Exhibit No. 1, p. 28). The distribution of opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process. (Respondent's Exhibit No. 1, pp. 22-23). The last component of the interpretation is the extent of the lung involvement or the so-called profusion. (Respondent's Exhibit No. 1, p. 23). Dr. Meyer testified that the profusion is basically trying to define the density of the small opacities in the lung. (Respondent's Exhibit No. 1, p. 30). Dr. Meyer testified that radiologists have about a 10% higher pass rate on the B-reading exam than other specialities. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making a distinction between the 0/1 and 1/0 film. (Respondent's Exhibit No. 1, pp. 34-35). He later acknowledged that making the distinction is one of the most difficult processes encountered by B-readers. (Id at 47)

At the request of Respondent's counsel, Dr. James R. Castle reviewed medical records and chest x-rays regarding Petitioner. (Respondent's Exhibit No. 2, p. 21). Dr. Castle is a pulmonologist and is board certified in internal medicine and the subspecialty of pulmonary disease. (Respondent's Exhibit No. 2, p. 4). Dr. Castle testified that there was a board certification in pulmonary disease for the first time in 1941. (Respondent's Exhibit No. 2, p. 52). Dr. Castle practiced in Roanoke, Virginia for 30 years. His practice was limited to pulmonary disease and chest disease, which encompassed critical

care medicine. (Respondent's Exhibit No. 2, p. 7). Dr. Castle's practice included treating patients with occupational lung disease. He had some patients in his practice who had coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 8). Dr. Castle has been certified as a B-reader since 1985. (Respondent's Exhibit No. 2, p. 14).

Dr. Castle reviewed a chest x-ray for Petitioner dated August 8, 2015. Dr. Castle testified that the film showed no findings indicating the presence of coal workers' pneumoconiosis. The film was essentially normal. (Respondent's Exhibit No. 2, pp. 46-47). Dr. Castle noted that Dr. Alexander and Dr. Smith read the same film as having minimal changes consistent with pneumoconiosis, profusion 1/0. Dr. Castle testified that this meant they also considered the film may be negative (Respondent's Exhibit No. 2, p. 55). Dr. Castle testified that the medical records he reviewed did not reveal any pathologic evidence of coal workers' pneumoconiosis in Petitioner. (Respondent's Exhibit No. 2, p. 47). Dr. Castle testified that for a proper reading of a film for coal workers' pneumoconiosis certain elements are required including the date of the film, the type of reading, the patient's name and film quality. It should be indicated whether or not there are any parenchymal or pleural abnormalities and the types thereof. Dr. Castle testified that the opacity type, the location and the profusion are also required. Dr. Castle testified that the Department of Labor gives greater weight to interpretations of chest x-rays by B-readers rather than other readers of chest films. (Respondent's Exhibit No. 2, pp. 48-49).

Dr. Castle testified that if an individual suffers a reduction in his diffusion capacity due to scarring of the lung as a consequence of dust exposure, that reduction would be permanent. Dr. Castle testified that the same thing would be true with regard to emphysema. Dr. Castle testified that if an individual suffers a restriction or an obstruction due to scarring of the lungs due to dust exposure, those conditions are permanent as well. (Respondent's Exhibit No. 2, pp. 49-50). Dr. Castle testified that the last pulmonary function testing performed on Petitioner at Methodist Hospital on June 12, 2014, did not reveal any evidence of obstruction or restriction. In that testing Petitioner's diffusion capacity was normal. He had no evidence of COPD or emphysema on the films and records that Dr. Castle reviewed. (Respondent's Exhibit No. 2, p. 50).

Dr. Castle testified that for diffusion capacity testing to be valid there should be a rapid inhalation of the test gas. In less than two seconds the patient has to inhale to his total lung capacity. He has to have a breath hold of at least 10 seconds and the inhalation has to be at least 85% of the best vital capacity. The testing must be reproducible within 10%. (Respondent's Exhibit No. 2, pp. 50-51).

Dr. Castle testified that based upon his review of medical in this case, Petitioner was capable of heavy manual labor from a pulmonary standpoint based upon the most contemporary pulmonary function studies. Dr. Castle testified that the medical he reviewed did not reveal a diagnosis of chronic bronchitis in Petitioner. (Respondent's Exhibit No. 2, p. 51). Dr. Castle testified that it is very unlikely for simple pneumoconiosis to progress once the exposure ceases. (Respondent's Exhibit No. 2, pp. 51-52). Dr. Castle agrees with the position taken by the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible exposure levels until he reaches retirement age. (Respondent's Exhibit No. 2, p. 52).

Dr. Castle testified that after a thorough and extensive review of all of the submitted medical data, he concluded that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. He testified that Petitioner does not suffer from coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, pp. 52-53). Dr. Castle testified that Petitioner had a rare disorder described as POEMS syndrome (Polyneuropathy, Organomegaly, Endocrinopathy, Monoclonal, Gammopathy, Skin Changes). Dr. Castle described this as a rare disorder related to plasma cell dyscrasia and dysfunction. Dr. Castle testified that Petitioner apparently underwent successful therapy with high dose melphalan therapy followed by autologous stem cell transplantation. Dr. Castle testified that in the Mayo Clinic series of 137 patients with this syndrome, pulmonary manifestations were present in 28%. These manifestations included pulmonary hypertension, restrictive lung disease, respiratory muscle weakness and an isolated diminished diffusing capacity. (Respondent's Exhibit No. 2, pp. 53-54).

Dr. Castle testified that the ventilatory function studies he reviewed were both technically invalid. The study done by Dr. Paul on November 11, 2013, did not have any evidence of airway obstruction as the FEV1/FVC ratio was entirely normal. He did have findings that would be consistent with restrictive disease. He also had a significant reduction in both the FVC and FEV1 without evidence of obstruction. (Respondent's Exhibit No. 2, pp. 55-56). Dr. Castle testified that the pulmonary function study obtained by Dr. Jeff Selby on June 12, 2014, was also technically invalid, but useful information could be obtained from same. Dr. Castle noted that it is not possible to artificially increase one's true ventilatory function. The ventilatory function obtained by Dr. Selby showed that Petitioner had a normal forced vital capacity, FEV1, FEV1/FVC ratio, total lung capacity and diffusing capacity after correction for alveolar volume. Dr. Castle testified that this study was essentially normal. Dr. Castle testified that it was not possible for the changes present on the study by Dr. Paul to be due to an irreversible process such as coal

workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 56). If there was a restrictive process present at the time of Dr. Paul's study it was clearly and unequivocally due to Petitioner's POEMS syndrome and/or treatment for same. The study obtained by Dr. Selby eight months later was entirely normal showing no evidence of obstruction, restriction or any significant diffusion abnormality. Dr. Castle found that Petitioner did not have any physiologic impairment occurring as a result of his occupational exposure or coal workers' pneumoconiosis. The physiologic impairment that he may have had was transient and was related to his POEMS syndrome and/or treatment for same. (Respondent's Exhibit No. 2, p. 57).

Petitioner's Social Security Disability Claim File was admitted into evidence. On the Disability Report Field Office completed by Petitioner on February 22, 2011, he listed the physical or mental conditions that limited his ability to work as POEMS, rare blood disorder, hypothyroidism, B-12 deficiency, polyneuropathy, right eye vision impaired, fatigue, loss of strength and no reflexes, anxiety, nerve damage in legs and arms and ascites. Petitioner indicated that he stopped working on September 3, 2010, because of the above conditions. (Respondent's Exhibit No. 5, pp. 5-6). According to the Disability Determination and Transmittal, Petitioner was found to be disabled as of November 2, 2010. The disability was alleged to be due to POEMS rare blood disorder, hypothyroidism, B-12 deficiency, polyneuropathy, right eye vision impaired, fatigue, anxiety, nerve damage in the legs and arms and ascites. The disability determination noted that with the history of POEMS and stem cell transplant Petitioner's condition was of a severity that he could be found disabled. (Respondent's Exhibit No. 5, pp. 15-19). In the Continuing Disability Review Report dated August 25, 2014, Petitioner indicated that he had trouble breathing. He reported that as a sequella of his POEMS, he gets extremely fatigued, suffers anxiety and neuropathy as well as discomfort. He also indicated that he had been diagnosed with black lung and that he was short of breath on exertion. (Respondent's Exhibit No. 5, p. 38). In Continuance of Disability Determination Transmittal dated January 26, 2015, the primary diagnosis was listed as history of black lung with the secondary diagnosis listed as visual disturbances. (Respondent's Exhibit No. 5, p. 148).

Medical records of Indiana University Health were admitted into evidence. Petitioner was seen on October 11, 2010, by Dr. Rafat Abonour. He charted that for about one and a half years Petitioner had had a significant deterioration in his performance status where he developed fatigue and was thought to have right lower extremity numbness that had migrated to the left lower extremity and finally to his hands. He also began having discoloration of his skin. In August 2010, he had developed ascites and been tapped three times. His review of systems was positive for shortness of breath on exertion. Physical

examination revealed his lungs had good air entry bilaterally, slightly reduced at the bases. Dr. Abonour's felt that Petitioner appeared to fulfill the criteria for the diagnosis of polyneuropathy, organomegaly, endocrinopathy, monoclonal, gammopathy, and skin changes syndrome (POEMS), which is a rare perineuroplastic syndrome related to plasma cell disorder. The doctor recommended high dose chemotherapy and peripheral blood stem cell transplantation using Petitioner's own stem cells. (Respondent's Exhibit No. 7, pp. 80-83). On that same date Petitioner underwent chest x-ray which was interpreted as revealing low lung volumes with scattered linear scarring/atelectasis. (Respondent's Exhibit No. 7, p. 86).

Petitioner was seen on November 1, 2010, to begin chemotherapy. It was noted that due to abdominal ascites he had been undergoing ultrasound paracentesis. His review of systems respiratory revealed shortness of breath. Physical examination of the chest revealed lungs that were clear to auscultation. His respirations were non-labored and breath sounds were equal. (Respondent's Exhibit No. 7, pp. 68-71). Petitioner was discharged from the hospital on November 19, 2010. Physical examination of the chest that date revealed the lungs were clear to auscultation with equal breath sounds. (Respondent's Exhibit No. 7, pp. 45-50). Petitioner underwent a chest x-ray on December 5, 2010. Same revealed the central pulmonary vasculature was engorged. There were low lung volumes with small bibasilar atelectasis or infiltrate. (Respondent's Exhibit No. 7, p. 44). Review of systems respiratory on that same date revealed no shortness of breath, cough or sputum. Physical examination of the chest revealed the lungs were clear to auscultation. (Respondent's Exhibit No. 7, pp. 38-40). Petitioner was hospitalized from December 5, 2010, to December 13, 2010. The discharge diagnoses included klebsiella sepsis bacteremia/apancytopenia. During his hospitalization he was started on broad spectrum antibiotics and required aggressive fluid resuscitation for sepsis. At the time of discharge, his lungs were clear to auscultation. (Respondent's Exhibit No. 7, pp. 26-29). Petitioner was seen on December 22, 2010. At that time physical examination of the chest revealed good air entry bilaterally. (Respondent's Exhibit No. 7, pp. 24-25). Petitioner was seen on May 27, 2011. He had not required any paracentesis for over one month. Physical examination of the chest revealed the lungs were clear to auscultation bilaterally. The doctor indicated there was no evidence of active disease in Petitioner at that time. (Respondent's Exhibit No. 7, pp. 18-19). Petitioner was seen on August 24, 2011. His major complaint was related to peripheral neuropathy that could at times be severe and disabling. He had no other symptoms on that date. Physical examination revealed the lungs were clear to auscultation. The doctor noted that the POEMS appeared to be in remission. (Respondent's Exhibit No. 7, pp. 16-17). Petitioner was seen on November 23, 2011. At that time he reported weakness in the lower extremities, but he was able to ambulate. He had no sensation in the lower extremities which was probably causing most

of his difficulty. Physical examination revealed the lungs were clear to auscultation bilaterally. (Respondent's Exhibit No. 7, pp. 14-15).

When seen on March 28, 2012, Petitioner reported a significant peripheral neuropathy with weakness in his lower extremities that had been improving gradually. He was having a hard time driving. Physical examination of the chest revealed the lungs were clear to auscultation bilaterally. (Respondent's Exhibit No. 7, pp. 12-13). Petitioner was seen on June 20, 2013. On that date he had no complaints. Examination of his chest revealed the lungs were clear to auscultation bilaterally. It was charted that because of the neuropathy associated with his disease, he had some gait disturbance. (Respondent's Exhibit No. 7, pp. 8-9). Petitioner was seen on December 19, 2013. Physical examination of the lungs showed they were clear to auscultation bilaterally. Assessment showed Petitioner with POEMS syndrome and no evidence of organ related dysfunction. (Respondent's Exhibit No. 10, pp. 169-170). Petitioner was seen on December 11, 2014. It was noted that his POEMS had been treated successfully in terms of eradicating monoclomal protein and ascites. Petitioner, however, continued to have significant peripheral neuropathy, unsteady gait and occasional falling despite adequate treatment and physical therapy. The doctor noted that Petitioner had significant neuropathy that prevented him from working. (Respondent's Exhibit No. 10, pp. 120-121). Petitioner was seen on October 8, 2015. He had mild peripheral neuropathy at that point. Physical examination of the lungs remained clear to auscultation bilaterally. There was a notation in the record that Petitioner had no symptoms of cardiac, pulmonary or renal disease. (Respondent's Exhibit No. 10, pp. 64-66). Petitioner was seen on July 7, 2016. It was noted that recently he had been having worsening peripheral neuropathy that was painful and also associated with unsteady gait and near falls. Physical examination of the lungs remained clear to auscultation bilaterally. (Respondent's Exhibit No. 10, pp. 10-11).

Medical records of Chatham Family Practice were admitted into evidence. Petitioner was seen on May 10, 2010, for follow up regarding peripheral neuropathy. His active problems remained fatigue, hypogonadism, hypothyroidism, lumbar canal stenosis, numbness, peripheral neuropathy and vitamin B-12 and D deficiency. (Respondent's Exhibit No. 8, pp. 113-114). Petitioner was seen on August 31, 2010, for abdominal distention onset June and progressively worsening. Petitioner related he could not breathe easily. The assessment that date was abdominal pain and ascites. (Respondent's Exhibit No. 8, p. 107). Petitioner was seen on November 23, 2010, in follow up subsequent to his stem cell procedure at Indiana University. It was charted that Petitioner had accumulated fluid and was very uncomfortable and getting short of breath from ascites. (Respondent's Exhibit No. 8, pp. 103-104). Petitioner was seen on October 6, 2011. At that time he complained of nasal congestion with clear drainage. He also related chest pain for prior

two days with cough, which was not productive. He had been a little short of breath the prior evening. Physical examination of the chest revealed normal respiratory effort with no increased work of breathing or signs of respiratory distress. The assessment was upper respiratory infection. (Respondent's Exhibit No. 8, pp. 79-80). Petitioner was seen on May 19, 2015, with chief complaint listed as follow up on cough. Petitioner described gradual onset of constant episodes of moderate cough, described as loose and productive. The assessment was cough and pneumonia. A chest x-ray of same date revealed infiltrate in the right middle lung area. Petitioner was prescribed and Albuterol inhaler to use as needed. (Respondent's Exhibit No. 8, pp. 43-46).

Medical records of Dr. Roger Elble were admitted into evidence. Petitioner was seen on February 22, 2010, in consultation for second opinion regarding sensory loss in his hand and lower legs. His chief complaints included leg numbness and weakness, as well as fatigue and loss of balance and apparent loss of strength. Petitioner reported that he had noticed some shortness of breath after walking up two flights of stairs or hurrying. Dr. Elble indicated that he suspected Petitioner's symptoms were due to B-12 deficiencies. He recommended B-12 injections. (Respondent's Exhibit No. 11, pp. 17-19). Petitioner was seen on May 26, 2011. Review of systems respiratory indicated there was shortness of breath. He complained he felt sore and he had more difficulty walking after he had been sitting for awhile. He also complained of poor balance in his lower limbs. Dr. Elble reported that Petitioner's neuropathy was improving based on the return of his reflexes. Even his sensory examination was slightly better. Dr. Elble explained that there were no medications that would make his strength, balance or numbness better. (Respondent's Exhibit No. 11, pp. 2-4).

A chest x-ray taken on May 19, 2015, was reported as showing no acute cardiopulmonary process. (Respondent's Exhibit No. 9, p. 3). A chest x-ray taken at Memorial Medical Center on January 4, 2016, was interpreted as showing no acute chest findings. (Respondent's Exhibit No. 9, p. 1).

Conclusions of Law

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

The Arbitrator finds the x-ray interpretations by Drs. Meyer, Castle and Selby to be more credible than the interpretations by Drs. Paul, Smith and Alexander. The Arbitrator gives no weight to Dr. Paul's opinion that Petitioner had radiographic evidence of coal

workers' pneumoconiosis. Dr. Paul did not know the date of the film he reviewed and did not give the film a profusion rating. Dr. Paul described the opacity type present as coal workers' pneumoconiosis. Dr. Castle testified that for a proper reading of a film for coal workers' pneumoconiosis the reader should note the date of the film, the type of reading, the film quality and also indicate whether there are any parenchymal or pleural abnormalities and the types thereof. Dr. Castle testified that the opacity type, the location and the profusion are also required. Dr. Castle testified that the Department of Labor gives greater weight to interpretations of chest x-rays by B-readers than other readers of chest films. Three B-readers interpreted the chest x-ray of August 8, 2013, as negative for pneumoconiosis. Two B-readers interpreted the chest x-ray of August 8, 2013, as positive for pneumoconiosis, profusion 1/0 with P/S opacities in all lung zones. Dr. Castle testified that a profusion of 1/0 meant that these readers also considered that the film may be negative.

Based upon the foregoing and the totality of the evidence, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffers from coal workers' pneumoconiosis.

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he suffers from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. Dr. Paul testified that Petitioner had a moderate to severe obstructive ventilatory defect, chronic obstructive pulmonary disease, emphysema and moderate restrictive impairment caused by coal dust and the coal mine environment based upon the testing he performed. Dr. Castle testified he reviewed the pulmonary function testing performed by Dr. Paul as well as that later performed by Dr. Selby and that the ventilatory function studies were both technically invalid, however, he was able to obtain some useful information from same. The study performed by Dr. Paul on November 11, 2013, did not have any evidence of airway obstruction as the FEV1/FVC ratio was entirely normal. Petitioner did have findings on Dr. Paul's testing that would be consistent with restrictive disease. The most recent pulmonary function studies performed by Dr. Selby on June 12, 2014, revealed that Petitioner had a normal forced vital capacity, FEV1, FEV1/FVC ratio, total lung capacity and diffusing capacity after correction for alveolar volume. This study was basically normal. Dr. Castle testified that it was not possible for the changes present on the study by Dr. Paul to be due to an irreversible process such as coal workers' pneumoconiosis. If there was a restrictive process present at the time of Dr. Paul's study, it was clearly due to Petitioner's POEMS syndrome and/or treatment for same. Dr. Castle testified that there was no evidence of COPD or emphysema in the films and records that he reviewed regarding Petitioner.

The Arbitrator also questions the credibility of the Petitioner. He testified that he had shortness of breath when performing his job as a roof bolter towards the end of his employment. He said that he wouldn't have been able to continue working if not for the help of his co-workers. He said that he was given an easier job by the Respondent because of his symptoms. Despite all of these alleged problems, no records were introduced to show that the Petitioner sought medical treatment for his symptoms. The only mention of symptoms came in Dr. Elble's office note of 2-22-10. Dr. Elble is a neurologist and was seeing the Petitioner for complaints of sensory loss in in hands and lower limbs. He did not even listen to the Petitioner's lungs as part of his neurologic examination. While the Arbitrator understands that the various diseases diagnosed by Dr. Paul, apart from CWP which the Arbitrator addressed above, could be progressive, the medical records introduced since the Petitioner stopped working are also inconsistent with those diseases. While he was seen for sinusitis, coughing and a sore throat on several occasions between February 2014 and February 2016, the records indicate that these were isolated visits for transient conditions. (RX 9)

Petitioner failed to prove by a preponderance of the evidence that he has an occupational disease arising out of and in the course of his employment. The claim is denied. All other issues become moot.

17IWCC0753

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

Keenan Young,

Petitioner,

vs. NO: 11WC 18921

State of Illinois, Department of Corrections Stateville,

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, causal connection, permanent disability, medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 8, 2017 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.

17IWCC0753

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: NOV 27 2017
SJM/sj
o-11/9/2017
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

17IWCC0753

YOUNG, KEENAN
Employee/Petitioner

Case# **11WC018921**

ST OF IL DOC STATEVILLE
Employer/Respondent

On 5/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.97% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0924 BLOCK KLUKAS & MANZELLA PC
MICHAEL D BLOCK
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JOLIET, IL 60432

5875 ASSISTANT ATTORNEY GENERAL
STPHANIE KEVIL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

MAY 8 - 2017

Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

17IWCC0753

☐ 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

KEENAN YOUNG
Employee/Petitioner

v.

STATE OF IL DOC STATEVILLE
Employer/Respondent

Case # **11** WC **18921**

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 **NEW LENOX, ILLINOIS**, on **APRIL 7, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0753

On **02/15/11**, 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 **$79,266.20**; the average weekly wage was **$1,524.35**.

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 **$18,147.56** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$18,147.56**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $3,849.35, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $3,174.35 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 $1,016.23/week for 18 weeks, commencing 05/06/2011 through 09/08/2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.64/week for 25.05 weeks, because the injuries sustained caused the 15% loss of use of the right foot as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

5/3/17
Date

ICArbDec p. 2

MAY 8 – 2017

STATEMENT OF FACTS:

Petitioner, a 46 year old Correctional Lieutenant, was a 26 year employee of the Department of Correction and Lieutenant since 1998, assigned to Stateville since 2002. His duties included transporting, escorting, and supervising prisoners as well as serving writs. He testified that his position requires extensive walking, approximately 5-1/2 hours of an 8 hour shift, as well as stair climbing, as he was charge of custody, security and control.

Petitioner testified on February 12, 2011, that he was running to breakup an inmate altercation when he turned a corner and jammed his right foot into the ground. He testified that he did not make it to respond to the call, but that immediately afterwards, he noticed pain in his foot and began limping. He went to the doctor at Stateville who told him to follow-up with a foot doctor.

Petitioner presented to Dr. Dale Brink on February 15, 2011. Dr. Brink recorded a history that "...[Petitioner] was running around a corner to intercept a fight or breakup a fight. He slipped at the time. The adrenalin was pumping at the time and he really didn't notice it, but then after things calmed down, he noticed his foot was sore and was swelling. Over the next few days, it was very swollen and difficult for him to walk..." An examination revealed minor swelling from the right compared to the left in the first metatarsal phalangeal joint area. The doctor noted a hallux valgus deformity and bunions on both the right and left foot which Dr. Brink indicated limited the evaluation of swelling. There was pain with dorsiflexion range of motion of the toe. There was pain with side to side transverse motion of the toe and pain with more forceful medial deviation of the toe and pain plantarly with end range of motion. A fluoroscopy exam showed a hallux valgus deformity. There was no evidence of sesamoid fracture; no significant effusion; no avulsion fracture of the base of the proximal phalanx. Dr. Brink diagnosed sprain of the first metatarsal phalangeal joint, no significant capsular injury. Dr. Brink prescribed Naprosyn and told Petitioner that he could return to work in three days. (PX 1, p.10) Petitioner testified that he also received a splint.

Dr. Brink prepared an Initial Worker's Compensation Medical Report to Central Management Services at the initial visit. Dr. Brink wrote Petitioner had a diagnosis of sprain foot and described the nature and extent of injuries as right ankle and great toe swelling and severe pain. He indicated the treatment plan was to see an MD as soon as possible and the estimated return to work was February 19, 2011. (PX 1, p. 11)

Petitioner testified that he returned to work and his condition progressed over the next two months. On April 12, 2011, Petitioner returned to Dr. Brink. The doctor recorded that he had previously treated Petitioner with conservative care with splinting and anti-inflammatory medications and it had settled down a little bit, but ever since returning to work, he has continued to suffer pain and discomfort in the area. The pain was not getting better and the swelling continued. Dr. Brink advised Petitioner that it was very likely he had a capsular tear that was not fully able to heal with conservative care, and also had a hallux valgus deformity in the area. The doctor's diagnosis was soft tissue injury to the right hallux, possible turf toe, possible capsular tear as well as hallux valgus deformity. Dr. Brink indicated that conservative care had failed and that "[t]he patient needs a repair of the capsule to correct the deformity as well as correction with a bunionectomy to relieve pressure on the capsule from the injury that had occurred." (PX 1, p.13)

On April 19, 2011, Dr. Brink authored a letter to the Workers' Compensation Coordinator. The doctor explained that "...the correction of the deformity at this point should also be considered a workman's comp issue and should be part of the treatment. My assessment of him is a clinical assessment and is difficult to totally

diagnose a soft tissue injury of the hallux two months later. MRI maybe helpful, but it is difficult to tell whether it will show what could be seen clinically with surgery..." Dr. Brink proceeded to schedule corrective surgery of the soft tissue and capsular injury of the hallux as well as hallux valgus correction. (PX 1, p.14)

On May 6, 2011, Dr. Brink performed a right first MPJ capsular repair and a right bunionectomy with first metatarsal osteotomy. (PX 1, pp.19-21) Petitioner began losing time from work on the date of his surgery and returned to Dr. Brink for follow-up visits. On May 10, 2011, Dr. Brink noted "...[t]he patient did have identifiable tear in the lateral capsule from the injury he sustained." (PX 1, p.22) On July 5, 2011, Dr. Brink returned Petitioner to light duty work with a 30 to 50 percent reduction in his work activity. On August 9, 2011, Dr. Brink noted Petitioner still had some tenderness and pain underneath the metatarsal heads. His range of motion was getting better. The doctor note Petitioner attempted running multiple times without success as he had soreness and pain in the area. Dr. Brink felt Petitioner was able to return to work on July 8, 2011 with limited running. On September 8, 2011, Dr. Brink released Petitioner to return to full duty work effective September 9, 2011. (PX 1, pp. 31-37) Petitioner testified that he returned to work on September 9, 2011. He was paid temporary compensation for the entire period except for the final day off. (RX 1)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. George Holmes, a foot and ankle orthopedist at Rush, on June 25, 2012. According to Dr. Holmes, he reviewed Petitioner's medical records, performed an examination, took a patient history, and reviewed x-rays. He noted Petitioner had no current complaints related to his bunionectomy. Dr. Holmes opined that Petitioner sustained a sprained right great toe on February 12, 2011. Dr. Holmes opined, "...it is very unusual for someone to get an acute bunion deformity as a result of an injury as described by [Petitioner]...It is reasonable to suspect that this gentleman did have some swelling in the great toe..." Dr. Holmes provided that not having "...viewed the initial x-rays that was taken by his DMP, it would be my opinion that I cannot find evidence in and of itself from just the history and the natural history of patients with this injury to support that the capsular repair and bunionectomy of the right metatarsophalangeal joint were related to the claim of 2/12/2011." The doctor added that additional information, specifically the initial x-rays, may lead him to find that the bunionectomy was causally related to the February 2011 injury. Lastly, Dr. Holmes opined that Petitioner had reached maximum medical improvement from both his February 12, 2011 injury and from his bunionectomy. (RX 2)

On May 17, 2014, Dr. Holmes authored an additional report. Dr. Holmes provided that he received additional records including images of Petitioner's right foot from June 7, 2011 and July 5, 2011, both of which were images post-surgery. Dr. Holmes provided that following review of the additional records, the images do not provide data that would cause him to change his previous causal connection opinion. The doctor stated, "...that data would suggest that no significant injury occurred that would have necessitated any subsequent surgery." (RX 3)

At his request, Dr. Brian Toolan, a foot and ankle orthopedist at the University of Chicago performed a records review. In his report Dr. Toolan opined that Petitioner injured his right great toe on February 12, 2011 while on duty. The doctor opined, "[t]his injury aggravated [Petitioner's] pre-existing condition of a right bunion that was asymptomatic prior to the injury. This injury and the persistence of symptoms as a result of this injury necessitated medical treatment of the right great toe that included a foot bunionectomy." (PX 4)

Petitioner testified that prior to the accident herein, he had never had any treatment or symptoms with respect to his right foot or toes. He also testified that he never had any symptoms or treatment with respect to his left foot, including with respect to any left foot bunion.

Petitioner testified that he currently can feel the screw that was inserted during surgery. Petitioner testified that in damp or cold weather he will feel the screw, and it limits running. He has not played basketball since, and on fishing trips he will not walk as much as the area of his foot is numb. He has had to wear cushions

on his feet in order to walk, as well as an "old man's" stocking for his right leg. He has pain when walking, like a throb, constant, and he will feel tightness along the foot. He demonstrated to the Arbitrator that the pain begins at the first joint of the toe and goes back approximately to the middle of the foot towards the heel, and produces pain when walking. Petitioner also provided that he had also seen a different doctor for an arch support for his foot, but could not remember who.

In Support of the Arbitrator's Decision regarding "F" (Causal Connection), the Arbitrator makes the following findings and conclusions:

It is uncontested that on February 12, 2011, Petitioner sustained an accident when he jammed his right foot into the ground while running to breakup an inmate altercation. According to Petitioner's credible testimony he immediately noticed pain in his foot and began limping. He went to the doctor at Stateville who told him to follow-up with a foot doctor.

On February 15, 2011, Petitioner presented to Dr. Dale Brink. Dr. Brink recorded a consistent history. An examination revealed swelling from the right compared to the left in the first metatarsal phalangeal joint area. The doctor noted a hallux valgus deformity and bunions on both the right and left foot which Dr. Brink indicated limited the evaluation of swelling. Dr. Brink diagnosed sprain of the first metatarsal phalangeal joint, no significant capsular injury. Dr. Brink prepared an Initial Worker's Compensation Medical Report to Central Management Services indicating Petitioner had a diagnosis of sprain foot and described the nature and extent of injuries as right ankle and great toe swelling and severe pain.

Despite conservative care, Petitioner returned to Dr. Brink on April 12, 2011 complaining that he continued to suffer pain and discomfort in the area. The pain was not getting better and the swelling continued. Dr. Brink felt Petitioner very likely had a capsular tear that was not fully able to heal with conservative care, and also had a hallux valgus deformity in the area. Dr. Brink indicated that conservative care had failed and that "[t]he patient needs a repair of the capsule to correct the deformity as well as correction with a bunionectomy to relieve pressure on the capsule from the injury that had occurred." On April 19, 2011, Dr. Brink authored a letter to the Workers' Compensation Coordinator explaining that "...the correction of the deformity at this point should also be considered a workman's comp issue and should be part of the treatment..."

Dr. Brink performed a right first MPJ capsular repair and a right bunionectomy with first metatarsal osteotomy. Dr. Brink noted "...[t]he patient did have identifiable tear in the lateral capsule from the injury he sustained."

Respondent's Section 12 examiner, Dr. Holmes, was asked to comment on whether the bunionectomy had any relationship to the claim of 2/12/11. Dr. Holmes opinion was that it was highly unusual for someone to get an acute bunion deformity as a result of the injury as described, and while initial x-rays might lead him to form an opinion that the bunionectomy was causally related, "I am unable to make that causal connection." Dr. Holmes did not address the possibility of aggravation of a pre-existing bunion, or, as the treating doctor had noted, that a bunionectomy would relieve pressure on the capsule from the injury that had occurred. Although Dr. Holmes continued to express his causation opinion in his second report of May 17, 2014, the doctor noted the x-rays furnished were post-surgery. Other than to identify the capsular tear, his reports are silent whether there was a causal connection between the accident and the capsular tear, as he was specifically asked to address the causal relationship with the bunionectomy.

Petitioner introduced into evidence a record review report of Dr. Brian Toolan, a foot and ankle orthopedist at the University of Chicago. Dr. Toolan likewise did not address the capsular tear, as there was not medical evidence disputing causal connection. The doctor opined, "this injury aggravated Mr. Young's pre-existing condition of a right foot bunion that was asymptomatic prior to this injury. This injury and the

persistence of symptoms as a result of this injury necessitated medical treatment of the right great toe that included a right foot bunionectomy."

Considering all the foregoing, the Arbitrator finds and concludes that there is a causal connection between the accident in question and both the capsular tear, on which the only evidence is that it was acute, and an aggravation of a bunion requiring a bunionectomy both to relieve pressure on the injured joint capsule and to relieve the aggravated effect on the bunion. With both contributing to the surgery, the surgery is likewise found to be causally connected to the accident, which included an osteotomy and insertion of a screw.

The chain of events clearly show prior existing bilateral bunions, with the left side never having symptoms or requiring treatment by the medical records admitted, including Petitioner's history to Dr. Brink, either before or after the accident and that both the capsular tear and the bunion became symptomatic on the right only after the accident, and remained asymptomatic on the left. Petitioner returned to work and worked as long as he could until having to return to Dr. Brink about two months later with a history of, at the least, no improvement in his symptoms. The fact he had a capsular tear found in surgery and an acute swelling of not only the toe but the entire ankle suggest he had a significant trauma. The two months is not a gap in treatment, but rather simply an attempt to resolve the issues through conservative care of a splint and anti-inflammatory medication, as the records show, until it became clear that the condition was not improving.

This is not a case of first impression with respect to whether a bunion or bunionectomy maybe causally related to a work accident See *Craft v. Laid law Waste Systems*, 99 IIC 0859; and *Glavin v. MetLife Auto*, 11 I.W.C.C. 0022. The chain of events, strongly support the opinions of Drs. Brink and Toolan, which the Arbitrator adopts.

In the Support of the Arbitrator's Decision regarding (K), Temporary Total Disability, the Arbitrator makes the following findings and conclusions:

Petitioner was initially off four or five days for service connected leave, which was not the subject of the temporary total disability claim. He was then off 18 weeks from May 6, 2011 thru September 8, 2011, returning to work the next day, as Petitioner testified and is shown in Dr. Brink's release to return to work slip. Respondent paid all but the last day, and Petitioner is awarded TTD for the 18 weeks, with Respondent to have a credit for $18,147.56 paid. This was a recovery period from the surgery, within the right to temporary total compensation until MMI set forth in the *Interstate Scaffolding* case.

In Support of the Arbitrator's Decision regarding (J), Medical Expenses, the Arbitrator makes the following findings and conclusions:

The only medical bill submitted by Petitioner is the bill of Dr. Brink. (PX 5) Dr. Toolan in his report opined that the accident necessitated the surgery, as did the records of the treating podiatrist. The Arbitrator adopts the opinions of the podiatrist and Dr. Toolan that the accident necessitated the surgery. The bill itself was paid, which evidences it is a reasonable amount, and it appears based on Respondent's Exhibit 1 that some of the bills may have been paid by Workers' Compensation, some by group insurance, and $675.00 was paid by Petitioner.

Petitioner is awarded the $675.00 he paid. Respondent shall have a credit with respect to all bills paid by Workers' Compensation. With respect to any bills or parts of bills paid by group insurance, Respondent shall have a credit and hold Petitioner harmless for any claims with respect thereto.

The Arbitrator notes the parties stipulated that Respondent would receive a credit for any payments it made which overlap anything awarded herein.

In Support of the Arbitrator's Decision regarding (L) Nature and Extent of the Injury, the Arbitrator makes the following findings and conclusions:

Regarding whether this case should be awarded as a disability to the right great toe or foot, when Petitioner first saw Dr. Brink, the injuries were described as right ankle and great toe swelling and severe pain (PX 1, p. 11). The pain chart is mostly marked at the joint at the right first metatarsal of the foot and great toe, but also is clearly indicated as a problem on the right first metatarsal. (PX 1, p. 18) With respect to the surgery, a Chevron type osteotomy was made on the head of the first metatarsal a bone of the foot, beginning at the dorsal arm and following with plantar arm. A capital fragment was transposed on the metatarsal shaft and impacted in order to provide stable fixation. A screw was then permanently fixed at the osteotomy sight. (PX 1, p. 20)

Petitioner testified that in damp or cold weather he will feel the screw, and it limits running. He has not played basketball since, and while on fishing trips he will not walk as much as the area of his foot is numb. These are activities of the foot. He has had to wear cushions on his feet in order to walk, as well as an "old man's" stocking for his right leg. He has pain when walking, like a throb, constant, and he will feel like tightness along the foot. He demonstrated to the Arbitrator that the pain begins at the first joint of the toe and goes back approximately to the middle of the foot towards the heel, and produces pain when walking. Even if the injury were limited to the MP joint, it may be awarded either on the foot or the toe, much as an ankle injury may be awarded on the leg or foot. See *Keystone Steel & Wire v. I.C.*, 73 Ill. 2d 290 (1978); *Insulated Panel Co. v. I.C.*, 318 Ill. App. 3d 100 (2001).

The Arbitrator notes this claim preceded the September, 2011 Amendments. As such, an analysis consistent with same is not applicable. Based on the above, the Arbitrator finds Petitioner sustained 15% loss of use of the right foot under 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 DOWN	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELIZABETH MILLER,

Petitioner,

v. NO: 14 WC 31653

OSWEGO SCHOOL DISTRICT 308,

17IWCC0754

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 average weekly wage, accident, causal connection, medical, temporary total disability, and prospective medical, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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).

I. Average weekly wage

The Arbitrator calculated Petitioner's average weekly wage at $1,248.00. In doing so, the Arbitrator noted the parties' agreement Petitioner only worked 40 weeks in the year preceding her accidental injury. Respondent would have the Commission divide by 52 weeks and highlights Petitioner was hired annually to work, was paid over 52 weeks rather than the 40-week school year, and the "contract should govern the calculation of benefits." The initial flaw in Respondent's argument is the contract it seeks to rely on is from 2006 and no longer in effect. The further, and

insurmountable, flaw is Respondent's argument is inconsistent with long-standing appellate case law.

The issue of how a teacher's wages should be calculated was addressed nearly a decade ago in *Washington District 50 Schools v. Illinois Workers' Compensation Commission*, 394 Ill. App. 3d 1087, 917 N.E.2d 586 (2009). Therein, the claimant had been a first-grade teacher for 13 years. As in the instant matter, she had two options for receiving her salary: payments spread out over the 52-week calendar year, or payments during the 39-week school year only. She elected the first option and received paychecks year-round. The Commission calculated her average weekly wage by dividing her salary by the number of weeks she actually worked (39). On appeal, the employer argued the Commission should have used the number of weeks over which she received payments (52).

The Appellate Court first noted Section 10 states the third method is applicable when "the employment prior to the injury extended over a period of less than 52 weeks." *820 ILCS 305/10* (West 2006). The Court next observed the time for which the claimant was retained to work prior to her injury only extended over a period of 39 weeks, and therefore, the issue presented was whether the time for which she was retained to work defines her "employment" with the employer:

> The word "employment" means: "1. a. The act of employing; a putting to use or work. b. The state of being employed. 2. The work in which one is engaged; business; profession. 3. An activity to which one devotes time." American Heritage Dictionary of the English Language 428 (1969). Likewise, the word "employ" means: "1. To use in some process or effort; put to service. 2. To devote or apply (one's time or energies, for example) to some activity. 3. a. To engage the services of; put to work." American Heritage Dictionary of the English Language 428 (1969). McLees was required to devote or apply her time and energy to teaching for 39 weeks, not 52 weeks. The same observation applies when determining the period for which the District put her to use, work, and service.
>
> Accordingly, the plain language of section 10 supports the Commission's method for calculating McLees's average weekly wage. "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 during which the employee actually earned wages shall be followed.*" *Washington District 50 Schools*, 394 Ill. App. 3d at 1090 (Emphasis in original).

Pursuant to *Washington District 50 Schools*, Petitioner's employment extended over a period of 40 weeks. Therefore, her average weekly wage was properly calculated by dividing her earnings by 40. The Commission notes, however, there is a typographical error on the Order ($1,248.20) and hereby corrects that error to reflect Petitioner's average weekly wage is $1,248.00.

17IWCC0754

II. TTD

The Arbitrator awarded temporary total disability benefits from May 13, 2014 to August 29, 2015 and September 1, 2015 through October 6, 2016. While the Commission finds Respondent's challenges to the temporary total disability award to be unavailing, a modification of the award is nonetheless necessary.

The Commission notes that on June 30, 2014, Dr. Austin prescribed physical therapy and released Petitioner to full duty. The records reflect therapy exacerbated Petitioner's symptoms and on July 24, 2014, Dr. Austin again authorized her off work. PX3. As Petitioner was not disabled from work for that period, no temporary total disability benefits are due. Therefore, the Commission vacates the award of temporary total disability benefits from July 1, 2014 through July 23, 2014.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's average weekly wage is $1,248.00.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $832.00 per week for a period of 121 6/7 weeks, representing May 13, 2014 through June 30, 2014; July 24, 2014 through August 29, 2015; and September 1, 2015 through October 6, 2016, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $4,328.24 for medical expenses, as provided in §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the DRG stimulator trial as recommended by Dr. Lubenow as provided in §8(a) of the Act.

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

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to filed a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 2 8 2017

L. Elizabeth Coppoletti

LEC/mck

Charles J. DeVriendt

O: 10/11/17

Joshua D. Luskin

43

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

MILLER, ELIZABETH
Employee/Petitioner

Case# **14WC031653**

OSWEGO SCHOOL DISTRICT 308
Employer/Respondent

17IWCC0754

On 11/14/2016, 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:

2333 WOODRUFF JOHNSON & PALERMO
LEANDRO ALHAMBRA
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0766 HENNESSY & ROACH PC
DANIEL S WELLNER
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Elizabeth Miller
Employee/Petitioner

Case # 14 WC 31653

v.

Consolidated Cases:

Oswego School District 308
Employer/Respondent

17IWCC0754

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Falcioni, Arbitrator of the Commission, in the city of New Lenox, on 10/06/2016. 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 __X___ TTD

M. Should penalties or fees be imposed upon Respondent?

N. Is Respondent due any credit?

O. Other _____

17IWCC0754

FINDINGS

- On the date of the accident, 05/07/14, 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 the Respondent.
- Petitioner's current condition of ill-being ***is*** causally related to the accident.
- In the year preceding the injury, Petitioner earned $ 49,920; the average weekly wage was $ 1,248.20
- On the date of the accident, Petitioner was 33 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 $ 23,501.30 for TTD, $ 0 for TPD, $ 0 for maintenance, and $ 56,658.79 for other benefits, for a total credit of $ 80,160.09.
- Respondent is entitled to a credit of $ 56,717.76 under Section 8(j) of the Act.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of **$832.00**/week for **125-1/7** weeks, the periods of **05/13/2014** through **08/29/2015**, and **09/01/2015** through **10/06/2016**, as provided in Section 8(b) of the Act. Respondent is entitled to credit of **$80,160.09.**
- Respondent shall pay reasonable and necessary medical services as delineated in Section J of the "Conclusions of Law", pursuant to Sections 8(a) and 8.2 of the Act.
- Respondent shall approve and pay for the DRG stimulator trial, recommended by Petitioner's treating physician, Dr. Timothy Lubenow.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefit 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 th Commission.

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

Robert E Johnson

Signature of Arbitrator

NOVEMBER 8, 2016

Date

NOV 14 2016

ICArbDec19(b)

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulate that on May 7, 2014, Petitioner was an employee for Respondent, Oswego School District 308. Petitioner works as a music teacher for Respondent, teaching kindergarten through fifth grade.

Petitioner testified that on 5/7/14, while she teaching class the automatic timer on the lights went off. She walked up the choir steps to turn on the lights. As she was coming down the choir steps, she tripped on a music stand and fell down, landing on the floor on her hands and knees. Petitioner hyperextended her left foot as she fell. She felt immediate pain in her left foot and left ankle, radiating up and down her leg. Petitioner felt like something in her foot stretched. Petitioner sat on the floor and continued teaching the remaining 10 minutes of her class. Petitioner notified the school nurse, who gave her ibuprofen.

On the morning of 5/8/16, Petitioner notified the assistant principal of the accident. Petitioner was sent to Dreyer Medical Clinic, where her foot was wrapped and she was given Ibuprofen.

Petitioner testified by 5/9/16, she noticed the swelling in her foot had increased. Petitioner was seen at Rush-Copley emergency room that day, with complaints of pain at the plantar aspect of the left foot. She was given tramadol for pain and referred to an orthopedic specialist. Petitioner was seen by Dr. Jill Austin, DPM on 5/13/14. Dr. Austin's examination noted palpation pain along the calcaneofibular and anterior talofibular ligament. She was diagnosed with a left foot contusion to the talar neck-navicular. Petitioner was taken off work and given a CAM boot. Petitioner continued to have pain and on 6/2/14 an MRI of the left ankle was ordered. The MRI was done on 6/28/14, which revealed mild tenosynovitis of the tibialis posterior tendon.

Petitioner followed up with Dr. Austin on 6/30/15. At that time, Petitioner continued to have complaints of stiffness in the morning and pain to the left foot. The medical note indicated that she was unable to progress to shoes and activities. Dr. Austin ordered a course of physical therapy. Petitioner started physical therapy on July 2, 2014. While in physical therapy, Petitioner began having increased complaints of pain to her left foot. According to the Dreyer Medical Clinic note dated 7/22/14, Petitioner called that day with complaints of having numbness, tingling and a feeling of cold in her foot. Petitioner requested to see Dr. Austin.

Petitioner was seen by Dr. Austin on 7/24/14. At that time, she continued to have complaints of shooting pains over the top side of her foot, which was getting progressively worse. Dr. Austin ordered another MRI to the left foot. If the MRI of the left foot was negative, she recommended

that Petitioner undergo a neuro consult for possible nerve injury versus CRPS. Petitioner was taken off work until after the MRI.

Another MRI of the left ankle was taken on 7/28/14. The MRI revealed mild tenosynovitis of the tibialis of the posterior tendon.

Petitioner was seen by Dr. Jeffrey Senall on 8/6/14. Petitioner was seen by Dr. Senall based upon a referral from Dr. Austin on August 6, 2014. (AT 17). At that time, she continued to have complaints of numbness and tingling at the top of her foot. Dr. Senall diagnosis was RSD, pain in ankle. Dr. Senall prescribed her a topical and analgesic cream for the pain and referred her to a pain management specialist. She was continued to be off work for four weeks. Petitioner was seen by Dr. Mark Hanna on August 18, 2014 based upon a referral from Dr. Senall. (AT 18). He prescribed Neurontin and a lumbar sympathetic block, which was performed on August 27, 2014. (AT 18-19). She initially had relief but then her symptoms returned after about three weeks. (AT 19). Petitioner continued to follow up with Dr. Senall (AT18-19). Dr. Senall provided restrictions of lifting no more than 20 pounds on September 19, 2014, which she brought to her employer. They did not accommodate the restrictions. (AT 20-21).

Petitioner was seen by Dr. Mark Hanna on 8/18/14. Examination revealed edema of the left medial ankle, pain upon palpation, and diminishment of venous engorgement of the left foot at the dorsum. Dr. Hanna diagnosed Petitioner with CRPS. Dr. Hanna prescribed Neurontin and recommended lumbar sympathetic blocks.

Dr. Hanna performed a lumbar sympathetic nerve block at L4 on 8/27/14. According to the medical note, Petitioner's pain before the nerve block was 8 out of 10. After the nerve block, the pain decreased to 4 out of 10. Dr. Hanna recommended repeat injection in a couple of weeks. Petitioner testified that the sympathetic nerve block gave her some relief with the tingling but her foot still felt cold. Petitioner testified that this relief lasted approximately three weeks.

At the request of the Respondent, Petitioner was seen by Dr. George Holmes for a Section 12 examination, on 9/3/14. Dr. Holmes examination revealed positive Tinel's. Dr. Holmes opined that Petitioner was not at MMI. Dr. Holmes also opined that "it would appear that, for all intents and purposes her current condition is work related." Dr. Holmes diagnosed Petitioner with a mild form of CRPS. Dr. Holmes opined that Petitioner could return to work with restrictions of limited walking 10-15 minutes per hour, 5-10lbs push/pull, and the ability to sit for prolonged periods without limitation. Petitioner was not offered a job within Dr. Holmes recommended restrictions.

Petitioner followed up with Dr. Senall on 9/19/14. Dr. Senall continued restrictions of no lifting more than 20lbs and sit down work only. Petitioner testified that she presented these restrictions to human resources. Petitioner testified that she was not offered a job within Dr. Senall's restrictions.

On 9/23/14, Dr. Hanna performed a second lumbar sympathetic nerve block at L4. Petitioner testified that she received minimal relief of pain, burning and coldness. Petitioner followed up with Dr. Mark Hanna on 10/7/14. At that time, Petitioner continued to have the same complaints of pain. Dr. Hanna continued to keep Petitioner off ow work. Dr. Hanna referred Petitioner to Dr. Lubenow for continued CRPS treatment.

Petitioner first saw Dr. Lubenow on 10/30/14. At that time, she complained of decreased sensation and color changes to her left foot. Dr. Lubenow's examination noted that Petitioner walked with an antalgic gait favoring her left foot, noticeable pallor to the left foot, hyperalgesia from the mid tibia down to the medial and lateral malleolus of the left foot, decreased sensation to temperature, and hypersensitivity of the left foot. Dr. Lubenow recommended lumbar sympathetic blocks. Dr. Lubenow performed as series of lumbar sympathetic nerve blocks on 11/17/14, 12/9/14, 12/30/14, 1/19/15, 2/16/15, and 3/30/15. Petitioner testified that after the lumbar sympathetic blocks, she noticed that her foot stopped turning purple, but still experienced pain and burning.

At the request of the Respondent, Petitioner was seen by Dr. Kenneth Candido for a Section 12 examination, on January 6, 2015. Dr. Candido diagnosed Petitioner with CRPS to the left foot. Dr. Candido opined that the work accident caused or contributed to Petitioner's diagnosis. Dr. Candido opined that Petitioner could return to work with restrictions of sit down work only and limited standing and ambulation.

Petitioner was seen by Dr. Lubenow on 4/16/15. At that time, Petitioner continued to have complaints of burning and pain to the left foot. Dr. Lubenow recommended and ketamine infusion. Dr. Lubenow continued to keep Petitioner off work.

Dr. Lubenow performed ketamine infusions from 6/1/15 through 6/5/15. Petitioner was admitted in-patient at Rush University Medical Center for these procedure. The 6/5/15 discharge note indicated that Petitioner had immediate pain reduction after the procedures.

Petitioner followed up with Dr. Lubenow on 6/22/15. At that time, Petitioner reported that before the ketamine infusion her pain 8 out of 10. Post epidural her pain decreased to 6 out of 10 for approximately four weeks. Dr. Lubenow, noted that Petitioner is currently back to baseline but is able to walk better. Petitioner continued to have complaints of sensitivity, burning, pain, spasm, and sharp shooting pain to the left foot. Dr. Lubenow scheduled a Tunneled epidural catheter placement for 9/1/15.

Petitioner testified that in mid-August 2015, she was notified by letter that Respondent was able to accommodate the restrictions given by, Dr. Kenneth Candido pursuant to the 1/6/15 Section 12 exam. Petitioner testified that she returned to work on August 30, 2015. Petitioner was placed in the office to do clerical work. Petitioner testified that she was assigned tasks by the principal's secretary, Ms. Smith. Petitioner testified that the first day she returned she was assigned to sit down clerical work. She returned to work on August 31, 2015. Petitioner

testified that the office was particularly "intense" that day. Petitioner testified that she was required to be on her feet, performing tasks such as making copies and distributing mail to the teachers' mailboxes. Petitioner testified that she began to notice increased pain to the left foot throughout the day. She was unable to complete the work day. She notified her supervisor that she could not continue the work day and was going to the emergency room.

Petitioner was seen at Rush-Copley emergency room on August 31, 2015. The medical note indicates that Petitioner went to work that day and had a flare-up of CRPS in the left ankle. Examination revealed swelling of the left ankle, diffusely tender to the light touch, and antalgic gait favoring the left foot. Petitioner was given Norco and cyclobenzaprine. She was instructed to follow-up with Rush Pain Management.

Petitioner followed up with Dr. Lubenow on September 23, 2015. Petitioner testified that she was scheduled to have a tunnelled epidural catheter on September 1, 2015, but the treatment was not approved by workers' compensation.

At the request of the Respondent, Petitioner was again examined by Dr. Candido on 12/21/15, pursuant to a Section 12 examination. In his report, Dr. Candido opined that there is a remote possibility that the left foot pain is caused by the May 7, 2014 accident. Dr. Candido recommended restrictions of light duty work, elevate legs 10 minutes every hour, and limit ambulation to 30 minutes per hour. Petitioner testified that Respondent has not offered her a job within Dr. Candido's new restrictions.

Petitioner followed up with Dr. Lubenow on 12/23/15. Examination revealed continued tenderness of the left ankle. At that time, Dr. Lubenow continued to recommend tunneled epidural catheter placement.

Petitioner was last seen by Dr. Timothy Lubenow on 7/20/16. At that time, she continued to have complaints of pain, swelling, and discoloration of the left lower extremity. She also complained of difficulty wearing tennis shoes or tight fitting shoes. Examination revealed hyperalgesia to palpation of the forefoot, left ankle and distal left leg. Dr. Lubenow also noted that there is diminished ability to perceive cold in the distal left foot to the left calf. Dr. Lubenow's diagnosis is CRPS 1 of the lower limb. Dr. Lubenow's recommendation was a trial of the DRG stimulator.

Petitioner testified that she has yet to undergo the DRG stimulator and wishes to proceed with Dr. Lubenow's treatment recommendation.

Dr. Timothy Lubenow testified on behalf of Petitioner. He is a board certified anesthesiologist. (PX 1, p. 5). Dr. Lubenow defined complex regional pain syndrome as a neurological pain condition that develops in response to some type of antecedent event, usually a trauma that have four different categories within them. These are the pain or sensory category, the autonomic

category, the edema and sweat category and the motortrophic change category. (PX 1, p. 6-7). In order to arrive at a diagnosis of CRPS, you have to have a symptom in three of the four categories. In addition, one has to consider one or two more physical exam findings from one or two from the categories to establish the CRPS diagnosis. (PX1, p. 8). Dr. Lubenow was involved in the development of the Budapest Criteria for diagnosing CRPS. (PX 1, p. 9-11).

He first saw Petitioner on October 30, 2014. (PX 1, p. 11). After a physical examination, he diagnosed Petitioner with neuropathic pain condition on the left lower extremity. (PX 1, p. 13). A neuropathic pain condition is a broader category or heading and within that category are other diagnosis that fall underneath it such as CRPS. (PX 1, p. 14). He recommended a series of lumbar sympathetic blocks. On October 30, 2014, he performed a sweat test which determined if there is an asymmetry of sweating and which was positive. (PX 1, p. 15-16). The first and second nerve blocks performed in November and December of 2014 resulted in pain relief in approximately 50% improvement. He did not have any notation of whether the third block performed in December 2014 showed improvement (PX 1, p. 17). She had a fourth and fifth and block in January and February 2015 and had less response from these injections. (PX 1, p. 17).

Dr. Lubenow's partner, Dr. Jaycox, saw Petitioner on March 11, 2015. Petitioner noted that the discoloration and temperature issues she had improved with the blocks. She had good range of motion. (PX 1, p. 19). The diagnosis was complex regional pain syndrome. Dr. Lubenow recommended an epidural infusion or ketamine neuromodulation treatment. (PX 1, p. 19). When Petitioner was seen in April 2015, she had continued left foot pain but 80% improvement following the March 30, 2015 lumbar sympathetic block. She had an inability to lift heavy items. There were no changes in her examination. (PX 1, p. 20).

When Dr. Lubenow saw Petitioner on July 22, 2015, he noted that she had a five day epidural infusion at Rush, on an inpatient basis. ((PX 1, p. 21). Dr. Lubenow noted that she had pain relief from the procedure because on, she was no longer taking Norco or Lyrica. However, he also testified that he pain worsened again and it returned to baseline after June 2015. (PX 1, p. 21-22). In alternative, treatment would be a tunneled epidural catheter (PX 1, p. 23). The success rate was variable. (PX 1, p. 24). He did not have any firm figures as to the success rate (PX 1, p. 25). If the catheter did not work he would recommend spinal cord stimulation (PX 1, p. 26). He was recommending new version of a stimulation called a dorsal root ganglion or DRG. (PX 1, p. 26). She had no changes to her examination on August 19, 2015. On September 23, 2015, it was noted she was scheduled for the tunnel catheter.

As of December 23, 2015, Dr. Lubenow diagnosed Petitioner with complex regional pain syndrome. She had ongoing complaints of pain that lasted long after one expected it to heal and explained the discoloration in the lower extremity. (PX 1, p. 31). At the beginning of his treatment, he felt she had CRPS based upon the sweat asymmetry, hyperalgesia to palpation, decreased range of motion with regards to plantarflexion and temperature asymmetry. He believed that she later met the diagnosis of CRPS but was partially improved. (PX 1, p. 32). Dr. Lubenow found that Petitioner's trauma in 2014 caused her CRPS. (PX 1, p. 33). This was based upon a temporary relationship and the development of the injury.

On cross examination, Dr. Lubenow testified that he did not see Petitioner until October 30, 2014 about six months after the injury. He would defer to the physicians she saw prior to October 30, 2014. (PX 1, p. 37). He did not have any records of any physicians prior to October 30, 2014. (PX 1, p. 37). In answering the questions posed to him, he was relying on the history as provided by Petitioner. (PX 1, p. 37). At the time of his initial appointment of October 30,

2014, he did not have the EMG X-ray or MRI reports. (PX 1, p. 39). It was his understanding there was no underlying orthopedic condition or that she needed further orthopedic treatment. (PX 1, p. 39). Petitioner met the diagnosis criteria on the first visit for CRPS. (PX 1, p. 40). The symptoms of CRPS can vary and are not always present. ((PX 1, p. 43). Petitioner was considered obese as of October 30, 2014, (PX 1, p. 43). During his examination, Petitioner was able to tiptoe and heal walk and had strength of 5/5 and equal in the lower extremities, which meant she had normal motor strength bilaterally. (PX 1, p. 44). She did not have allodyna and unusual pain full response to normal tactile stimulation at the first visit. Dr. Lubenow agreed that pain was subjective, and there was no way of absolutely determining whether someone is in pain or the amount of pain they have. (PX 1, p. 45).

If lumbar sympathetic blocks were not helping a patient, he would discontinue them if the patient was not responding. (PX 1, p. 45-46). In the April 2015 note, Dr. Lubenow indicated she had improved sensitivity and discoloration and that she had full strength and no allodynia. (PX 1, p. 46). He came to the conclusion that she had improved, and he recommended the epidural infusion and increase in medication. (PX 1, p. 46).

He did not mention Petitioner's work status on October 30, 2014. (PX 1, p. 48). There was no work restriction noted in his records on April 16, 2015. (PX 1, p. 49). On April 16, 2015, Petitioner mentioned to him that she was able to walk 15 to 20 minutes before getting burning pain and hypothetically she could return to work if her job requirements fit into that category. (PX 1, p. 50). During the July 15, 2015 visit, Petitioner reported she could not walk more than six blocks at a time and stand for more than 20 minutes. Hypothetically, if that was within her job description, she could return to work. (PX 1, p. 50). Dr. Lubenow was aware that Petitioner was a music teacher bit did not have any information or exact physical job demands. (PX 1, p. 51). He did know how much she had to walk, if she had to use stairs or what type of surface she worked on. There were no work restrictions in the September 23, 2015 note. (PX 1, p. 51). On that date, he found her with an improved gait and no allodynia and that she was partially improved. (PX 1, p. 51). Petitioner had adequate pain relief with her Norco and Lyrica. (PX 1, p. 52). She had no allodyna during the December 2015 appointment. (PX 1, p. 52). Petitioner had not returned to him since December 2015 but had an appointment scheduled in July 2016. (PX 1, p. 53). With regards to the tunnel catheter procedure, he denied having any facts or figures as to its success rate. (PX 1, p. 54).

On redirect, Dr. Lubenow testified that he provided separate work status notes were his patients but did not recall providing them for Petitioner. (PX 1, p. 54-55).

Dr. Lubenow diagnosed Petitioner with CRPS. Dr. Lubenow opined that the 5/17/14 trip and fall caused CRPS in the left foot. Dr. Lubenow's based this opinion the temporal relationship with the May 2014 trip and fall, development of symptoms, physical exams findings and the edema noted on her bone scan. At the time of the deposition no longer was recommended tunneled catheter placement for Petitioner. Dr. Lubenow opined that Petitioner could be a candidate for DRG stimulator. As of 7/20/16 (Petitioner's last appointment with Dr. Lubenow), Dr. Lubenow has recommended that Petitioner undergo a trial DRG stimulator.

Dr. Kenneth Candido testified on behalf of the Respondent.

Respondent presented the testimony of Dr. Candido, a board certified anesthesiologist based at Advocate Illinois Medical Center. (RX 2A, p. 4). He has an active practice and he sees patients who have complex regional pain syndrome. (RX 2A, p. 5). He saw Petitioner for an

independent medical examination at the request of Respondent on January 6, 2015. (RX 2A, p. 8). Prior to seeing Petitioner, he reviewed records from Dreyer Clinic, Cadence Physician Group, Dr. Holmes, Dr. Hanna and Cadence Physician Groups. (RX 2A, p. 9-10). He took a history from Petitioner. (RX 2A, p. 10-11). Petitioner's reaction to the lumbar sympathetic nerve blocks performed by Dr. Lubenow showed that they were not useful to her. (RX 2A, p. 11-12). Petitioner informed him that she was able to drive and shop. (RX 2A, p. 12). She had a past medical condition called ankylosing spondylitis that could present lower extremity symptoms consistent with some features of her pain. (RX 2A, p. 13).

He stated that complex regional pain syndrome or CRPS is a painful condition arising from some disorder of the function of the nervous system. (RX 2A, p. 14). CRPS involves two broad categories, one being a symptom category and the other objective findings. There were four subclassifications of the two main categories including allodynia or hyperesthesia, light pain to touch and motor dysfunction and pseudomotor findings. (RX 2A, p. 15). Patients must have at least three out of the four subjective reports met and then objectively a minimum of two of four of the findings to confirm the diagnosis. (RX 2A, p. 16).

During his physical examination, he noted Petitioner was obese at 5'7 and 249 pounds. (RX 2A, p. 17). Morbid obesity can affect a lower extremity pain issue (RX 2A, p. 17). He noted that Petitioner had subjective complaints of pain in the left foot and ankle, difficulty walking for long periods and bearing weight, sleep disturbance and other issues. (RX 2A, p. 21). Objectively, a reduction of strength in the left illiposas and a reduction of the quadriceps function of the left leg was noted. She had hyperthesias to sensor testing and temperature disparity. He noted Petitioner had an EMG and was unclear why major muscle major groups would be significantly weaker on left side than right which did not match her subjective findings. (RX 2A, p. 22). She had no allodynia in the light touch and no hyperalgesia, no color changes, no edema, no atrophy and no atrophic signs and no tremors. (RX 2A, p. 22). His diagnosis was an underlying condition of anklosing spondylitis which was contributing to her left leg pain. (RX 2A, p. 23). She met minimum diagnostic criteria of having CRPS of the left leg. (RX 2A, p. 23). The diagnosis was neuropathic pain. He wanted to see an EMG to help verify the complaints of weakness. (RX 2A, p. 24).

He indicated that it was probable that the accident of May 7, 2014 did cause or contribute to the diagnosis. He indicated that just because she met some of the diagnostic criteria for CRPS she did not necessarily have the condition. Because she had other unknown issues he did not have sufficient information to conclude it whether she had it or did not have it. (RX 2A, p. 25). At the time of the January 2015 appointment she had mild symptoms, and he noted that she could return to light duty work including her former occupation of a music teacher. (RX 2A, p. 25). The pictures taken during the evaluation and attached to the report (RX 2A Ex 3, p. 19, fig. 3) show that there was no edema, atrophy, color changes or trophic signs. The pictures showed bilateral symmetry which was a contrary finding for someone with CRPS. (RX 2A, p. 29).

Following this examination, he was provided with a copy of the EMG. (RX 2A, p. 31). The EMG did not support a finding of motor weakness in the left foot or disparity in the physical exam where she indicated she could not move the left foot inwards. (RX 2A, p. 32). He found a lack of objective basis for the professed weakness in the left foot and ankle. (RX 2A, p. 32-33). Following the review of the EMG, he believed it was appropriate to return to light duty work in conjunction with the job duties of a music teacher. (RX 2A, p. 33).

Dr. Candido reviewed additional records provided to him on June 12, 2015. Upon this review of records from Dr. Lubenow, he noted that sympathetic blocks were not needed because

they had not benefited her in the past. (RX 2A, p. 35). He also stated narcotics were not needed because of the historic precedent of Petitioner obtaining and receiving multiple narcotic and Benzodiazepine prescriptions from numerous sources. He suggested that she might benefit from a referral to a mental health expert in possible consideration of either detoxification program or perhaps treatment if there was an evaluation on the substance abuse disorder.

Dr. Candido performed another examination of Petitioner on December 21, 2015. He reviewed additional medical records from DuPage Community Hospital and Delnor Radiology. He also reviewed additional records from Dr. Lubenow. (RX 2A, p. 37). The doctor took an updated history. (RX 2A, p. 39). He performed a physical examination. (RX 2A, p. 39). Positive findings on the physical examination included modest temperature disparity between the left calf and right and hypesthesia in the nerves on the left side. His opinion was that she did not have complex regional pain syndrome. (RX 2A, p. 40). This is based upon her meeting one criterion on temperature disparity and that everything else in her clinical examination was inconsistent with the diagnosis of CRPS. (RX 2A, p. 40). Photographs in his report showed symmetry in the extremities and his grasping of the left leg without eliciting pain response. (RX 2A, p. 41). He believe the anklosing spondylitis was a contributing factor to the left leg pain. (RX 2A, p. 41). As of December 21, 2015, Petitioner reported to Dr. Candido that she had severe pain, she could drive her own automobile and that she could walk slowly up to half a mile. (RX 2A, p. 42). The only objective finding was a moderate reduction in temperature in several areas of the left leg. (RX 2A, p. 43). Her subjective complaints did not match her objective findings on December 21, 2015. (RX 2A, p. 43). Her diagnosis as of December 21, 2015 was anklosing spondylitis of a chronic nature, neuropathic pain in the left leg which was improving, symptom magnification and insufficient evidence of complex regional pain syndrome. (RX 2A, p. 43-44).

Dr. Candido concluded that there was a remote possibility that the left foot pain was caused by the events of May 7, 2014. (RX 2A, p. 44). He noted there was a relatively trivial trauma at work that resulted in a contusion. This led to the development of a minor sensory only neuropathy of the left foot resulting in pain out of portion to the moderate physical exam findings. (RX 2A, p. 44). He believed she could return to work as a music teacher. (RX 2A, p. 45). Her noted her report of her ability to ambulate up to half a mile and that music teaching was between sedentary and possibly light duty. Petitioner was not in need of any interventional pain management including sympathetic blocks, epidural catheters and treatments of that nature. He indicated that the logical treatment was a comprehensive pain program such as the Rehabilitation Institute of Chicago, which would be an opportunity to engage in group therapy sessions, biofeedback, use of imagery and have psychological issues addressed. (RX 2A, p. 45). The DRG simulator would not be indicated for Petitioner because she did not meet the diagnostic criteria for complex regional pain syndrome. (RX 2A, p. 47). The pictures attached to the December 21, 2015 report did not show any evidence of complex regional pain syndrome. (RX 2A, p. 47).

On cross examination, the doctor noted that during his first examination in January 2015, he did not review the initial ER report or the EMG. (RX 2B, p. 56). His examinations were comprehensive and involved musculoskeletal as well as neurologic evaluation. (RX 2B, p. 57). During his examination he noted that the lower left extremity was cooler than the right, but the dorsum of the foot was half a degree warmer than the right side. (RX 2B, p. 58). During the sensory examination, there were hyperesthesia and diminished capacities for physical sensation present in the left saphenous nerve distribution. (RX 2B, p. 58). He noted an inversion of the ankle during the physical examination. (RX 2B, p. 61). He noted the subjective and objective findings during his first examination. (RX 2B, p. 62). He concluded that she met some

inconsistent criteria for the diagnosis of complex regional pain syndrome. (RX 2B, p. 63). He agreed with Dr. Holmes that if she had it, it was mild. She did not need to exhibit all of the symptoms to be diagnosed with CRPS. After listing the objective and subjective findings, he noted that if one was following the criteria strictly she did not meet the clinical criteria by the Budapest for CRPS. (RX 2B, p. 65). He noted that Petitioner did not have hypesthesia or allodynia. (RX 2B, p. 67). He noted there was a diagnostic test to measure sweat production but it has not been qualified or quantified as being reliable in the diagnosis of CRPS.

In his June 2015 report, he reviewed Dr. Lubenow's updated notes. (RX 2B, p. 82). When he reviewed Dr. Lubenow's October 30, 2014 note, he noted Dr. Lubenow did not use the term CRPS. He noted lower leg neuropathic pain. Based upon his review, he could have established a lack of a diagnosis of CRPS from the exam. Based upon his review of Dr. Lubenow's report, if he did not diagnose Petitioner with CRPS in his assessment, he would opine that she did not satisfy the criteria. (RX 2B, p. 89). When questioned about the Rush Surgery Center reports about the injections, Dr. Candido noted that they produced a handwritten note and a typewritten note. (RX 2B, p. 95). Dr. Candido was aware that Petitioner had a tunneled epidural infusion. (RX 2B, p. 99). During his December 2015 evaluation, he noted Petitioner still had complaints of pain. (RX 2B, p. 100). Dr. Candido disagreed that the blocks may have a positive effect on some of the symptoms that she reported. He noted that on her examination, she had worse temperature disparity then noted in the original examination while Petitioner identified the blocks as responsible for a favorable response, it was not in his clinical evaluation. (RX 2B, p. 103).

On re-direct examination, Dr. Candido was shown the note from December 9, 2014 which was the date of a lumbar sympathetic block. It showed the Petitioner had 40% to 50% improvement. This did not match the typewritten note which showed 70% improvement. (RX 2B, p. 106). The handwritten note from the December 30, 2014 procedure by Dr. Lubenow showed 50% improvement but the typewritten note showed 70%. (RX 2B, p. 108). The report from February 16, 2015 indicated that Petitioner had minimal improvement but the typewritten note showed 50% improvement. (RX 2B, p. 109). He noted it was significant that Dr. Lubenow did not state Petitioner had CRPS in the October 30, 2015 report, because he made himself out as being an expert in CRPS and would likely err on the side of making the diagnosis. (RX 2B, p. 109-110). He concluded it was equivocal whether Petitioner had CRPS after his first examination. (RX 2B, p. 110). Dr. Candido noted one could not describe a single finding as indicative as having CRPS or not having it. It is a constellation of findings. (RX 2B, p. 111). When he examined Petitioner in December 2015, he found that she did not have complex regional pain syndrome.

It was the doctor's understanding that she worked in a classroom. (RX 2B, p. 112). The fact that Petitioner indicated that she was able to walk a quarter mile indicated to him that she was able to move about the classroom. (RX 2B, p. 112). If Petitioner was allowed to stand as necessary, she would be able to return to work. After he was provided with the records of Dr. Lubenow, he then noted that he did not believe the blocks were necessary or that further blocks were needed. (RX 2B, p. 115). He did not need the infusion procedure report from June 2015 to opine with regards to the necessity of that procedure. There was insufficient evidence the medical literature to support that procedure. (RX 2B, p. 116).

His review of Dr. Jaycox's report from August 2015 noted some signs of CRPS but did not support a diagnosis of CRPS. (RX 2B, p. 117-118). At the time of the examination, Petitioner had no color changes, her strength was bilateral symmetrical and she was able to walk

on her heels and tiptoes. She was also able to walk more than six blocks but indicated she could not stand for more than 20 minutes. (RX 2B, p. 118). This was consistent with his December 20, 2015 evaluation. (RX 2B, p. 119). They were not the signs of an individual with complex regional pain syndrome. (RX 2B, p. 119).

Mike Mitchinson testified on behalf of Respondent. Mr. Mitchinson is a principal for Boulder Hill School. Mr. Mitchinson testified that in August 2015, the school district offered light duty work, based on Dr. Candido's restrictions of January 6, 2015.

Mr. Mitchinson testified that Petitioner returned to work on 8/30/15. He testified that Petitioner was assigned office work working on purchase orders. Mr. Mitchinson testified that Petitioner could sit and stand as necessary while performing this work. Mitchinson also testified that this work did not require Petitioner to stand more than 50% of the time.

On cross-examination, Mitchinson admitted that the position of teacher is not a sit down job. Mitchinson testified that Petitioner is required to be on her feet while teaching and in fact, he encourages teachers to be on their feet interacting with students.

Mitchinson also admitted that his secretary, Stacy Smith, was responsible for assigning tasks to Petitioner when she returned in August 2015. Mitchinson admitting that he did not know if Petitioner was asked to stuff mailboxes or make copies. Mitchinson testified that it is possible that she was asked to perform these tasks. Mitchinson also admitted that the task of stuffing mailboxes could not be done while sitting down.

On cross-examination, Mitchinson admitted that he was not aware that Dr. Candido modified Petitioner's restrictions on 12/21/15. Mitchinson also admitted that the school district did not offer work within Dr. Candido's 12/21/15 restrictions.

CONCLUSIONS OF LAW

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

The arbitrator finds that Petitioner sustained an accident arising out of and in the course of her employment with the Respondent. This finding is based on Petitioner's unrebutted testimony that on May 7, 2014, as she was walking down the choir steps she tripped on a music stand and fell. Petitioner credibly testified that she felt immediate pain to her left ankle. As she was falling, she felt a tear in her left foot. Furthermore, Petitioner's accident is well documented throughout the medical records.

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the 5/7/14 work accident. In coming to this conclusion, the Arbitrator puts greater weight on the the opinions of Petitioner's treating physician, Dr. Timothy Lubenow, than that of Respondent's Section 12 examiner, Dr. Kenneth Candido. The Arbitrator also notes that a major question in this case is whether or not Petitioner actually has CRPS and if so, was it a result of the accident she sustained as alleged herein. The Arbitrator notes that Dr. Austin initially suspected CRPS, that Dr Hanna, a pain specialist positively diagnosed it in August 2014 based on his clinical findings, and that Dr. Lubenow confirmed the diagnosis with objective testing such as positive temperature changes and changes in sweat production as measured by the QSART test. Additionally, the Arbitrator notes that Petitioner did obtain relief, some permanent and some temporary, from the injections and infusions administered by Dr. Lubenow. It is also noted that Dr. Candido denied that Petitioner had received any relief from these treatments and that it was partially on reliance upon this mistaken fact that he reached the conclusion that CRPS was not present. It is also noted that the relief that Petitioner received from this treatment had erased some of the symptoms and signs of CRPS by the time she saw Dr. Candido. Also, Dr. Candido opined that Petitioner's symptoms were likely caused, at least in part, by a condition of aqnkylosing spondylosis in her spine, a condition which, as far as the record is concerned, was completely asymptomatic prior to the date of accident. Further, Dr. Candido admitted that his exam could only find that evidence of CRPS did not exist at the present moment at which Petitioner presented for the exam, and could not show evidence of its existence in the past. Wherefore, based on the record before him, the Arbitrator finds that Petitioner does in fact have CRPS.

Petitioner was last seen by Dr. Lubenow on 7/21/16. Examination revealed hyperalgesia to palpation of the forefoot, left ankle and distal left leg. Dr. Lubenow also noted that there is diminished ability to perceive cold in the distal left foot to the left calf. The arbitrator notes that Petitioner's complaints of pain, discoloration and swelling are consistent throughout the medical records. Dr. Lubenow diagnosed Petitioner with CRPS I of the left foot. Dr. Lubenow opined that Petitioner's CRPS to the left foot was caused by the 5/17/14 trip and fall. Dr. Lubenow based his opinion on the temporal relationship with the May 2014 trip and fall, development of symptoms, physical exams findings and the edema noted on her bone scan. Additionally, Dr Hanna diagnosed Petitioner with CRPS before referring her to Dr. Lubenow.

Although Respondent's Section 12 examiner, Dr. Candido, disagrees with Dr. Lubenow's CRPS diagnosis, on the 1/6/15 report he opined that the 5/7/14 caused or contributed to petitioner's left leg pain. Dr. Candido also writes on the 12/21/15 report that "There is a remote possibility that the left foot pain was caused by the events of May 7, 2014." Wherefore, based on the record as a whole, and noting the factors set forth above, the Arbitrator finds that there is a causal connection between Petitioner's current condition of ill being, that being CRPS, and the accident as alleged herein.

G. What were Petitioner's earnings?

The arbitrator finds that Petitioner's average weekly wage is $1,248.00. This is based on Petitioner's unrebutted testimony that at the time of her accident her salary was $49,920.00 per year. Both parties agree that Petitioner was a 40 week employee. Principal Mitchinson agreed that as a school district employee her compensation was based on the 40 weeks that she actually worked. However, Petitioner opted to take the equal pay option, where she is paid her 40 week salary over a 52 week period. In light of the above and in accord with the plain language of Section 10 of the Act, Petitioner's AWW should be calculated based on the weeks and parts thereof that Petitioner actually worked (40 weeks). Thus, the AWW calculation is as follows -- $49,920.00 ÷ 40 *weeks* = $1,248.00 *per week*.

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 herein by reference thereto the findings as set forth above. The Arbitrator also finds that all of the treatments provided to Petitioner were reasonable and necessary. Additionally, the Arbitrator finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. It was reasonable and necessary for Petitioner to undergo a series of lumbar sympathetic nerve blocks and ketamine infusions to treat CRPS of her left foot. Petitioner testified that after the nerve blocks her foot stopped turning purple, noticed improved circulation to the foot, but continued to pain and tingling. Petitioner also testified that the ketamine infusions provided temporary relief.

The Arbitrator orders the Respondent to pay, pursuant to the fee schedule the following outstanding charges from Rush-Copley Medical Center ($1,196.97), Empact Emergency Physicians ($801.00), Valley Imaging Consultants ($90.00), University Anesthesiologists ($679.92), Rush University ($198.67), Rush Surgicenter ($881.28). The Arbitrator also orders the Respondent to pay Petitioner her out of pocket expenses of $480.40 pursuant to the fee schedule. Respondent to receive credit for all sums previously paid hereunder.

K. Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates herein by reference thereto the findings as set forth above. The Arbitrator finds that Petitioner is entitled to the medical treatment recommended by her treating physician, Dr. Lubenow. Dr. Lubenow is recommending DRG stimulator trial. Dr. Candido opined that Petitioner is not a candidate for DRG stimulator. Dr. Candido recommended that Petitioner undergo comprehensive pain program which consists of learning strategies to lose weight; use imagery to control her pain; engage in biofeedback and group therapy sessions. In coming to the decision the Arbitrator finds the opinions of Dr. Lubenow to be more persuasive than the opinions of Dr. Candido for the reasons stated above and awards the prospective medical treatment as prescribed by Dr. Lubenow.

L. What temporary benefits are in dispute?

The Arbitrator incorporates herein by reference thereto the findings as set forth above. The Arbitrator bases this decision on the credible testimony of the Petitioner, along with the records of the treating physicians, work status notes and disability forms completed by treating physicians.

On January 6, 2015, Respondent's Section 12 examiner, Dr. Candido, opined that Petitioner could return to work with restrictions of sit down work, limited standing and ambulation. However, Respondent did not offer work within Candido's restrictions until August 2015. Despite Dr. Lubenow's recommendation to stay off of work, Petitioner attempted returned to work for Respondent on 8/30/15 and 8/31/15. Petitioner testified that on 8/31/15 she was asked to perform duties (i.e. make copies, stuff mailboxes) that required her to be on her feet. According to Petitioner, this caused increased pain in her left foot and ankle. Petitioner was not able to complete the work day and sought treatment at Rush Copley ER that afternoon where it was noted that Petitioner had complaints of pain and it was noted that her foot and ankle were swollen. Petitioner did not return work after 8/31/15 and has continued to stay off work, per Dr. Lubenow's recommendation.

At the request of the Respondent, Petitioner was re-examined by Dr. Candido on 12/21/15. At that time Dr. Candido modified her restrictions to elevate legs 10 min per hour and limit ambulation 30 minutes uninterrupted. Mr. Mitchinson, principal for the school, admitted that the school district has not offered Petitioner a position within Candido's new restrictions. Wherefore, based on the record as a whole, the Arbitrator finds that Petitioner was temporarily and totally disabled for the period of 5/13/15 through 8/29/15 and 9/1/15 through 10/6/16.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JON MARK CAMP,

Petitioner,

vs. NO: 10 WC 49516

STATE OF ILLINOIS/
PINCKNEYVILLE CORRECTIONAL CENTER,

Respondent.

17IWCC0755

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical, and the admissibility of Petitioner's Exhibit 9, and being advised of the facts and law, reverses the denial of causal connection, awards prospective medical care, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

In denying ongoing causal connection, the Arbitrator observed Petitioner did not seek additional treatment following Dr. Brown's recommendation for surgery and therefore found Petitioner reached maximum medical improvement on January 26, 2011. The Commission views the evidence differently and finds Petitioner's inability to proceed with the recommended surgery does not equate to a break in the chain of causation nor is it tantamount to achieving maximum medical improvement.

The Commission emphasizes it agrees with the Arbitrator's assessment of Petitioner as "exceedingly credible and forthright." Petitioner testified he attempted to have the recommended surgery despite the lack of approval but was unable to do so. Petitioner explained he did not pursue surgery with Dr. Brown because "I was told that I couldn't have surgery." T. 84. Petitioner thereafter attempted to see a different provider but was refused because it was a workers' compensation matter: "I went to see Steve Priebe, and he said, Is this in any way related to workmen's comp? And I said, Well, yeah. And he said, I can't - - I can't do anything." T. 83. The Commission finds this testimony of an unsuccessful pursuit of surgery to be credible.

The Commission additionally notes there was a significant delay in completing the depositions in this case: Dr. Williams was deposed on January 25, 2012, yet Dr. Brown was not deposed until June 24, 2016; the case was tried two months later. Statements made by counsel during the hearing indicate this delay was beyond Petitioner's control. In short, Petitioner's cessation of treatment is not reflective of a cessation of causation. The Commission finds Petitioner's condition of ill-being remains causally connected to his work injury.

Having found Petitioner's condition is causally related to his repetitive trauma injury, the Commission further finds Petitioner is entitled to prospective medical care with Dr. Brown. Should Dr. Brown deem a repeat EMG is necessary prior to proceeding with surgery, Respondent shall provide and pay for same.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's condition of ill-being remains causally related to his repetitive trauma accidental injury which manifested on December 15, 2010.

IF IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for prospective medical treatment as recommended by Dr. Brown as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $3,433.00 for medical expenses as provided in §§8(a) and 8.2 of the Act. Respondent shall have credit for all amounts paid through its group carrier but shall indemnify and hold Petitioner harmless from any claim by any providers of the services for which Respondent is receiving this credit under §8(j).

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Exhibit 9 is rejected.

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

17IWCC0755

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: NOV 28 2017

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

LEC/mck

O: 10/3/17

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

CAMP, JON MARK
Employee/Petitioner

Case# **10WC049516**

SOI/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

17IWCC0755

On 3/21/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.89% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH & COOKSEY PC
KRISTINA D COOKSEY
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 DEPT OF CENTRAL MGMT SERVICES
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

MAR 21 2017

GERALD A. RAMOS, Acting Secretary
Illinois Workers' Compensation Commission

17IWCC0755

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)

JON MARK CAMP
Employee/Petitioner

v.

STATE OF ILLINOIS/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

Case # 10 WC 49516

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 **August 25, 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 **Admissibility of Petitioner's Exhibit 9**

FINDINGS

On the date of accident, **December 15, 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 **$62,909.00**; the average weekly wage was **$1,209.79**.

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

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

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

Respondent is entitled to a credit of **$ANY AND ALL** 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 his employment with Respondent on December 15, 2010. Timely notice was given to Respondent.

Respondent shall pay reasonable and necessary medical services totaling $3,433.00, as reflected in Petitioner's Exhibit 1, that remain unpaid. Specifically, Respondent shall pay the following bills, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act: Dr. David Brown/The Orthopedic Center of St. Louis $1,363.00 and Dr. Daniel Phillips/Neurological & Electrodiagnostic Institute $2,070.00. Respondent shall receive credit for amounts paid, including those paid through its group medical plan, for which credit is allowed under Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claim by any providers of the services for which Respondent is receiving credit under Section 8(j).

Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being is causally related to his accident at work on December 15, 2010. Petitioner reached maximum medical improvement for his bilateral upper extremities on January 26, 2011. All benefits after that date are denied.

Petitioner's Exhibit 9 is rejected.

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 16, 2017
Date

MAR 21 2017

STATE OF ILLINOIS)
) ss
COUNTY OF MADISON)

17IWCC0755

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JON MARK CAMP
Employee/Petitioner

v.

Case #: 10 WC 49516

STATE OF ILLINOIS/PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim alleging he sustained repetitive injuries to his bilateral hands and bilateral arms/elbows as a result of repetitive duties while working for Respondent. He has alleged a date of accident of December 15, 2010. Respondent disputes accident, date of accident, notice, causation, liability for medical bills, and liability for prospective medical care. Also at issue was the admissibility of Petitioner's Exhibit 9, that being the deposition of Jason Thompson on October 5, 2011, taken for and tendered for use in another case, unrelated to the case at bar.

On December 15, 2010, Petitioner was 53 years old, married, and had no dependent children. He was employed as a correctional officer at Pinckneyville Correctional Center and had been so employed since 2001. Prior to that, he was a correctional officer at Big Muddy Correctional Center from 1993 to 2001. He also previously served in the U.S. Navy for three years and received an honorable discharge. He retired from Pinckneyville in 2012 as a Correctional Sergeant, after being promoted to that position six months prior. He testified that the physical requirements of that position were the same as those for a correctional officer. After retiring he opened a barbeque restaurant, which he still owns and operates. He also actively gardens and testified he uses a tiller that "does the work for you", and other than watering tomatoes and such there is not much he has to do. He testified he does not ride a motorcycle and does not have any hobbies that involve repetitive use, grip, or force with his hands.

Petitioner testified that in his eleven years at the Pinckneyville facility he spent about 90% of his time working on the gallery and the other 10% of the time he worked as a walk officer and a caustic officer. He worked overtime every chance he got, which was about twice a week. He usually worked the day shift, which went into second shift if he worked overtime, and worked the midnight shift only about five percent of the time. When working as a gallery

officer, 50% to 60% of the time he was assigned to the segregation unit and about 40% to 50% of the time he was assigned to general population.

Petitioner testified that prior to the super maximum security facility being built, the high-security inmates, referred to as "circuit riders", were transferred from facility to facility for the safety of the officers. These inmates engaged in antagonistic behavior and attempted to stab the officers through the chuckholes, which led officers to not open the chuckholes. In the segregation unit services are rendered to the inmate through a chuckhole in the cell door. Petitioner described the chuckhole as an 8" by 14" heavy steel door with a lock mechanism at that top that takes a large Folger Adams key to unlock. He testified that the chuckhole is meant to be opened with the officer standing in front of it and pulling down after unlocking it. However, in segregation it "can be real dangerous" to stand in front of the chuckhole so it is generally opened from the side, so that the only area exposed to the danger is the officer's hands, rather than any vital organs. Petitioner testified as to experiences of being cut or stabbed by the inmate in the hands while opening the chuckhole, and showed the Arbitrator a scar from such an incident when an inmate had fashioned a weapon.

Petitioner testified that some chuckholes are easy to open but some are nearly impossible to open. He explained that the hinges get clogged up by food and milk, as well as by the inmates' feces, urine, and bodily fluids. When the hinges get clogged up, the chuckhole becomes very difficult to open. With regard to the Folger Adams key, Petitioner testified it is about six or seven inches long and less than a quarter-inch thick. It is a heavy key that turns a big spring that moves the metal lock up and down. Sometimes one click of the key will open the lock, but sometimes the key has to be turned multiple times before the lock opens. There are times when both hands must be used to turn the key. When a lock sticks, Petitioner testified "you try everything you can to get it open", but if that is unsuccessful the lieutenant is called. There is also a locksmith on staff at the facility, in the event that the officer cannot get a chuckhole or cell open. He estimated there were about 218 inmates in two wings whose chuckholes had to be opened each time they were fed.

Petitioner's duties included doing performing property box checks and shake downs, which involved using his hands and arms. He also had to cuff and uncuff inmates, which involved pinching of the cuffs to close them. Placing and removing leg irons involved getting down by the inmates' legs and the officer generally turned sideways to accomplish this, for safety reasons. He also performed wing checks every 30 minutes or so, whereby he would check each door of the wing to make sure it was closed and locked. He did so by pulling, then pushing, then pulling the door again. It was done this way because inmates could be pulling the door from the inside, to make it appear closed and locked, so pulling then pushing would detect this. Petitioner testified that when the facility went on lockdown, which "seemed like always", the officers worked non-stop and performed duties normally performed by others, such as carrying laundry, food, mail, and trash.

Petitioner was also on the tactical team at the facility. It was a six-man special unit which was called for cell extraction of non-compliant or violent inmates. Being on the tactical team involved extra training and required use of every part of the body.

Petitioner testified that he noticed his arms and hands would tingle and hurt when he was home napping in his recliner with his arms up and his fingers interlocked with his hands behind his head. Due to the symptoms he went to his attorney, Mr. Rich, who referred him to Dr. Brown. Prior to seeing Dr. Brown he had never been treated or tested for carpal tunnel or cubital tunnel syndrome. He first saw Dr. Brown on December 15, 2010, which was the first time he received any testing for the symptoms he had been having, the first time was given a diagnosis, and the first date he understood that he had a work related condition. He thereafter reported the situation to his employer and filled out an incident report.

Petitioner testified that prior to the hearing he prepared a Work History Timeline and Job Description, entered as Petitioner's Exhibit 5. He reviewed the deposition of Dr. Brown and agreed with him about the things he told Dr. Brown. He also reviewed the deposition of Respondent's witness, Dr. Williams. He testified he was not examined by Dr. Williams and disagreed with his report. He noted Dr. Williams did not go to the prison to personally observe the job duties being performed, but only watched a video.

Petitioner testified that since retiring from in 2012 his arms and hands are worse and his symptoms have gone into his thumb and fingers. When cooking at his restaurant he uses his left hand a lot, as it does not hurt as bad. He would like to have the surgery that Dr. Brown recommended in early 2011.

On cross-examination, Petitioner confirmed that the last time he saw Dr. Brown was in January 2011 and that he would not disagree if the records indicated he was diagnosed with only an elbow condition at that time and that recommended treatment was for his elbows only at that time. He acknowledged that Dr. Brown based his opinions solely on his work at Pinckneyville Correctional Center and, upon questioning and review of Petitioner's Exhibit 5, he further acknowledged that he was not a tactical officer while at that particular facility. Petitioner agreed that the circuit rider inmates were moved to the super maximum facility around 1998 or 1999, when he was still working at the Big Muddy Correctional Center. He conceded that he did not have circuit riders while working at the Pinckneyville facility, but did have "lifers", which actually should not have been housed in a medium security facility.

Petitioner testified that his hobby of gardening involved a personal garden only. It is about the size of his barbeque restaurant, and was the same size back in 2010.

With regard to his duties when working in general population, Petitioner agreed that most main line or mass movement of inmates was done through the control pod. This meant that the officer in the control room unlocked the cell doors and the inmates came out of the cells and then re-secured the doors. After the line moved, the officers would go through and check the doors to ensure they were re-secured. While working in general population, he did not key open the doors for mass line movements, did not feed inmates through the chuckhole except during a lockdown, and did not cuff and uncuff inmates to move them except during a lockdown. He confirmed that he worked in general population 40% to 50% of the time while at Pinckneyville.

With regard to working in segregation, Petitioner agreed that officers had the use of inmate porters. The porters picked up laundry, passed out meals, and carried the milk crates.

The porter did not, however, key open or close the chuckhole. Generally, the officers were responsible for one feed per shift, but occasionally they would have to finish up the breakfast feed and also do the lunch feed, such as after a lockdown or if there was snow or a lot of call-ins. Petitioner conceded that he did not deal with property boxes much in segregation and that he generally performed one to two shakedowns per day, but it could be higher on some days.

With regard to other job assignments, Petitioner testified that work as a main gate sergeant was not generally busy and involved a lot of time sitting. It did not involve cuffing, keying, or the other duties testified to. Work as a walk officer involved escorting inmates to different places and did not involve cuffing or keying. Work as a caustic officer involved assembling and handing out caustic kits of cleaning supplies, with the assistance of two inmate workers. Work as a bus escort involved cuffing and uncuffing about 50 inmates on the bus, including leg irons, and most of his three-hour overtime periods involved this assignment.

Petitioner acknowledged he reviewed the key estimation study completed by (then Lieutenant) Major Thompson, entered as Respondent's Exhibit 10. He did not dispute those estimations on the average number of keys that were turned for different positions per shift.

When asked on cross-examination why he saw his attorney before he saw a doctor when he noticed symptoms, Petitioner testified, "Well, the fellows at work said that this is what they had went for, and that Mr. Rich knew who to send you to. That surgery had really worked for them." He acknowledged that he completed a Patient Intake Questionnaire while in Dr. Brown's waiting room and noted he was being seen for a work related injury. When asked how he knew it was work related before being examined by Dr. Brown and being told it was work related, Petitioner testified that it was "common knowledge" among the correctional officers that these were symptoms of carpal tunnel. He indicated on the Questionnaire that he had been referred to Dr. Brown by Jimmy Phillips, who he explained worked for him and was also represented by Mr. Rich.

Petitioner confirmed he currently had symptoms down into his thumb, but acknowledged that he had not received any treatment from Dr. Brown regarding his thumbs. He conceded he had not treated with any medical provider for his hands or elbows since January 2011.

Petitioner testified he opened his restaurant about three months after he retired. He and all his employees work together to run the restaurant and he currently has a pit master that cooks and prepares the barbecue.

Petitioner called Respondent's witness, Major Jason Thompson, to testify. He testified that he worked at Pinckneyville Correctional Center from July 1998 until December 2011, at which time he went to the satellite facility in DuQuoin until March 2013. He was at Pinckneyville the same time as Petitioner, with the exception of the last six months before his retirement. On occasion he was Petitioner's direct supervisor. He testified that Petitioner's work ethic was "top notch" and that he had no reason to doubt any of his testimony. He was asked about a deposition he gave on October 5, 2011, the transcript of which was proffered as Petitioner's Exhibit 9. Respondent objected to the admission of the transcript and the Arbitrator reserved ruling on same. Major Thompson was reminded by Petitioner's counsel that during his

deposition he was asked how many hours in an eight-hour shift a conscientious correctional officer would use his hands and arms. His answer was five to six hours out of a seven and a half hour shift. He was asked if that was his testimony then, and if continued to be his testimony. He testified that it was, and that five to six hour with rest was probably accurate.

On cross-examination, he clarified that throughout the shift there would be times a correctional officer would be using his hands or arms and there would also be downtime when he was not, "like any other job". He estimated that only about 1% to 2% of the chuckhole locks in general population were problematic and testified that the chuckholes were rarely used in general population, so that it was not an issue most of the time. With regard to the doors, they would sometimes get rusty or the tumblers would get worn but it was infrequent. Whenever there was an issue, the onsite locksmith could be called to fix it.

Major Thompson testified that wing checks were done every 30 minutes, which involved walking down the wing to check each door by flicking it with your fingertip. If you heard the metal lock latch and the door didn't come open, you were "pretty sure the door is secure". If the alarm in the control center showed that a door was not secure, an officer would check the door by jiggling it back and forth two or three times, to ensure the inmate had not jimmied it.

Major Thompson identified Respondent's Exhibit 10 as a copy of the key estimation study that he had rendered, which he testified was true and accurate. He explained that he had done a study of the day shift by physically observing R5 unit, receiving, seg (segregation) unit, and two of the four housing units. He observed housing units one and four, which were the highest movement and lowest movement houses. He physically watched employees in each of these areas and counted how many key turns and how many people were moved that day. He then added all the call passes for the month and got an average, and determined how many key strokes it would take to move every one of those inmates. From the average number of call passes and in and out cell house moves, he then multiplied that by the number of key turns and double locks it would have taken to move those inmates. That was the process by which he arrived at the amount of key turns. For the other shifts, he looked at their movement records, counted up the entire number of moves, and multiplied that by the number of key strokes it would have taken to get the inmates in and out of the house. At the conclusion of his study he talked with the warden and expressed the need to take into account those days that were busier than the one he observed. It was agreed he would add 20% to his numbers to account for that difference, which is noted in his study. As a result, the original amount he calculated per month for an average was 20% less than the amount reflected in the study.

On December 15, 2010, Petitioner presented to Dr. David Brown of The Orthopedic Center of St Louis. He completed a New Patient Questionnaire, indicating he was there for a work-related injury and had been referred to Dr. Brown by Jimmy Phillips. The Arbitrator notes he testified he was referred to Dr. Brown by his attorney. He listed gardening as a hobby and noted he smoked two packs a day for 38 years. Under the Symptoms section, Petitioner noted both of his hands and arms go numb. In describing his symptoms he stated, "Hands and arms go to sleep when propped and every night when going to sleep, when propped behind head, sleep with pillow under chest for seven years now that's not working". He wrote that he first noticed his symptoms "about 9 years ago". With regard to his work history, Petitioner noted he had been

with the Department of Corrections since 1992 and currently worked 8 to 16 hours a day, 40 to 50 hours a week. In describing his job detail he wrote, "Open various locks on doors, gates, chuckholes, handcuffs, leg irons, and waist chains 300-400 times a day; 35 to 80 lbs. sporadically during lockdowns and resupply from warehouse; data entry 1 hour daily intermittent; open locks up to 200 times an hour." He noted he was currently working his regular job. PX3, RX13.

Dr. Brown noted the above information in the History section of his report, and noted that Petitioner explained he had a nine year history of numbness and tingling in both hands, mainly his little and ring fingers, and weakness. He could recall no specific traumatic injury. On examination, he had good active range of motion of both extremities. He had a positive Tinel's sign over the ulnar nerve at the right and left cubital tunnels, and negative Tinel's over both carpal tunnels. Direct compression test was positive bilaterally and elbow flexion test was negative bilaterally. Phalen's test was negative bilaterally and he had good sensation and perfusion in the digits of both hands. There was no muscle atrophy in either hand. Grip strength was 104 pounds on the right and 92 pounds on the left. Dr. Brown noted Petitioner had some symptoms and findings consistent with peripheral compression neuropathy and he recommended wearing wrist splints over both wrists at night. He also gave Petitioner bilateral pillow splints to wear over both elbows at night to help keep his elbows in an extended position while sleeping. Dr. Brown also prescribed a nonsteroidal anti-inflammatory and nerve conduction studies. He opined that, based on Petitioner's job description, he believed the work activities were an aggravating factor in his need for further evaluation and treatment for bilateral carpal and cubital tunnel syndrome. He allowed Petitioner to continue working with no restrictions. PX3.

On December 15, 2010, the same day he saw Dr. Brown, Petitioner also saw Dr. Daniel Phillips of Neurological & Electrodiagnostic Institute, Inc., upon referral by Dr. Brown. On the Patient Questionnaire he noted gradual onset of his symptoms, which began in 2001. He noted complaints of left elbow and shoulder pain with intermittent bilateral hand numbness that started in the fifth fingers. He experienced numbness in the left hand when he flexed the left arm and placed it behind his head. He noted Petitioner had two fractures of the left forearm in 1998, which required open reduction internal fixation. Cervical pain was not described. The EMG/NCS revealed: (1) relatively moderate ulnar neuropathy across the left elbow with ulnar sensory axonal involvement; (2) evidence for very mild demyelinative ulnar neuropathy across the right elbow; and (3) no evidence of carpal tunnel. PX4, RX14.

Dr. Brown reviewed the results of the EMG/NCS and added an Addendum to his report of December 15, 2010, noting the tests showed evidence of bilateral cubital tunnel syndrome. His recommendations stayed the same and Petitioner was to return in six to eight weeks. PX3.

On December 21, 2010, an Employer's First Report of Injury was completed. It noted date of injury was December 15, 2010, and diagnosis was bilateral carpal tunnel syndrome due to repetitive job duties of opening locks and doors. RX2, PX6. On December 25, 2010, Petitioner completed an Employee's Notice of Injury. He noted date of injury was December 15 and that he had reported the injury to his supervisor, Major Edwards, on December 16. He reported that both hands and arms became numb from "repetitive turning of keys for handcuffs, leg irons, waist chains, gates, doors, and various other padlocks in and around the correctional center

setting. RX1, PX6. On January 12, 2011, Major Edwards completed a Supervisor's Report of Injury. He indicated he had received notice of the injury on January 11 from Petitioner, who stated he was having numbness and tingling in his wrists and hands. There were no other details listed on the report. RX3, PX6. Major Edwards also completed a Demands of the Job Form on January 12, 2010. He indicated that Petitioner used his hands for 0 to 2 hours per day for gross manipulation (defined as grasping, twisting, and handling) and never used his hands for fine manipulation (defined as typing and good finger dexterity). He also indicated Petitioner lifted 1 to 10 pounds and 11 to 20 pounds 0 to 2 hours per day and never lifted anything heavier than 20 pounds. RX5.

On January 26, 2011, Petitioner returned to Dr. Brown and reported he continued to have numbness and tingling in his little and ring fingers bilaterally and weakness and decreased strength in both hands. On examination, he had good active range of motion of both arms. Tinel's sign was positive over the ulnar nerve at the cubital tunnels bilaterally and direct compression test/elbow flexion test was positive bilaterally. Dr. Brown's impression was chronic bilateral cubital tunnel syndrome, confirmed on nerve conduction studies. He noted, "Mr. Camp has had these symptoms now for the past nine years." He recommended ulnar nerve transposition, in that Petitioner had failed to respond to conservative measures. He recommended Petitioner continue with the elbow splints at night and the nonsteroidal anti-inflammatory medication, and continue to work full duty, no restrictions. The Arbitrator notes this is the final record from Dr. Brown or any other medical provider. PX3.

As Major Thompson testified to, he conducted a study on key usage at Respondent's facility. It was conducted on the 7:00 a.m. to 3:00 p.m. shift from Monday February 14, 2011, through Thursday February 17, 2011. The figures in the study were estimations based on visual observations, average inmate movement on the post, estimated amount of staff movement during the shifts, and the assumption that the institution was not on lockdown. Key use for second shift (Petitioner's shift) for R5 wing officers was estimated at 110 large and 20 small keys; for Rec/Seg officers it was estimated at 75 large and 15 small; and for General Population officers it was estimated at 55 large and 50 small. Saturday and Sunday key usage for second shift R5 wing officers jumped to 245 large and 70 small; Sunday usage for second shift Rec/Seg jumped to 245 L and 70 small; weekend usage for General Population did not change. RX10.

Respondent conducted two Job Site Analyses through CorVel, on December 17, 2010, and February 2, 2011, and DVD's and reports were generated for each analysis (RX11, RX12, and RX 9). The Arbitrator reviewed both videos and both reports. The videos showed officers demonstrating various tasks of a Correctional Officer, including keying of doors and chuckholes. The Arbitrator notes that use of the small keys did not appear to require as much strength as use of the large keys. The videos also depicted the condition of some of the chuckholes, which appeared to range from good to fair. RX11, RX12.

The Arbitrator notes that the accompanying reports include detail on work area, equipment, conditions, and job demands. With regard to **Strength Demands**, the "Medium" level was marked, which encompassed lifting 50 pounds maximum with frequent lifting and/or carrying up to 25 pounds. With regard to **Physical Demands**, it was estimated that "wrist turning" occurred on a frequent basis, defined as 2.5-5.5 hours per day/34%-66% of the day/33-

200 repetitions per day. The description for wrist turning was: "Related to opening doors and chuckholes with keys. Estimated up to 150 keys turned for day shift. Fewer for remaining shifts. There would be more key turns during lockdown." It was estimated that "finger manipulation" also occurred on a frequent basis. It was based on the post for the officer, and noted to include "control uses computer and mouse". It was estimated that "grasping" occurred on an occasional basis, defined as 0-2.5 hours per day/1%-33% of the day/1-32 repetitions per day. The description for grasping was: "Related to opening doors and chuckholes. Holding keys. Taking items off of belt. Hold radio when not on shoulder clip." It was estimated that "pinching", defined as "to turn key" also occurred on an occasional basis. RX9.

On August 1, 2011, a report was issued by Dr. James Williams of Midwest Orthopaedic Center following a records review at Respondent's request. He did not examine Petitioner. He reviewed the following documents in preparing his report:

1. Employer's First Report of Injury
2. Employee's Notice of Injury
3. Supervisor's Report of Injury
4. Roster Management Sheet from November 2009 through December 31, 2011.
5. Dr. Brown's notes of December 15, 2010, with addendum, and January 26, 2011.
6. Dr. Phillips' report of the nerve conduction studies.
7. Job site analysis conducted by CorVel, including the videos and reports.
8. Job description of a Correction Officer.
9. Estimation of Key Usage report

After reviewing all of the information, Dr. Williams opined, "I see no way how any of these activities could be either contributing to or aggravating the condition of cubital tunnel syndrome. I do not feel that the job of a Pinckneyville Correctional Center Officer is in any way related to Mr. Camp's development of cubital tunnel syndrome." He noted that the officers were constantly changing job duties and that, although they do turn a lot of keys, there was significant rest and recovery time between cells as they moved from one to another. He further noted there was no significant vibration or impact and no significant repetitive use. RX7.

Dr. Williams noted that Dr. Brown stated Petitioner turned 200 keys in an hour and then stated that that for the entire day he turned 400, which did not correlate. He referred to the nerve conduction study by Dr. Phillips, which noted that the main time Petitioner got numbness and tingling in his left hand was when he flexed his left arm and placed it behind his head. He believed this was an activity Petitioner would do at night as was unaware of a time he would be doing this at work. He opined that these nighttime activities were aggravating the symptoms, which were primarily in his left arm. He noted Petitioner was right-handed and that he would be turning the keys with his right hand. Dr. Williams pointed out that Petitioner was hypertensive and a smoker, both of which were contributing factors in the development of carpal and cubital tunnel syndrome. He further noted Petitioner's family history of diabetes, though it did not appear Petitioner had been tested himself. RX7.

Dr. Williams concluded that Petitioner's other medical factors contributed to the development of his cubital tunnel syndrome, rather than his work duties. The nerve conduction studies showed the condition was more severe in his left, non-dominant arm. Whereas, the dominant right arm showed only very mild slowing, on the lower limits of normal and only

borderline abnormal. Dr. Williams noted that Petitioner would have primarily used his right arm to turn keys at work, as that was his dominant arm, and the study was not even definitive for cubital tunnel syndrome on the right. He concluded, "The left is his non-dominant arm and it was affected much more and he is not turning keys with the left, just dominant right. This leads me to believe without a doubt that his work is not contributory to his development of his cubital tunnel syndrome." RX7.

Dr. Williams testified by way of deposition on January 25, 2012. He is a Board Certified Orthopedic Surgeon with special certification in hand surgery. He sees 5,000 to 5,500 patients a year, performs 600 to 650 surgeries a year, and performs about 100 Independent Medical Examinations a year. At least 95% of his practice is treating patients versus IME's. He performs 150 to 200 carpal tunnel surgeries and about 100 to 150 cubital tunnel surgeries a year. He explained that risk factors for cubital tunnel syndrome include: (1) medical etiologies of diabetes, hypertension, and thyroid dysfunction; (2) environmental etiologies of vibratory work, impact work, and work that requires excessive flexion of the elbows for a long period of time; and (3) congenital etiologies of anomalies muscle and subluxation of the nerve. RX7.

Dr. Williams reiterated the records he reviewed in formulating his opinions with regard to Petitioner, including the history he gave to Dr. Brown. He testified Petitioner's diagnosis was significant left side cubital tunnel syndrome. On the right side, he had had some inflammation, but Dr. Williams opined, "I don't know if you'd classify it as cubital tunnel." RX7.

Dr. Williams testified he was familiar with the job duties of a correctional officer at Pinckneyville Correctional Center and that he had personally toured the facility. He testified that Petitioner's cubital tunnel syndrome was not caused or aggravated by his duties as an officer at the facility. He based his opinion on the fact that Petitioner was right-handed and turned the keys with his right hand, yet his condition was worse on the left side. Further, he was hypertensive and a smoker, both of which could contribute to the development of compression type neuropathies. Finally, the key turning study elaborated that there was quite a bit of rest in between turning the keys, and it was not found to be something that was significant or contributory to the condition. Dr. Williams testified that Petitioner did not have any physical findings or nerve conduction evidence consistent with carpal tunnel syndrome. He agreed with the need for cubital tunnel surgery on the left, but reiterated that any treatment was not causally connected to Petitioner's job duties. He further testified that Petitioner had several co-morbid factors which would predispose him to the development of carpal tunnel syndrome, including his hypertension and history of being a smoker. RX7.

On cross-examination, Dr. Williams acknowledged that Respondent's videos did not contain duties specific to a segregation officer and that he rendered an opinion concerning the job duties of a general correction officer and not for an individual who spent a great deal of time working in the segregation unit. He conceded that he did not know whether chuckholes were difficult to open, whether inmates damaged the chuckholes, or whether officers must forcibly operate the chuckholes due to their condition. He did not have information as to whether Petitioner performed property box checks or cell searches, or information regarding Respondent's facility going on lockdown. He conceded that based on the activity estimates in the Job Site Analyses, the activities could be an aggravating factor in the development of carpal

tunnel syndrome, but did not believe it would be aggravating factor in the development of cubital tunnel syndrome. RX7.

Dr. Brown testified by way of deposition on June 24, 2016. He is a Board Certified Plastic and Reconstructive Surgeon with a subspecialty in hand surgery. He limits his practice to taking care of patients with problems in the hand, wrist, and elbow. He sees 120 to 125 patients a week and performs 15 to 20 surgeries a week, including cubital tunnel surgery. Independent medical evaluations, second opinions, and depositions make up less than 10% of his practice. The majority of his referrals come from insurance companies, occupational medicine clinics, employers, defense firms, and a smaller percentage from claimant attorneys. He has performed independent medical evaluations at the request of the State of Illinois. PX7.

Dr. Brown testified that occupational risk factors that lead to the development of cubital tunnel syndrome include repeated or prolonged elbow flexion, forceful turning, twisting of the wrist which involves muscles that attach to the inside of the elbow and can place pressure on the ulnar nerve, leaning on the elbow, and vibration exposure. PX7.

Dr. Brown testified he reviewed Respondent's material pertaining to Pinckneyville Correctional Center, including the Job Site Analyses (RX9), the DVD's (RX11, RX12), and the Estimation of Key Usage (RX10). The Arbitrator notes that Dr. Brown testified to also having reviewed deposition testimony from the locksmith (unnamed) at Pinckneyville, the lieutenant (unnamed) "that toured Dr. Williams", and "several other correctional officers (unnamed) that worked there for more than 10 years". There was no information regarding the identity of the individuals, when their depositions were taken, or whether they were taken in relation to this case or another, unrelated, case. Respondent objected to any testimony regarding these depositions. Petitioner responded that the individuals would be subpoenaed as witnesses at arbitration and it was expected that their trial testimony would be the same as their deposition testimony. Petitioner asked that the Arbitrator consider Dr. Brown's consideration of and reliance upon said depositions. The Arbitrator notes that Petitioner did not call any of these witnesses to testify at trial. Respondent's objections to Dr. Brown's testimony with regard to these depositions were sustained, and the Arbitrator has not considered said testimony. PX7.

With regard to Petitioner's physical examination and findings, the history he provided, the diagnosis of bilateral cubital tunnel syndrome, and his treatment recommendations, Dr. Brown testified consistent with his treating records. Petitioner did not advise how long he had been an officer at Pinckneyville, but Dr. Brown testified, "I found out later from the various other records I viewed he'd been there for about a decade." He testified that in his medical practice he had treated other correctional officers from Pinckneyville and believed he had a good understanding of what was required of such an officer. Dr. Brown testified that Petitioner did not have any non-occupational risk factors that would contribute to the development of his cubital tunnel syndrome and did not list any hobbies or activities that would be a risk factor in the development of the condition. PX7.

With regard to Respondent's Job Site Analyses (RX9), Dr. Brown testified that they describe a significant amount of keying that is performed. He noted that "correctional officers are keying inmates out of cells 199 times per shift, and after keying them back, that would

double that". He also noted that wrist-turning related to opening doors and chuckholes with keys was estimated to be 150 times per shift, with more turns during lockdown. The Analyses stated the facility was on lockdown 90 days in 2010 or 25% of the time, and that during lockdown there was more keying because the officers have to pass everything to the inmates through the chuckholes. With regard to Respondent's Estimation of Key Usage (RX10), Dr. Brown testified the study showed a lot of keying was done at the facility and that the average amount was 220 times per day. He noted the study did not take into account increased keying due to overtime, working a double shift, or working more than one post. With regard to Respondent's DVD's (RX11, RX12), Dr. Brown noted in particular that it demonstrated the amount of keying involved in an inmate's showering was 12 times. PX7.

Dr. Brown testified that over the course of one to two decades Petitioner "was exposed to abnormal occupational forces on his upper extremities of turning locks in keys and doors, gates, chuckholes, handcuffs, leg irons, waist chains, up to 400 times per day". He testified that based on Petitioner's job description, the duration of his exposure, and the lack of any significant non-occupational risk factors, Petitioner's cubital tunnel syndrome was at least aggravated by his job. He disagreed with Dr. Williams' opinion that Petitioner's condition was attributable to his nighttime activities, hypertension, smoking, and other medical factors. He testified that recent medical literature did not show that sleeping or nighttime activities contributed to, aggravated, or caused cubital tunnel syndrome, or that hypertension or smoking was a risk factor for carpal tunnel syndrome. He also disagreed with Dr. Williams' belief that Petitioner would not be turning keys with his left hand, yet conceded that Petitioner did not specify during treatment whether he used both extremities in his work activities. PX7.

On cross-examination, Dr. Brown acknowledged that Petitioner was referred to him by Jimmy Phillips, a former patient of his and a former client of Petitioner's counsel. He testified that Petitioner completed a New Patient Questionnaire while in the waiting room prior to his first appointment. He acknowledged that, although Petitioner marked he was being seen for a work-related injury, he had not yet been diagnosed with any condition, including a work-related condition. He further acknowledged that Petitioner described his hands and arms going to sleep when propped up and every night when going to sleep, when propped behind his head. He conceded that Petitioner did not specifically state that he experienced numbness and tingling when he keyed doors, but stated he did not interpret that to mean that the only time Petitioner was getting symptoms was when he was sleeping. Dr. Brown admitted that he did not know what shift Petitioner worked or what Petitioner's job posts or assignments were, and further conceded that a correctional officer's duties can change based on their shift and job post. PX7.

Dr. Brown testified he did not consider hypertension or smoking to be important risk factors for cubital tunnel syndrome, but did admit that Petitioner's age would be considered a risk factor. He testified he did not ask Petitioner about his hobbies, which were listed on the Questionnaire as gardening and farming. He admitted that he made an assumption that those were unlikely to be important risk factors, and conceded he would need to know more information to know whether they could have contributed to the development of his cubital tunnel syndrome. Dr. Brown admitted that he also made an assumption that Petitioner used both arms in his job, and conceded that Petitioner did not report that to him. Petitioner also did not report the extent to which he was affected by any of the lockdowns. Dr. Brown acknowledged

that at the time he gave his initial opinion regarding causation on December 15, 2010, he did not have the Job Site Analyses, the DVD's, or the key usage study, and that he based his opinion solely on the information provided by Petitioner at that time. PX7.

Dr. Brown agreed it had been approximately five-and-a-half years since he had seen Petitioner and that he had no idea how he was currently doing. He testified he was not aware of Petitioner ever contacting his office to schedule surgery, nor was he was aware of Petitioner asking for a referral to another surgeon that took his group health insurance. PX7.

Respondent's Exhibit 6 is the Roster Management/Staff Assignment History for Petitioner from April 11, 2009, through the date it was printed on June 24, 2011. His shift was consistently 3 p.m. to 11 p.m. and his days off were Tuesday and Wednesday.

1. For the period of April 11, 2009, through January 20, 2010, Petitioner's post was Zone 1 and 2 Sergeant and he worked five days a week.
2. For the period of January 21, 2010, through October 31, 2010, Petitioner's post was Maingate Sergeant and he worked five days a week.
3. For the period of November 1, 2010, through March 11, 2011, Petitioner's post was Zone 6 Sergeant on Sunday, Monday, and Thursday; and Zone 5 Sergeant on Friday and Saturday (Relief Officer).
4. For the period beginning March 12, 2011, and forward, Petitioner's post was Maingate Sergeant on Thursday and Zone 1 and 2 Sergeant on Sunday and Monday. It is unclear whether Petitioner worked only three days a week at that time, as opposed to the previous five days a week.

CONCLUSIONS OF LAW

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

In support of the Arbitrator's decision relating to issue (O), the admissibility of Petitioner's Exhibit 9, the Arbitrator finds the following:

Petitioner proffered the evidence deposition of Jason Thompson taken on October 5, 2011. The deposition was taken and tendered for use in an unrelated case, Jimmy Phillips, a/k/a "Correctional Officer", et.al., v. State of Illinois/Pinckneyville Correctional Center, 10 WC 23567. Respondent objected to its admission on the basis of hearsay, and the Arbitrator reserved ruling at the time of the hearing. Jason Thompson was available to testify in the case at bar, and in fact did so.

The Arbitrator notes that the Commission recently addressed similar issues in *Stephen Bradshaw v. State of Illinois/Menard Correctional Center*, 14 IWCC 0394, and *Dustin Bowles v. State of Illinois/Pinckneyville Correctional Center*, 14 IWCC 0842. In both cases, the Commission ruled that depositions taken and tendered for use in an unrelated case were hearsay and inadmissible.

The Arbitrator finds that the deposition testimony of Jason Thompson is inadmissible hearsay as it relates to the case at bar. Petitioner's Exhibit 9 is therefore rejected.

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 Worker's 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).

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. Simply because an employee's work-related injury is gradual, rather than sudden and completely disabling, should not preclude protection and benefits. The Act was intended to compensate workers who have been injured as a result of their employment. 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. An employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 529-530 (1987). See also *Durand v. Industrial Comm'n*, 224 Ill.2d 53 (2006).

There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. *Hines v. Industrial Comm'n*, 356 Ill.App.3d 186, 193-194 (2nd Dist. 2005).

The Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained repetitive injuries to both arms that arose out of and in the course of his employment with Respondent. In so concluding, the Arbitrator finds significant Respondent's own Estimation of Key Usage, Job Analyses, and DVD's filmed onsite, all of which established a high volume of key turning as well as wrist movement associated with opening and closing cell doors and chuckholes.

Key use for second shift for R5 wing officers was estimated at 110 large/20 small keys; for Rec/Seg officers 75 large/15 small; and for General Population officers 55 large/50 small. Saturday and Sunday key usage for second shift R5 wing officers jumped to **245 large/70 small**; Sunday usage for second shift Rec/Seg also jumped to **245 large/70 small**; weekend usage for General Population did not change. The Roster Management/Staff Assignment History documents that Petitioner worked second shift Thursday through Monday, with Tuesday and Wednesday off. Given the estimated key usage above, he was thus exposed to an even higher number of key turns, in that his normal work week included Saturdays and Sundays.

Turning to the medical testimony, Dr. Williams opined that Petitioner's cubital tunnel syndrome was not caused or aggravated by his duties with Respondent, specifically the keying activities, giving three bases for that opinion. First, Petitioner was right hand dominant and would be turning keys with his right hand, yet he had more significant cubital tunnel findings on his left side. Dr. Williams was unable to reconcile those two facts. Second, Petitioner's hypertension and smoking habit were contributing factors in the development of his condition. Third, the key turning study elaborated that there was quite a bit of rest in between turning the keys and he did not find the activity to be significant or contributory based on the study. He conceded, however, that his opinion was rendered based on the job duties of a general correction officer and he not give consideration to the duties of a segregation officer. He did not meet or examine Petitioner or discuss with him any details of his duties, shift, or posts.

Dr. Brown testified that activities that lead to the development of cubital tunnel syndrome include repeated or prolonged elbow flexion, forceful turning, leaning on the elbow, and vibration exposure. In addition, twisting of the wrist, which involves muscles that attach to the inside of the elbow and can place pressure on the ulnar nerve, can also lead to cubital tunnel syndrome. Dr. Brown referenced the Job Site Analyses, which described that correctional officers perform a significant amount of keying. He noted up to 200 inmates are keyed out and then keyed back in, making 400 iterations of keying activity. In addition, wrist-turning related to opening doors and chuckholes was estimated to be 150 times per shift. Dr. Brown opined that Petitioner's sleeping habits, hypertension, and smoking were not significant in the development of his cubital tunnel syndrome.

The Arbitrator is not convinced that either Dr. Williams or Dr. Brown had a specific and detailed understanding of Petitioner's individual history. Rather, it appeared both doctors made general assumptions about Petitioner, which may or may not have been valid, and both doctors drew upon their general knowledge of Respondent's facility. The Arbitrator, therefore, relies heavily upon the testimony of Petitioner and Major Thompson, both of whom were found to be exceedingly credible and forthright regarding Petitioner's daily duties as a correctional officer. The Arbitrator also relies upon the Job Analyses, DVD's, and key study, all of which establish a high volume of key turning as well as wrist movement associated with opening and closing of cell doors and chuckholes. In addition, the Arbitrator finds Dr. Brown to be more persuasive than Dr. Williams with regard to the activities that lead to the development of cubital tunnel syndrome and his conclusions regarding Petitioner.

Based on the foregoing and the record in its entirety, the Arbitrator finds Petitioner met his burden of proof in establishing by a preponderance of the evidence that an accident occurred which arose out of and in the course of his employment.

In support of the Arbitrator's decision relating to issue (D), the date of the accident, and (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds the following:

An employee suffering from a repetitive trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Durand v. Industrial Comm'n*, 224 Ill.2d 53, 65 (2006).

The Arbitrator finds Petitioner's date of accident is December 15, 2010. In so concluding, the Arbitrator finds significant that this was the date Petitioner underwent the EMG/NCS by Dr. Phillips. The tests revealed bilateral cubital tunnel syndrome, left worse than right, and he was informed by Dr. Brown that the condition was related to his work as a correctional officer. Petitioner testified this was the first date he was ever tested for any type of bilateral compression neuropathy. There is no evidence to suggest that such testing had previously been done, nor that a diagnosis had previously been made. He reported a worker's compensation injury to Respondent on or before December 21, 2010, as that is the date on the Employer's First Report of Injury. Timely notice was therefore given to Respondent.

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

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Comm'n*, 260 Ill.App.3d 551, 553 (1st Dist. 1994). 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.App3d 681, 685 (1st Dist. 1994).

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that his current complaints with regard to his bilateral upper extremities are causally related to his accident of December 15, 2010. In so concluding, the Arbitrator finds significant the minimal treatment Petitioner sought following the accident and the lack of any treatment whatsoever from January 26, 2011, through August 25, 2016, the date of the hearing, a period of more than five and a half years.

Following the accident, Petitioner's medical treatment consisted of only two office visits and the diagnostic EMG/NCS, on December 15, 2010, and January 26, 2011. Though he was given a diagnosis and treatment recommendation at that time, he chose not to follow up with his physician, for reasons known only to him. He continued working as a correctional officer until his retirement in 2012, and still chose not to follow up with his physician. He candidly testified that he had not sought any treatment since January 26, 2011.

The Arbitrator finds that the initial minimal treatment, followed by a lack of any treatment for more than five and a half years, simply does not support a finding that Petitioner's current complaints are related to his work accident. Based on the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that his current condition of ill-being and need for treatment are causally related to his work accident of December 15, 2010. The Arbitrator further finds that Petitioner reached maximum medical improvement on January 26, 2011, that being the second and final treatment by Dr. Brown.

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:

In light of the Arbitrator's findings above with respect to issues (C), (D), and (E), the Arbitrator finds that medical services rendered on December 15, 2010, and January 26, 2011, were reasonable and necessary in Petitioner's care and treatment relative to his accident of December 15, 2010. The Arbitrator finds that Respondent is liable for the following outstanding medical bills, as set forth in Petitioner's Exhibit 1, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

1. Dr. David Brown/The Orthopedic Center of St. Louis in the amount of $1,363.00, for dates of service December 15, 2010, and January 26, 2011.
2. Dr. Daniel Phillips/Neurological & Electrodiagnostic Institute in the amount of $2,070.00, for date of service December 15, 2010.

TOTAL AMOUNT $3,433.00

The parties stipulated and the Arbitrator finds that Respondent is entitled to credit for all payments previously made to providers, including those made 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 findings above with respect to issue (F), the Arbitrator finds that Petitioner is not entitled to ongoing medical care.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joseph Boyles,

Petitioner,

vs.

NO: 15 WC 20033

17IWCC0756

Caterpillar, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering all of the issues, and being advised of the facts and law, reverses the decision of the arbitrator. The Commission adopts the statement of facts contained in the arbitrator's decision but substitutes the findings that follow, with additional facts added to the findings where necessary.

Findings

In this case, the parties dispute (1) whether Petitioner's injury arose out of and in the course of his employment with Respondent and was caused by his employment with Respondent; and if so, (2) whether Petitioner is entitled to medical expenses, (3) whether and to what extent Petitioner is entitled to temporary total disability (TTD) benefits, and (4) whether and to what extent Petitioner is entitled to permanent partial disability payments.

The Commission begins with the first issue, regarding whether Petitioner's current condition of ill-being arose out of and in the course of and is causally related to his employment. An employee who suffers a gradual injury due to repetitive trauma is eligible for benefits under the Act, but he must meet the same standard of proof as a petitioner alleging a single, definable accident. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879 (1999). "The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that the injury arose out of and in the course of employment, and that involves as an element a causal connection between the accident and the condition of claimant." *Cassens Transp. Co. v. Indus. Comm'n (Shaw)*, 262 Ill. App. 3d 324, 330 (1994). A petitioner must "meet the burden of proving that the injury was work related and not the result of normal degenerative aging processes." *Id.* "[A]ggravation or acceleration of a preexisting condition is recoverable

unless the employee's health has deteriorated to the point that any normal daily activity is an overexertion or the activity engaged in presented no greater risks to the employee than those to which the general public is exposed." *Id.* at 331.

Here, Petitioner asserts that his right shoulder condition was caused by the repetitive stress of his work for Respondent. Asked at the hearing to describe his duties in his current and immediately preceding role, Petitioner explained that he would "assemble the parts in the tack fixture, make sure they are touching all the locators, prep any parts that needed stuff welding on before [he] put them in the tack fixture. [He] would tack the part together, pull it out." (Arb. Trans. P 19). He said he would hand weld radiator guards and then buff the tie ends. (Arb. Trans. P 19). He also said that he worked as a tacker, a role that required him to affix nuts, perform hinging, tighten parts with ratchets or bar knobs, and weld parts together. (Arb. Trans. P 21).

Petitioner listed his tools as including welding guns, grinders, impact guns, hand ratchets, a wire wheel for cleaning welds, an air arc for cutting metal, fixture jigs, air motors, and weld cables for operating welding guns. (Arb. Trans. P22-24). He testified that he typically held welding equipment near the level of his chest area or perhaps to his shoulder area, around 90 or 100 degrees. (Arb. Trans. P24). He said that he sometimes welded above his head, depending on the body positioning he felt best placed him to perform the work. (Arb. Trans. P25). For the vibrating air tools, such as grinders, buffers, and air arcs, Petitioner testified that he held devices anywhere from waist high (60 degrees) to slightly above shoulder high (110 degrees), depending on the situation. (Arb. Trans. P27, 32). Petitioner testified that he held impact guns at chest level, or 75 degrees. (Arb. Trans. P33). He said that he used ratchets at shoulder level and used wrenches anywhere from stomach to shoulder level. (Arb. Trans. P35-36).

Tying those activities into his job duties, Petitioner testified that working on slabs (a task that involved tightening and untightening 15 bolts and doing "a little bit" of welding) took him approximately one hour per slab (Arb. Trans. P37-38), that building a dam (a task that involved welding and grinding) took approximately 2 hours (including 90 to 115 minutes of prep work) (Arb. Trans. P38-40), and that case tacking (a task that required him to weld, add and hammer weld nuts) took approximately two hours per part (Arb. Trans. P42-43). He also described a lift cylinder task that required him to place approximately 40 weld nuts and then weld; he said that task took 45 to 60 minutes per part. (Arb. Trans. P44-46). Finally, he described what he said is a now outmoded task in which he took 45 minutes to an hour welding a different type of slab. (Arb. Trans. P47). Overall, Petitioner testified that 10 to 15 percent of his work was performed above shoulder level, and 60 to 75 percent was performed above the 60-degree (navel) level. (Arb. Trans. P50). Petitioner's supervisor, Rustin Pattenaude, testified that Petitioner's description of his work was "fairly accurate" (Arb. Trans. P135) or "accurate" (Arb. Trans. P137-38).

Petitioner's treating physician, Dr. Rhode, opined that Petitioner's condition is causally related to Petitioner's job duties. (PX8, PX14). He explained that repetitive awkward positioning, including postures that require a reach of 60 degrees or higher, can lead to rotator cuff disease but that even lower-degree positions can cause stress on the shoulder. Dr. Rhode's opinion is supported by Petitioner's testimony relating his pain and fatigue to his work (Arb. Trans. P51-52) and the fact that, upon returning to work, Petitioner felt pain with increased activity (PX8).

17IWCC0756

Against this evidence, Respondent offers the testimony and opinions of its environmental health professional, Jason Labeda, and its retained medical expert, Dr. Paletta. Labeda opined based on a force analysis and literature that Petitioner's working at angles calculated by Labeda would have caused him little risk over an eight-hour period. (Arb. Trans. P92, 105). Petitioner, however, does not claim an injury incurred over an eight-hour period; he attributes his injury to repetitive stressful movements over the course of at least several months. Thus, Labeda's opinions do not effectively undercut Petitioner's causation evidence. Similarly, as Petitioner points out, to reach his opinion that Petitioner's injury is not work-related, Dr. Paletta assumed that Petitioner's work was not above shoulder level. Petitioner's credible testimony to the contrary renders that assumption untenable, and Dr. Paletta's opinion unpersuasive.

For these reasons, the Commission concludes that Petitioner proved that his shoulder condition is causally related to his work.

The second issue raised by the parties—whether Petitioner's medical expenses are compensable—turns entirely on the question of whether those expenses are related to a workplace accident. Because the Commission finds that his injury was tied to a workplace accident, the Commission also finds that the related medical expenses are compensable. The Commission therefore awards Petitioner's medical expenses, subject to the fee schedule.

The third issue in this case is the amount of TTD to which Petitioner is entitled. An injured employee is entitled to TTD "from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of injury will permit. [Citations.] To be entitled to TTD benefits, it is the claimant's burden to prove not only that he did not work but also that he was unable to work." *Holocker v. Ill. Workers' Comp. Comm'n*, 2017 IL App (3d) 160363WC, ¶ 34. As with the previous issue, the parties' dispute regarding TTD centers on whether Petitioner is entitled to any benefits at all or whether his condition is not work-related. Because the Commission finds that it was, Petitioner is entitled to TTD benefits for the time the injury left him was unable to work. The evidence shows that Petitioner was unable to work from May 21, 2015, through September 10, 2015, then again from September 23, 2015, to December 3, 2015. In total, then, Petitioner is entitled to 26 1/7 weeks of TTD, at a rate of $538.13 per week, a figure that represents the equivalent of 66 2/3% of his $807.20 average weekly wage. See 820 ILCS 305/8(b).

The final issue in this case is the extent to which Petitioner is entitled to PPD. The accident at issue occurred on May 18, 2015. Effective September 1, 2011, section 8.1b of the Act requires that the Commission base its determination of permanent partial disability on five factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. The Act states that "... [n]o single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." 820 ILCS 305/8.1b(b). The relevance and weight of each of the factors is explored below.

The first factor weighs in Respondent's favor; Petitioner received a 0% impairment rating in Dr. Rhode's report. (PX13). The second factor, the occupation of the injured employee, weighs in Petitioner's favor, as his occupation clearly involves physical demands. Petitioner's age—he was 31 years old at the time of his injury—weighs strongly in his favor. On the fourth factor, decreased earning capacity as a result of his injury, Petitioner testified that he returned to his prior job, albeit with pain; the Commission therefore accords this factor some weight in Respondent's favor. The fifth factor weighs in Petitioner's favor. Petitioner's disability is well corroborated by treating medical records.

The determination of permanent partial loss of use of a member is not capable of a mathematically precise determination, and estimation of partial loss is peculiarly the function of the Commission. *Steak 'N Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC (citing *Pemble v. Industrial Commission*, 181 Ill.App.3d 409, 417 (1989)). In all, Petitioner's injury has left him, at a relatively young age, with continued shoulder pain that he must endure in order to continue to perform his job. In light of the statutory factors, the Commission finds that Petitioner is permanently disabled to the extent of 10% of his person as a whole. That percentage triggers benefits in the amount of 60% of his average weekly wage (see 820 ILCS 305/8(b)2.1) for 10% of 500 weeks (see 820 ILCS 305/8(d)2), or, in this case, $484.32 per week for a period of 50 weeks.

As a final issue, the Commission denies Petitioner's request for penalties against Respondent. The imposition of penalties requires a finding that the respondent's defense has been unreasonable or vexatious (820 ILCS 305/16, 19(k); *McMahan v. Indus. Comm'n*, 183 Ill. 2d 499, 515 (1998)) or a delay it caused to have been without good cause (820 ILCS 305/19(l)). The Commission finds that Respondent presented and relied on a reasonable defense in this case.

Conclusion

The Commission finds:

- On May 18, 2015, Respondent was operating under and subject to the provisions of the Act.
- On that date, an employer-employee relationship did exist between Petitioner and Respondent.
- On that date, Petitioner did sustain an accident that arose out of and in the course of his employment with Respondent.
- Timely notice of the accident was given to Respondent.
- Petitioner's current condition of ill-being is causally related to the accident.
- In the year preceding the injury, Petitioner earned $41,974.40; the average weekly wage was $807.20.
- At the time of the injury, Petitioner was 31 years of age, married with one child under 18 years of age.
- 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 $12,280.49 for other benefits, for a total credit of $12,280.49.

17IWCC0756

- Respondent is entitled to a credit under Section 8(j) of the Act for any benefits paid under that section.
- Respondent shall pay Petitioner TTD benefits of $538.13 per week for 26 1/7 weeks, for the periods covering May 21, 2015, through September 10, 2015, and September 23, 2015, to December 3, 2015.
- Respondent shall pay Petitioner PPD benefits of $484.32 per week for a period of 50 weeks.
- Respondent shall pay all reasonable and necessary medical expenses, subject to the fee schedule.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 6/14/16 is reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner TTD benefits of $538.13 per week for 26 1/7 weeks.

IT IS FUTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner PPD benefits of $484.32 per week for 50 weeks.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all reasonable and necessary medical expenses, subject to the fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and fees is denied.

Bond for the removal of this cause to the Circuit Court 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:
o:10/30/2017 NOV 29 2017
TJT/knc
51

Thomas J. Tyrrell

Michael J. Brennan

17IWCC0756

DISSENT

I respectfully dissent from the decision of the majority reversing case. I would affirm and adopt Arbitrator Gallagher's findings. I find the decision to be well reasoned. Great weight should be placed on Arbitrator Gallagher's specific findings that Petitioner is lacking in credibility. The Arbitrator's findings are persuasive and well grounded in the record. I would affirm the decision.

Kevin W. Lamborn

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

Nick Arena,

Petitioner,

vs.

NO: 15 WC 3594

17IWCC0757

ADT Security,

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 July 26, 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.

17IWCC0757

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: NOV 29 2017
TJT:yl
o 11/7/17
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Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

ARENA, NICK
Employee/Petitioner

Case# **15WC003594**

ADT SECURITY
Employer/Respondent

17IWCC0757

On 7/26/2016, 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:

2208 CAPRON & AVGERINOS PC
MICHAEL A ROM
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
WILLIAM DEWYER
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

17IWCC0757

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Nick Arena
Employee/Petitioner

v.

ADT Security
Employer/Respondent

Case # **15** WC **003594**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Geneva**, on **May 11, 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 _____

17IWCC0757

FINDINGS

On the date of accident, **1/2/15**, 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 **$80,640.56**; the average weekly wage was **$1,550.78**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **4** dependent children.

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

Respondent shall be given a credit of **$15,064.32** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$N/A** **TTD is not an issue in the hearing.**

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

ORDER

- The Respondent shall pay reasonable and necessary medical services of $6,395.00 (Petitioner's Exhibits 4-6) as provided in Section 8(a) and 8.2 of the Act.

- The Respondent shall pay all reasonable and necessary medical expenses pursuant to Section 8(a) and 8.2 of the Act for the bilateral cubital tunnel decompression and possible ulnar nerve transposition as recommended by Dr. Howard Freedberg.

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.

Jessica C. Wyatt

Signature of Arbitrator

7-26-16

Date

ICArbDec19(b)

JUL 26 2016

17IWCC0757

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NICK ARENA, Petitioner, v.	)	
	)	15 WC 03594
ADT, LLC Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

STATEMENT OF FACTS

On January 2, 2015, the Petitioner alleges that bilateral upper extremity injuries manifested due to his repetitive work duties as an installer of residential home security systems for Respondent.

The Petitioner testified as to his varied work duties which included drilling holes and fishing wires through both masonry, wood and a variety of other surfaces as well as performing fine motor skills associated with both finished carpentry work and electrical work. Petitioner's work required the use of vibratory tools such as hand drills and hammer drills.

On January 2, 2015, Petitioner was performing an install which he could not complete due to significant numbness and tingling in both wrists. That day, Petitioner sought medical treatment at Occupational Health Centers of Illinois where he was seen by Dr. William Weaver. The medical records indicate that Petitioner presented with injury to his hands as a "result of repetitive work activity and work [that] involves a lot of pulling of wires and making connections and drilling using hand tools including screwdrivers and hammer drills (vibration)" (PX 2).

Petitioner was referred by his primary care physician, Dr. Jemini Ignacio, to Dr. Howard Freedberg whom he saw for the first time on January 6, 2015. On that day, an EMG was conducted which noted mild to moderate bilateral carpal tunnel syndrome. Dr. Freedberg recommended bilateral carpal tunnel surgery.

On March 30, 2015, Petitioner was examined by Dr. Leon Benson at the request of the Respondent. Dr. Benson found that Petitioner had bilateral carpal tunnel syndrome aggravated by the type of work that Petitioner performed, including the use of vibratory tools. (RX1, EX.2)

Petitioner underwent right carpal tunnel surgery on April 13, 2015 and left carpal tunnel surgery on June 13, 2015 at Ashton Center for Day Surgery. On June 9, 2015, Petitioner continued to complain of pain in his fourth and fifth fingers bilaterally. Dr. Freedberg indicated that a repeat EMG might be necessary if pain continued in the right ulnar nerve distribution. On August 4, 2015, Dr. Freedberg noted that Petitioner had cubital tunnel syndrome. The doctor recommended a right elbow cubital tunnel decompression and possible ulnar nerve transposition.

On August 10, 2015, Petitioner was re-examined by Dr. Leon Benson at the request of Respondent. Dr. Benson did not feel that the repetitive nature of Petitioner's job would cause ulnar nerve entrapment at the elbow and he was not convinced that Petitioner had ulnar nerve entrapment.

CONCLUSIONS of LAW

In support of the Arbitrator's decision relating to ("C") did an accident occur that arose out of and in the course of Petitioner's employment by Respondent and ("F") is Petitioner's current condition of ill-being causally related to the injury and ("K") is Petitioner entitled to any prospective medical treatment, the Arbitrator finds the following facts:

There is no dispute that Petitioner's need for bilateral carpal tunnel release is related to his work activity as an installer of residential home security systems. Both the treating physician, Dr. Howard Freedberg, and the independent medical examiner, Dr. Leon Benson, agree that Petitioner's job duties caused Petitioner's bilateral carpal tunnel syndrome. There is also no dispute as to Petitioner's job duties. Dr. Benson stated that the job description provided to him (PX 7 and RX 6) was consistent with what Petitioner described as his job activity. (RX 1, p.22) The sole dispute appears to be whether Petitioner's current complaints of pain in his fourth and fifth finger, diagnosed by Dr. Freedberg as cubital tunnel syndrome, are related to his job activities.

Dr. Freedberg stated in his treating medical records that Petitioner had ulnar nerve symptoms related to his work activity. Dr. Freedberg clarified in his deposition that he would forgo an EMG and proceed with the surgery based on the fact that Petitioner's clinical picture pointed to cubital tunnel. Dr. Freedberg stated:

> *He had a positive Tinel's at the cubital tunnel. He had pain radiating down from the cubital tunnel into the ring and little finger. And that's where his findings were located which is very classic for cubital tunnel.* (PX 8 p.12)

> *I respectfully disagree with Dr. Benson on causal connection. I felt the patient used vibratory tools constantly over the prior three years which I felt was a competent cause for the production of the ulnar nerve symptoms.* (Id. P.13)

The Arbitrator places more weight on the opinion of Dr. Freedberg than that of Dr. Benson. The Arbitrator notes that at no time did Dr. Freedberg or Dr. Benson indicate that "elbow pain" was required for a diagnosis of cubital tunnel syndrome. Dr. Benson never fully explained how Petitioner's job was sufficiently repetitive to cause carpal tunnel syndrome but would not cause cubital tunnel syndrome.

Regarding Respondent's claim that Petitioner was not actually at work when he developed ulnar nerve complaints (he was recovering from carpal tunnel surgery) Dr. Freedberg noted:

> *Two things. One can be that he was just masking cubital tunnel. In other words, the carpal tunnel was, you know, symptomatic enough that he wasn't concerned as much about the issues of numbness and tingling in the ring and little fingers. And of course without the EMG being positive I wasn't focused on that also.*

Number two is when you get these repetitive problems, they do take time to manifest itself. It doesn't manifest initially. It's not like an acute injury that someone sustains, these symptoms are manifested immediately because it's an acute issue." (PX 8 p.37)

Based upon the evidence contained in the record, including the credible testimony of Petitioner and Dr. Freedberg, the Arbitrator finds:

1. Petitioner suffered an accident that arose out of and in the course of employment;

2. Petitioner's bilateral carpal tunnel and cubital tunnel syndrome are causally related to Petitioner's work injury of January 2, 2015 and;

3. The Respondent shall pay all reasonable and necessary medical expenses pursuant to Section 8(a) and 8.2 of the Act for the bilateral cubital tunnel decompression and possible ulnar nerve transposition as recommended by Dr. Howard Freedberg.

In support of the Arbitrator's decision relating to ("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 the following facts:

Petitioner's exhibits number four through six consists of medical bills incurred by the Petitioner as a result of his work related bilateral ulnar nerve condition. Having found a compensable accident arose out of and in the course of Petitioner's employment the Arbitrator finds that the medical expenses are the responsibility of the Respondent pursuant to section 8(a) of the Act subject to the fee schedule under Section 8.2.

The Arbitrator finds that Petitioner is entitled to have and receive from the Respondent the sum of $6,395.00 for medical services incurred as a result of said accident.

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

Robert Woodard,

Petitioner,

vs. NO: 13 WC 14300

17IWCC0758

Illinois State Police,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 2017, is hereby affirmed and adopted.

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

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

NOV 29 2017

DATED:
TJT:yl
o 11/21/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WOODARD, ROBERT
Employee/Petitioner

Case# **13WC014300**

ILLINOIS STATE POLICE
Employer/Respondent

17IWCC0758

On 6/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.07% 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:

3269 SPIROS LAW PC
WILLIAM P SCHMITZ
2807 N VERMILION ST SUITE 3
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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

JUN 6 - 2017

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

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

17IWCC0758

Robert Woodard
Employee/Petitioner

v.

Illinois State Police.
Employer/Respondent

Case # **13** WC **14300**

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 Glaub**, Arbitrator of the Commission, in the city of **Herrin**, on **April 12th, 2017.** By stipulation, the parties agree:

On the date of accident, **8/27/11**, 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 **$65,383.24,** and the average weekly wage was **$1257.37.**

At the time of injury, Petitioner was **31** years of age, **married,** with **2** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $21,038.99 for TTD, $0 for TPD, $0 for maintenance, extended benefits paid from 8/28/11-8/31/11, 5/10/14-8/21/14 and, for a total credit of $21,038.99 .

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 permanent partial disability benefits of $695.78 for 25 weeks for 5% Person as a Whole for injuries to the lower back as provided in Section 8(d)2 of the Act, and an additional 7.59 weeks for 3% loss of use of the right arm for injuries to his right elbow as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

June 6, 2017
Date

JUN 6 - 2017

BEFORE THE ILLINOIS WORKER'S COMPENSATION COMMISSION

Robert Woodard,	)	17IWCC0758
Petitioner,	)	
vs.	)	No. 13 WC 14300
Illinois State Police,	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Herrin, Illinois on April 12, 2017. The parties agree that on August 27, 2011, Petitioner and Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act, and that their relationship was one of employee and employer. They agree that Petitioner sustained accidental injuries arising out of and in the course of his employment and that Petitioner gave notice of the accident within the time limits stated in the Act. The parties agree that Petitioner's current condition of ill-being is causally related to the claimed accidental injury and that respondent is liable for medical bills. They further agree that in the year pre-dating the accident petitioner earned $65,383.24 and his average weekly wage calculated pursuant to §10 was $1,257.37.

The sole issue in dispute is the nature and extent of the injury.

FINDINGS OF FACT

Petitioner, Robert Woodard, is a 36-year-old State Trooper for the Respondent, Illinois State Police. Petitioner has held this position for over five years and continues to do so at present. Petitioner testified that his duties include a variety of public safety functions, including, but not limited to, patrolling in a squad car, directing traffic, pursuing and physically restraining suspects, issuing citations, and making arrests. Petitioner testified his work duties are such that he may have to engage in violent altercations, should the same arise.

Petitioner testified that he did not have any lower back or right elbow conditions or symptoms prior to August 27, 2011. Petitioner testified that on that date, he was performing his work duties and directing traffic at the state fairgrounds in DuQuoin, Illinois. Petitioner testified he was wearing a reflective vest and was using a flashlight to direct the traffic. Petitioner testified that suddenly, he "felt a rush of energy" into his lower back. Petitioner testified that he felt himself fly through the air and hit the pavement. Petitioner testified that it took him a moment to realize what had happened,

and that he was informed by a fellow officer that he had been hit from behind by a pickup truck. Petitioner further testified that the impact of the truck threw him approximately ten feet before he hit the ground. Petitioner testified that the ground surface which he fell on after being struck by the pickup truck was either asphalt or some other hard surface. Petitioner testified that immediately after he was stuck by the truck, he felt pain in his right arm and that he noticed blood on his right arm, dripping from his hand.

Petitioner was transported by Pinckneyville Ambulance Service to Memorial Hospital of Carbondale. Petitioner presented to Dr. Mark Donvito in the Emergency Department at Memorial Hospital of Carbondale on August 27, 2011. (PX2, p. 8–25) The medical records reveal that Petitioner had right arm pain after being hit by a vehicle. (PX2, p. 9) Dr. Donvito diagnosed Petitioner with multiple contusions and ordered Toradol for treatment of Petitioner's symptoms (PX2, pp. 11, 25) Dr. Donvito also ordered X-rays, which were taken and did not reveal any fractures. (PX2, p. 20)

On August 28, 2011, Petitioner reported the August 27, 2011, work accident to his employer in writing. (RX1) In describing his injuries, Petitioner indicated the parts of his body affected as "lower back/tailbone area, right leg, [and] right arm." *Id.*

On August 30, 2011, Petitioner presented to Dr. Allison Jones at Carle Department of Occupational Medicine. (PX3, pp. 27–31) The medical records reveal Petitioner had lumbar pain, an elbow strain and contusion, as well as a right knee strain. (PX3, p. 29) Petitioner was given a TENS unit and ThermaCare packs and was released to regular work duty. (PX3, p. 30) Due to ongoing pain, Petitioner underwent additional X-Rays of his right elbow, which did not reveal any fractures. (PX4, p. 33)

On September 8, 2011, Petitioner returned to Dr. Allison for a reevaluation due to ongoing pain. (PX5, 36–40) The medical records from this date reveal that Dr. Jones diagnosed Petitioner with a left posterior rib strain and bone contusion. (PX5, p. 38) Petitioner underwent X-Rays of his chest, left lower ribs, sacrum, and coccyx, none of which revealed any fractures. (PX6, pp. 42-46) The medical records further reveal that Dr. Jones ordered an MRI, released Petitioner to regular work, and advised him to return for a recheck in two weeks. (PX5, p. 39)

On September 23, 2011, Petitioner saw Dr. Jones. (PX7, pp. 48–52) The medical records reveal Petitioner had residual pain in his right elbow, left posterior ribs, and lower back. (PX7, p. 50) The medical records further reveal Dr. Jones diagnosed Petitioner with a left posterior back strain and a right elbow strain and contusion. *Id.* Petitioner was referred to see an orthopedic doctor for a reevaluation of his right elbow. (PX7, p. 51).

On October 7, 2011, Petitioner presented to Dr. Paul Plattner at Carle Department of Orthopedics. (PX7, pp. 53–57) The medical records reveal that Petitioner

continued to have pain in his right elbow at the olecranon process. (PX7, p. 55) The medical records further reveal that upon examination and review of X-rays, Dr. Plattner diagnosed Petitioner with a right elbow contusion. *Id.* Dr. Plattner recommended Petitioner wear elbow pads to see if the elbow would heal with time or whether an MRI was warranted. *Id.*

On October 24, 2011, Petitioner returned to Dr. Jones at Carle Department of Occupational Medicine. (PX7, pp. 58–62) The medical records reveal that Petitioner had continued pain in his right elbow and lower back. (PX7, p. 60) The medical records further reveal that Dr. Jones diagnosed Petitioner with a right elbow strain and ordered a closed MRI of the right elbow. *Id.*

On November 22, 2011, Petitioner again presented to Dr. Jones. (PX7, pp. 63-67) The medical records reveal that Petitioner had continued pain and point tenderness in the area overlying the olecranon process of his right elbow. (PX7, p. 65) Petitioner's closed MRI for his right elbow was still scheduled but was pending approval by workers' compensation insurance. *Id.* Dr. Jones diagnosed Petitioner with a right elbow strain and contusion and again released him to work without restrictions. *Id.*

Petitioner testified that although he was released to work full duty, he continued to have symptoms including pain in his lower back and right elbow throughout 2012. Petitoner testified that he did not undergo an MRI of his right elbow after his November 22, 2011, meeting with Dr. Jones because the test was never approved by workers' compensation insurance. The medical records reveal that Petitioner was notified of Respondent's workers' compensation insurance company's refusal to authorize his right elbow MRI on January 23, 2012. (PX7, p. 68).

Petitioner testified that he did not get any other additional treatment from November 22, 2011, to June 1, 2012, because the same was not approved by workers' compensation insurance. Petitioner testified that his right elbow and lower back symptoms first emerged after the August 27, 2011, work accident and persisted during the period from November 22, 2011, to June 1, 2012. Petitioner testified that his symptoms were intensified by his regular work duties, such as riding for long hours in a squad car.

On June 1, 2012, Petitioner presented to Dr. William Scott at Carle Department of Department of Occupational Medicine. (PX8, pp. 71–77). The medical records from that date reveal that Petitioner had been suffering lower back pain over the four months prior. (PX8, p. 73) The medical records further reveal that Petitioner's back pain was increased with flexion and that he had continued sharp pain in his right elbow. (PX8, p. 74) The medical records also reveal that Dr. Scott diagnosed Petitioner with lower back pain and residual right elbow pain, and advised Petitioner to stay active and to allow his injuries to heal with time. *Id.*

Petitioner testified that following his visit with Dr. Scott on June 1, 2012, he continued to perform his work duties and other daily activities, but continued to suffer pain in his lower back and elbow.

On October 1, 2012, Petitioner presented to Dr. Stuart King at Christie Clinic. (PX9, pp. 79–92) The medical records from that date reveal that Dr. King diagnosed Petitioner with pain in his lumbar spine with left sided neurological symptoms. (PX9, p. 80) The medical records also indicate that Petitioner had no lumbar back problems until the work accident on August 27, 2011. *Id.* Dr. King offered pain medication but Petitioner declined because he did not want to take anything that would compromise his ability to perform his job. *Id.* Dr. King noted the need for updated images and ordered an MRI, which was still pending approval by workers' compensation insurance. *Id.*

On October 24, 2012, Petitioner returned to Christie Clinic and met with Dr. Daniel Lee. (PX10, pp. 94–95) The medical records reveal that Dr. Lee diagnosed Petitioner with low back pain and acknowledged that Dr. King ordered an MRI on October 1, 2012, which was still pending workers' compensation insurance approval. (PX10, p. 94) The medical records also reveal physical therapy was ordered through the Spine and Pain Clinic, and that too was awaiting workers' compensation insurance approval. *Id.* Dr. Lee instructed Petitioner to await approval for his treatment and to return as needed. (PX10, p. 95)

Petitioner testified that for approximately sixteen months after his October 24, 2012, visit with Dr. Lee, he continued to work and suffer back pain on a daily basis. He testified that he attempted to simply deal with his pain and that he did not seek treatment because his prescribed treatment was not approved by workers' compensation insurance.

On April 14, 2014, Petitioner underwent an MRI of his lumbar spine as ordered by Dr. Stuart King. (PX11, p. 97) The medical records reveal that the MRI was interpreted to reveal an L5-S1 diffuse posterior bulging with a high intensity zone. *Id.*

On April 24, 2014, Petitioner followed up with Dr. Stuart King at Christie Clinic. (PX12) The medical records reveal that upon review of the April 14, 2014, MRI, Dr. King diagnosed a bulging disc at L5-S1 and an annular tear at that same level. *Id.* Dr. King also diagnosed facet arthropathy. Petitioner was instructed to follow up in two weeks. *Id.*

On May 5, 2014, Petitioner followed up again with Dr. King at Christie Clinic. (PX12) The medical records reveal that Petitioner was advised to use caution in his activities of daily living and to not lift anything over 50 pounds. *Id.* The medical records further reveal that Dr. King recommended Petitioner undergo physical therapy for treatment of his annular tear. *Id.*

On May 14, 2014, Petitioner saw Dr. King at Christie Clinic. (PX12, p. 100) The medical records reveal Petitioner had a reduced range of motion with flexion of his lower back. *Id.* Dr. King recommended a functional capacity evaluation for a full and final determination of Petitioner's ability to function. *Id.*

On June 12, 2014, Petitioner underwent a functional capacity evaluation ("FCE") at Accelerated Rehab. (PX13, pp. 104–113) The FCE report reveals that the evaluation results were found to represent a true and accurate representation of Petitioner's physical capabilities and tolerances. (PX13, pp. 105–06) The FCE report reveals that Petitioner was unable to safely perform a job simulation of a perpetrator takedown without musculoskeletal compensation, and accordingly that Petitioner does not have all the physical capabilities to perform all essential job functions of a state trooper. *Id.* The FCE report reveals that an aggressive physical therapy program was recommended to treat Petitioner's lower back condition. *Id.*

On July 24, 2014, Petitioner presented to Dr. David Robson for an independent medical evaluation ("IME"). (RX2; PX15, pp. 115–120) The IME report reveals that leading up to the evaluation, Petitioner had been off work due to the findings from his MRI on April 14, 2014, and his FCE on June 12, 2014. (RX2; PX15, p. 115) The IME report reveals that Petitioner had been just dealing with the pain in his lower back and working through it. *Id.* The IME report reveals that Petitioner had lower back pain that was worse with bending backwards, after exercise, with fatigue, with twisting or turning, and in the morning. *Id.* The IME report reveals that Dr. Robson diagnosed Petitioner with a lumbar strain and internal disc derangement at L5-S1. (RX2; PX15, p. 119)

The IME report reveals that in answering the questions posed by Respondent regarding Petitioner's condition, Dr. Robson opined that Petitioner suffered a work accident on August 27, 2011, and sustained injury to his back. *Id.* Dr. Robson opined that Petitioner's diagnosis was internal disk derangement at L5-S1, and that the diagnosis was causally related to Petitioner's work accident of August 27, 2011. *Id.* Dr. Robson further opined that Petitioner's condition if ill-being at the time of the evaluation was causally related to his work accident of August 27, 2011. *Id.* Finally, the IME report also reveals that it was Dr. Robson's opinion that Petitioner's lumbar strain and internal disk derangement had not resolved and that he required physical therapy. *Id.*

On October 6, 2014, Petitioner presented to Accelerated Physical therapy for an initial physical therapy evaluation. (PX15, pp. 122–24) The physical therapy records reveal that Petitioner's MRI from April 14, 2014, was reviewed and his L4-L5 lateral disc bulge with foraminal stenosis and L5-S1 diffuse posterior disc bulge were noted. (PX15, p. 122) The physical therapy records further reveal that from October 6, 2014, until November 28, 2014, Petitioner attended a total of sixteen physical therapy sessions. (PX15, p. 135) The physical therapy records further reveal that Petitioner made progress with therapy and was discharged on November 28, 2014, with instructions to continue a home exercise program for maintenance. (PX15, p. 135–37)

17IWCC0758

On March 5, 2015, the parties deposed Dr. David Robson regarding his independent medical evaluation dated July 24, 2014. (PX22, pp. 156–198) Dr. Robson testified that Petitioner's internal disc derangement was related to the August 27, 2011, work injury. (PX22, p. 173) Dr. Robson further testified that at the time of the IME, he reviewed Petitioner's FCE report dated June 12, 2014. *Id.* Dr. Robson testified that he did not find anything inconsistent or unreliable contained within the FCE report. *Id.*

Dr. Robson testified that he recommended Petitioner undergo physical therapy after his IME, despite it being approximately three years from the date of injury, because he anticipated that physical therapy would help the Petitioner, even at that stage of his condition. (PX22, p. 174) Dr. Robson testified in his deposition testimony that Petitioner had a limited range of motion in his lumbar spine of 70 degrees, as opposed to 90 degrees, at the time of the IME. (PX22, p. 175) Dr. Robson testified during his deposition testimony that Petitioner indeed had a bulged disc at the time of the IME. (PX 22, p. 176) Dr. Robson testified that when he referred to "herniated nucleus pulposus" and "internal disc derangement" throughout his IME report, he was using those phrases synonymously with "herniated disc." (PX22, pp. 177–78). Finally, Dr. Robson testified that even though he did not meet with Petitioner until over three years after the injury, Petitioner still had limited range of motion in his lumbar spine, warranting additional treatment. (PX22, pp. 178–79).

Petitioner testified at arbitration that he continues to have symptoms in his lower back and right elbow because of the August 27, 2011, work accident. He testified that he suffers pain, stiffness, and soreness in his lower back. Petitioner also testified that he favors his right elbow, and that he must be careful when resting it on hard surfaces to avoid sharp pain. Petitioner further testified that long periods of sitting in his squad car causes stiffness, and that when he moves in a certain way he suffers a sharp pain in the lower left side of his lower back. Petitioner testified that he suffers pain on a regular basis and that he favors his back and approaches his job duties differently than he did before the August 27, 2011 work accident. Petitioner testified that certain duties of his job, such as physical altercations and making arrests, discomfort him due to his back injuries.

CONCLUSIONS OF LAW

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 Arbitrator first notes that the August 27, 2011, accident at issue predates the amendments to the Act that were enacted on September 1, 2011. Based upon the Arbitrator's findings in the sections above, the Arbitrator finds that Petitioner sustained accidental injuries diagnosed as a lumbar strain, annular tear, internal disc derangement, and a bulging disc at L5-S1, as well as a right elbow strain and contusion. Petitioner's initial treatment included a TENS unit and ThermaCare pack for his elbow injuries. Thereafter Petitioner endured ongoing lower back pain for a course of years with little treatment due to the failure of workers' compensation insurance to approve the MRI of his lower back. Ultimately, Petitioner underwent an MRI of his lumbar spine, which revealed diffuse posterior bulging disc at L5-S1. Petitioner eventually underwent a course of physical therapy to treat his lower back symptoms.

The Arbitrator notes Petitioner's credible testimony that his back symptoms improved from physical therapy and he is able to perform his current job duties. The Arbitrator further notes that Petitioner's testimony and the medical records consistently show he suffered and continues to endure both lower back pain and residual elbow symptoms because of the August 27, 2011 work accident.

The Arbitrator notes the radiologist who interpreted the MRI, the treating physician and the examining physician interpret the MRI films differently. The Arbitrator adopts the findings of the radiologist who opined that the films reveal a diffuse posterior bulging at L5-S1. The Arbitrator also notes that the diagnostic testing and the treating and examining physicians make no reference to any encroachment of any exiting nerve roots by the L5-S1 disc and that the petitioner tendered no subjective complaints of radiculopathy.

Based on the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in 5% loss of the person as a whole and 3% loss of use of his right arm.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Tangen,

Petitioner,

vs. NO: 14 WC 19578

17IWCC0759

Verizon Wireless,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 22, 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.

17IWCC0759

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: NOV 2 9 2017
TJT:yl
o 11/7/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

TANGEN, CHRISTOPHER
Employee/Petitioner

Case# **14WC019578**

VERIZON WIRELESS
Employer/Respondent

17IWCC0759

On 7/22/2016, 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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0011 LAW OFFICES OF EDWARD J KOZEL
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CHICAGO, IL 60604

17IWCC0759

STATE OF ILLINOIS)
)SS.
COUNTY OF LA SALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATRION DECISION

Christopher Tangen
Employee/Petitioner

v.

Verizon Wireless
Employer/Respondent

Case # **14** WC **19578**

An *Application for Adjustment 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 **Ottawa**, on **March 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. [X] Was timely notice of the accident given to Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [X] TTD
L. [X] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **January 8, 2014,** Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$40,411.24**; the average weekly wage was **$777.14**.

On the date of accident, Petitioner was **26** 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.

To date, Respondent has paid **$0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

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

ORDER

Petitioner failed to prove he sustained an accident on January 4, 2014 that arose out of and in the course of his employment with respondent.

Petitioner's claim is hereby denied and case is dismissed.

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 Moy

07/22/2016

Signature of Arbitrator — Date

ICArbDec p. 2

JUL 22 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Tangen	)	17IWCC0759
Petitioner,	)	
vs.	)	**No. 14 WC 19578**
Verizon Wireless	)	
Respondent.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter was heard on March 23, 2016 in Ottawa, Illinois. The parties agree that on January 8, 2014. The Petitioner and Respondent were operating under the Illinois Workers' compensation or Occupational Diseases Act, and their relationship was on of employee and employer. They agree that in the year pre-dating the accident petitioner earned $40,411.28 and his average weekly wage was $777.14.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accident injuries that arose out of and in the course of her employment;
2. Whether petitioner gave respondent notice of the accident within the time limits sated in the Act.
3. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
4. Whether respondent is liable for the unpaid medical bills totaling $31,891.48.
5. Whether petitioner is due TTD as claimed from June 3, 2014 to October 22, 2014.
6. What is the Nature and Extent of Injury?

STATEMENT OF FACTS

Petitioner testified he was employed by respondent as the store manager in Plano from September, 2013 through May, 2014. His duties as the store manage included maintaining and ordering store inventory, providing customer service and staffing. Petitioner supervised the two employees; Roger Clark and Maria Cardenez. Clark and Cardenez were employed full time and worked 39 hours a week. Petitioner needed to obtain permission from the district manage for Clark and Cardenez to work more than 40 hours a week as they would need to be paid overtime. Petitioner was not eligible for overtime as he was a salaried employee. Petitioner was required to work at least 42 to 45 hours a week.

On January 8, 2014, petitioner had not been scheduled to work. On January 8, 2014, respondent's store was to be open from 9 A.M. to 8 P.M. Clark was to work from 9 A.M. to 5:30 P.M. Cardenez was scheduled to work from 11:30 A.M. to 8 P.M. Cardenez called

petitioner on the morning of January 8, 2014 at about 9:30 or 10 A.M. and advised her car would not start. Petitioner testified he agreed to cover Cardenez's shift.

Petitioner left his home to drive to work at about 10 A.M. On his way, he was involved in an automobile accident. Petitioner lost control of his car and slid, striking another vehicle. His vehicle was struck on the passenger's side. The driver's side seat broke and petitioner's right shoulder was pinned against the passenger's seat. The impact was to his right arm.

The police, fire and ambulance were called, but petitioner refused treatment at the scene; stating he was fine (RX.4). Petitioner's dad met him at the scene so that he was able to get to work by 11:30 A.M. Petitioner texted a photo of his damaged vehicle and advised his district manager on the day of the accident (RX.2).

Petitioner confirmed he was not paid for mileage or time he traveled to and from work. Petitioner also confirmed he was on his way to work when the accident occurred.

He had complaints of right arm, head, back and neck pain, but continued working that week. Due to pain and loss of movement, petitioner contacted Dr. Chudik, whom he first saw after the accident on January 15, 2014. Petitioner's complaints of right shoulder and neck pain. Dr. Chudik ordered and MRI, which was done on February 11, 2014 and showed a possible partial thickness tear of the supraspinatus and signal on the superior labrum.

Petitioner obtained physical therapy. On June 2, 2014, Dr. Chudik reported petitioner's exam was for positive for Neer's and Haskin's impingement and recommended arthroscopic surgery. Dr. Chudik performed right arthroscopic right biceps tenodesis, right labral debridement, right rotator cuff repair, and right subacrominal decompression. Post-operative diagnosis was SLAP tear, partial thickness tear of the right supraspinatus tendon and subacrominal impingement. Petitioner received additional therapy and was released to return to work on October 22, 2014.

Petitioner obtained another MRI on February 13, 2015 due to a recent complaints of a pop in the right shoulder. Petitioner received a cortisone injection in the shoulder and was released from Dr. Chudik's care on March 27, 2015.

Petitioner had continued complaints of an inability to sleep with his arm above his head, and was having difficulty with raising his arm and range of motion. He also has stiffness in his arm.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

In support of whether an accident occurred which arose out of and in the course of Petitioner's employment with Respondent the Arbitrator makes the following conclusions of law:

The facts are undisputed. Petitioner was injured in an automobile accident on January 8, 2014 while driving his own vehicle from his home to respondent's store. Although not scheduled to work, petitioner agreed to fill in for an employee that petitioner supervises, when the employee's vehicle would not start. Petitioner's job with respondent does not require him to travel. He is not paid for time or mileage for his travel from home to work.

The Arbitrator finds petitioner's accident did not arise out of his employment with respondent, nor was petitioner in the course of his employment with respondent when the accident occurred. If this were true, anyone who was called in to work on a day the employee

was not scheduled would be covered while traveling to work from home. The mere fact petitioner had to go to work on a day he was not scheduled to work does not expose him to a greater risk than traveling to his place of employment on a day he was scheduled to work.

Petitioner cites two cases in support of his position; *Int'l Art Studios v. Industrial Comm'n.*, 83 Ill.2d 457 () and *Torbeck v. Industrial Comm'n., 49 Ill 2d 515 (1971).* The Arbitrator finds the facts in both cases distinguishable as the petitioners in both cases had already arrived at work, took a break in order to accommodate the employer, and was injured in an accident during the break.

The Arbitrator finds this case is closer to the case of *Martinez v. Industrial Comm'n*, 242 Ill. App. 3d 981. In the *Martinez* case, as in the present case, petitioner was not paid for mileage or time going to and from the place of employment. In *Martinez,* as in the present case, the petitioner was injured in an automobile accident while traveling to his place of employment on a day he was not scheduled to work, having agreed to substitute for another employee.

Therefore, the Arbitrator finds as a matter of law, petitioner's accident did not arise out of or in the course of his employment with respondent.

As the Arbitrator does not find petitioner was injured in an accident that arose out of or in the course of employment with respondent, the other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jan Moss,

Petitioner,

vs. NO: 16 WC 38544

17IWCC0760

Precision Pipeline, LLC,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 27, 2017, is hereby affirmed and adopted.

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

17IWCC0760

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 $9,000.00. 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: NOV 2 9 2017
TJT:yl
o 11/21/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MOSS, JAN
Employee/Petitioner

Case# **16WC038544**

PRECISION PIPELINE LLC
Employer/Respondent

17IWCC0760

On 2/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5576 STRATTON MORAN GIGANTI SRONCE
GREG W SRONCE
725 S 4TH ST
SPRINGFIELD, IL 62703

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

17IWCC0760

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

JAN MOSS
Employee/Petitioner

Case # 16 WC 38544

v.

Consolidated cases:

PRECISION PIPELINE, LLC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **01/20/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS
On **12/01/16**, 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 date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$46,839.31**; the average weekly wage was **$1,975.62.**

On the date of accident, Petitioner was **47** years of age, ***married*** with **3** dependent children.

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

1. Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent.

2. Petitioner's current condition(s) of ill-being concerning his right knee and any limitations related thereto, is causally related to the December 1, 2016 accident as aforementioned.

3. The Petitioner is entitled to TTD benefits from December 4, 2016 through (Present date of hearing) January 20, 2017 for a total of 6 & 5/7 weeks at the Petitioner's TTD rate of $1,316.94 for a total of $8,842.29 as a result of injuries Petitioner sustained on December 1, 2016. Also, Petitioner will continue to be entitled to TTD benefits into future until released to return to work by Dr. DeJong.

4. The Arbitrator finds that the Respondent is ordered to pay any and all reasonable and related medical expenses attendant to the Petitioner's right knee/leg condition which were incurred from the date of accident through the present time, subject to the Fee Schedule..

5. The Arbitrator finds that the prescription cost of $49.99 was reasonable and necessary and orders that the Respondent to reimburse the Petitioner for said out of pocket expense.

6. The Arbitrator further finds that the MRI recommended for Petitioner by Dr. DeJong is reasonable and necessary and orders Respondent to authorize said MRI to determine the Petitioner's diagnosis and future treatment plan.

7. The Arbitrator further denies the Petitioner's Petition for Penalties under Section 19(k) and 19(l) of the Act as well as Attorneys' fees under Section 16(a) of the Act, for reasons set forth in the Conclusions of law which are part of this decision.

In no instance shall this decision 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, as well as entitlement to further medical benefits.

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

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

D. Dyas McCarty

Signature of Arbitrator

2/24/17
Date

FEB 27 2017

ADDENDUM TO ARBITRATION DECISION

Introduction

The issues in dispute in this workers' compensation claim are (1) accident (2) causal connection as to Petitioner's knee/leg (3) the Respondent's liability for past and future medical expenses pursuant to Section 8 of the Act, and (4) TTD due to Petitioner (5) out of pocket expenses due Petitioner (6) whether the recommended MRI is reasonable and necessary to determine Petitioner's diagnosis and treatment plan and (7) Whether the Petitioner is entitled to Penalties and Attorneys' Fees pursuant to §19(1), §19(k) and §16 of the Act. The evidence adduced at trial establishes that the Petitioner sustained injuries to his knee/leg which arose out of and were in the course of his employment with the Respondent. Furthermore, the evidence establishes that the Petitioner's condition of ill-being is causally related to his employment duties with the Respondent. It follows that the Respondent is liable under the Act to pay for Petitioner's past and future medical expenses as evidenced by the Petitioner's testimony and Exhibits tendered at trial. The specific factual and evidentiary bases supporting the Arbitrator's decision are set forth as follows:

Statement of Facts

Petitioner testified that he had been employed with the Precision Pipeline, LLC as a laborer. In that capacity, he testified that his job duties, on December 1, 2016, included removing earth and rock that surrounded an oil pipe buried six-foot underground. Trenches were dug parallel to both sides of the oil pipe using a backhoe. Petitioner was then required to remove, by hand and shovel, any earth and rock that remained within three feet underneath the pipe. It is unrebutted that this part of the Petitioner's job duty required him to kneel, crawl, crouch, stand, and lay face down multiple times on uneven ground. Petitioner estimated that he went from a facedown laying position to a standing position approximately fifteen times on December 1, 2016, in an effort to fulfill the duty of freeing the pipe from any surrounding debris. The ground upon which Petitioner was working was uneven malleable as it consisted of loose dirt and rock.

Chad Way, Petitioner's co-worker, testified that the duties of Petitioner's work required his body to be manipulated into awkward positions including a significant amount of bending legs and arms while crawling, kneeling, and laying facedown. These body positions and manipulations were required to accomplish the removal of the rock and dirt that surrounded the pipe. At the time of the accident, Petitioner testified that he stood up and felt a pop and pain in his knee. Accordingly, he reported the injury, and sought medical treatment.

Chad Way testified that he witnessed the Petitioner's accident on December 1, 2016. He testified that while him and the Petitioner were cleaning the underside of a pipe, the Petitioner, believed he was experiencing a cramping sensation in his right leg. Accordingly, Petitioner attempted to gain his footing and enter into a standing position. In doing so, Petitioner stated he felt a pop behind his knee. Chad Way testified that it was evident that the Petitioner's physical reaction was that he was in a lot of pain when the incident occurred.

Conclusions of Law
Accident

Arising out of means that the origin or cause of the accident presupposes a causal connection between the employment and the accidental injury. *Jones v. Industrial Commission*, 78 Ill. 24 284 (1980). In order for an injury to arise out of one's employment the risk must be: 1) a risk to which the general public is generally not exposed but that is peculiar to the employee's work, or 2) a risk to which the general public is exposed but the employee is exposed to a greater degree. A peculiar risk is one that is peculiar to a line of work and not common

to other kinds of work. *Karastamatis v. Industrial Commission*, 306 Ill. App. 3d 206 (1999); *Orsini v. Industrial Commission*, 117 Ill.2d 38 (1987). The instant case is distinguishable from the case law establishing that a simply act of standing and walking does not constitute a risk greater than that to which the general public is exposed. *Caterpillar v. Industrial Commission*, 129 Ill. 2d 52 (1989); *Oldham v. Industrial Commission*, 139 Ill. App 3d 594 (1985); *Elliot v. Industrial Commission*, 153 Ill. App 3d 238 (1987); *Prince v. Industrial Commission*, 15 Ill. 2d 607 (1959). The instant case is consistent with the reasoning in *Luplow v. Bright Horizons Daycare*, where the Commission overturned a denial of benefits and concluded that while squatting, bending and getting up from a floor are ordinary activities, a Petitioner who is required to engage in these types of activities to a much greater degree than the general public is exposed to a greater risk. Luplow, 04 I.I.C. 0805 (Ill. Indus. Com'n Dec. 7, 2004).

Here, Respondent misses the mark in attempting to analogize this incident with a simple act of standing. And, there is ample evidence that Petitioner was exposed to a risk that was not neutral in that the Petitioner had to rise up from a working position on either his hands and knees or belly in order to get out of the hole in which he was working. In addition to that qualitative difference between the Petitioner's risk of accident versus that of the general public, there is evidence of a quantitative difference as well. Both witnesses testified without rebuttal that the Petitioner was required as part of his job to climb in and out of the six foot hole in which he was working at least fifteen times a day. There is ample evidence that Petitioner was exposed to a greater degree of risk than the public, as was the case in *Luplow*.

Unlike a single instance of standing, Petitioner, in the instant case, was required to manipulate his body in awkward positions while kneeling, crawling, and laying facedown. It is unrebutted that Petitioner would have ascended from a facedown laying position to an upright standing position upwards of at least fifteen times on the day of the accident. Naturally, lying face down in a hole six-foot underground is not a common position the general public finds itself encountering. But even if we assume it is, clearly, the degree of exposure to Petitioner is greater due to the frequency in which he was exposed. Moreover, other surrounding circumstances, including uneven, loose footing, and a confined space present a risk to which the public is generally not exposed. Petitioner, at one point during the dig, and while lying face down in dirt and rock, felt it necessary to ascend to a standing position to investigate a cramping/pain sensation brought on during the contortion of his body. In the process of coming to his feet, Petitioner experienced a pop in his knee and severe pain. Given the foregoing, the Arbitrator concludes that Petitioner sustained an accident that arose out of and was in the course of his employment with Respondent.

Causation and Medical Expenses

Immediately after the incident Petitioner reported to his foreman and safety team member, Jim Hurley, that he had injured his right knee. The safety member, Jim Hurley, recommended Ibuprofen and a knee brace. Mr. Hurley then asked the Petitioner to follow him to the closest Walgreens which was in Jacksonville, Illinois. There, he purchased two knee braces for the Petitioner.

Petitioner presented to Dr. DeJong at Springfield Clinic on December 2, 2016. Petitioner complained of acute right knee pain without any prior issues. Petitioner stated that on December 1, 2016, while at work he was working under a pipe on his knees when he stood up he felt a pop behind his kneecap with immediate pain. Petitioner had subsequent difficulty with bearing weight as well as associated swelling and recurring feeling of instability and decreased range of motion. Dr. DeJong diagnosed acute right knee pain and swelling post injury at work 12/01/16 with concern for internal derangement (PX1). Dr. DeJong recommended Diclofenac and Acetaminophen, MRI of the right knee (PX5). Petitioner was given a work note for no use of the right lower extremity (PX3).

Petitioner presented the prescription for Diclofenac Sodium 75mg tablets to Walgreens. The Petitioner paid for this expense out of his pocket and is requesting reimbursement of $49.99 (PX 4).

Petitioner returned to Dr. DeJong at Springfield Clinic on January 5, 2017. Petitioner reported that he had not made any improvement with ongoing constant dull, sharp, stabbing pain, as well as, instability and catching issues (PX1). Dr. DeJong again recommended an MRI of the right knee for further evaluation of internal derangement with suspicion including involvement of the medial meniscus (PX5). Dr. DeJong changed Petitioner's work restriction for no use of right lower extremity until cleared (PX3).

Petitioner incurred expenses with Springfield Clinic totaling $786.00 (PX2).

Petition for Penalties and Attorneys' Fees pursuant to §19(1), §19(k) and §16 of the Act

The Petitioner filed a Petition for Penalties and Attorneys' Fees pursuant to §19(1), §19(k) and §16 of the Act. The Petitioner claims that the Respondent made no effort to pay the Petitioner temporary total disability benefits and no effort to authorize the diagnostic MRI of his right knee. The Respondent argues that it had a good faith basis for contesting the claim in that the Petitioner's accident did not arise out of his employment.

The Arbitrator denies the penalty position. While he does not accept the Respondent's arguments on the issue of arising out of, the case law referenced in this decision as well as the Respondent's proposed decision shows that there is no bright line test to determine whether a risk which is neutral on its face is increased for a particular petitioner. Each case turns on specific facts and the Respondent certainly could have believed in good faith the Petitioner was exposed to a risk no greater than that of the general public.

Conclusion

For the foregoing reasons, the Arbitrator finds the following:

1. Petitioner sustained accidental injuries to his right knee/leg on December 1, 2016 while in the course of his employment with Respondent.

2. Petitioner's current condition(s) of ill-being concerning his right knee and any limitations related thereto, is causally related to the December 1, 2016 accident as aforementioned.

3. The Petitioner is entitled to TTD benefits from December 4, 2016 through (Present date of hearing) January 20, 2017 for a total of 6 & 5/7 weeks at the Petitioner's TTD rate of $1,316.94 for a total of $8,842.29 as a result of injuries Petitioner sustained on December 1, 2016. Also, Petitioner will continue to be entitled to TTD benefits into future until released to return to work by Dr. DeJong.

4. The Arbitrator finds that the Respondent is ordered to pay any and all reasonable and related medical expenses attendant to the Petitioner's right knee/leg condition which were incurred from the date of accident through the present time.

5. The Arbitrator finds that the prescription cost of $49.99 was reasonable and necessary and orders that the Respondent to reimburse the Petitioner for said out of pocket expense.

6. The Arbitrator further finds that the MRI recommended for Petitioner by Dr. DeJong is reasonable and necessary and orders Respondent to authorize said MRI to determine the Petitioner's diagnosis and future treatment plan.

7. The Arbitrator further denies the Petitioner's Petition for Penalties under Section 19(k) and 19(l) of the Act as well as Attorneys' fees under Section 16(a) 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 Reynolds,

Petitioner,

vs. NO: 15 WC 15173

Ameren Illinois,

17IWCC0761

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 2, 2017, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,600.00. 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: NOV 2 9 2017
TJT:yl
o 11/21/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

REYNOLDS, WILLIAM
Employee/Petitioner

Case# **15WC015173**

AMEREN
Employer/Respondent

17IWCC0761

On 3/2/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.67% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0384 NELSON & NELSON
ROBERT C NELSON
420 N HIGH ST PO BOX Y
BELLEVILLE, IL 62222

1241 LEMP & MURPHY PC
WILLIAM LEMP
8045 BIG BEND BLVD SUITE 202
WEBSTER GROVES, MO 63119

17IWCC0761

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)

William Reynolds
Employee/Petitioner

v.

Ameren
Employer/Respondent

Case # **15** WC **15173**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Collinsville**, on **December 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 **Mileage**

FINDINGS

On the date of accident, **April 4, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$93,395.64**; the average weekly wage was **$1,796.07**.

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

Per the stipulation of the parties, Respondent shall be given a credit of **$6,842.18** for TTD, **$0** for TPD, **$0** for maintenance, and **$46,095.59** in net non-occupational disability benefits, for a total credit of **$52,937.77.**

Respondent is entitled to a credit of **$all amounts paid** in medical bills paid through group insurance under Section 8(j) of the Act.

ORDER

Respondent shall authorize the treatment recommended by Dr. Mall, including, but not limited to, the additional arthroscopic surgery.

Respondent shall pay the reasonable and necessary medical services as contained in Petitioner's Exhibit 12 as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$1,197.38/week** for **88 weeks, for the timeframe of April 22, 2015 through December 28, 2016,** as provided in Section 8(b) of the Act.

Per the stipulation of the parties, Respondent shall be given a credit of **$6,842.18** for TTD, **$0** for TPD, **$0** for maintenance, and **$46,095.59** in net non-occupational disability benefits, for a total credit of **$52,937.77.**

Respondent shall pay Petitioner travel expenses in the amount of **$40.25.**

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

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

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

Signature of Arbitrator

2/28/17
Date

ICArbDec19(b)

MAR 2 - 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

William Reynolds
Employee/Petitioner

Case # **15** WC **15173**

v.

Consolidated cases: **N/A**

Ameren
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he goes by the name "Mike" and has been a lineman for Respondent for 17 years which is a physical position that involves climbing poles and lifting more than 100 pounds. He testified that he works a lot of overtime. He testified that he never worked too few hours to qualify for sick time.

Petitioner denied having seen a doctor prior to April 4, 2015 for either of his legs. He testified that he always keeps his right hand on his right leg all the time because of the pain and that it feels like someone is using a screwdriver to pop his knee off. He testified that he had no issues with either leg before this accident and that he had never seen a specialist for either leg prior to the accident.

Petitioner testified that on the date of accident, he was called out for a power outage and that there was a tree that split and knocked lines out. He testified that he could not get his truck in and got stuck in the mud. He testified that he threw the boom of the truck over to pull the tree up, but that they had to have the tree cut down. He testified that the tree company would not climb the tree because of the rope, and that they tried to get a smaller bucket in to cut down the tree safely. He testified that they tried wenching it off the front of the truck and that at the time of the pull, the customer's horses broke and were running through the stable. He testified that they sat there waiting until the customer got his horses penned, and that the next thing he knew, he was on his back. He testified that the guy wire let go and that a 10-pound shiv hit him in leg. He testified that he was in a tremendous amount of pain. He denied having any trauma to his leg since the accident.

Petitioner testified that his leg "swelled up like a basketball," that his whole knee area was swollen and that it felt like his kneecap had been shoved to the side. He testified that he was impacted on the outside of his kneecap and that it was pushed towards the other leg.

Petitioner testified that he has never had any prior claims. He testified that since the accident, his knee has never been pain-free. He testified that he rubs his leg all the time. He testified that he tried to continue working and that he went in for almost a week, but it never felt good.

He testified that he was told to see Dr. Beyler by the Ameren nurse, Janice Chamness. He testified that she x-rayed both legs. He testified that he ultimately saw Dr. Kriegshauser in St. Louis, had surgery on May 1, 2015 and followed up with him regularly. He testified that he continued to report aching on the outside of leg as well as the inside area. He testified that after surgery, he developed a knot

on the kneecap that he never really noticed before because of the swelling. He testified that when he asked the doctor about it, he said it could have been something that occurred with surgery. He testified that the knot location was almost exactly where got hit at the 9-10 o'clock position on the kneecap.

Petitioner testified that he was seen by Dr. Rothrock at Respondent's request, but that he did not release him to climb poles. He testified that at the time of the accident, he was 58 years old. He testified that his left leg did not bother him. He testified that he underwent physical therapy and had various testing including MRIs. He testified that the treatment with Dr. Kriegshauser had never stopped the pain that he has today. He testified that compared to just after the trauma, his leg never really got any better. He testified that his pain now is similar to when it happened, but that he had more pain when he was hit from the direct injury. He testified that his kneecap feels like it is coming out of the top of his leg for some reason, that he has no strength to kneel down and push up with right leg and that he has no stability. He testified that he also has issues with extension of the leg.

Petitioner testified that he has treated with Dr. Mall since March of 2016 and that he has an upcoming surgery. He testified that he sees Dr. Mall in January but does not know when the surgery will be. He testified that he is still getting physical therapy twice per week in Millstock where he lives, and that his physical therapy is scheduled through the end of the year.

Petitioner testified that his knee pain now is a 3/10 and that it will increase to a 4 or 5/10 when driving. He testified that after about 30 minutes of driving, he needs to stop. He testified that he tries to avoid making his leg hurt. He testified that before the accident, he climbed poles all the time. He testified that before the accident, both of his legs were the same strength. He testified that he thinks his thighs are both still the same size. He testified that the knot is still in the same location. He testified that he was probably a little turned at the time impact when he was hit by the shiv.

Petitioner testified that he has grinding in the knee, which he did not have before the accident. He denied having any grinding in the left leg. He testified that he would not rely on his leg to climb. He testified that he does not feel like he is ever comfortable and that he can put weight on it, but that it is stressful when trying to push off with the knee. He testified that he can walk or stand about 30 minutes before he has to get off his leg. He testified that he can squat down and can stand up, but that if he tries to do it only on the right leg he cannot do it. He testified that he can kneel down on his right leg but has difficulty getting back up. He testified that he does not sleep well at night and that he has tried sleeping with a pillow between his legs. He testified that he takes aspirin or Aleve for pain.

On cross examination, Petitioner agreed that after his surgery in May of 2015 he had some physical therapy and that in September, he was released to return to work but no climbing of poles. He testified that he has been placed under additional restrictions from Dr. Mall including no climbing, no squatting and no lifting more than 50 pounds. He testified that Dr. Mall told him that he probably will not be able to climb poles again, but that he would reserve that decision until after the upcoming surgery. He testified that he does not have any driver's license restrictions, but that he did not have a DOT physical so he has a CDL with no medical certificate.

On cross examination, Petitioner testified that in January of 2016 he turned and stepped on his right leg and had to go to emergency room. He testified that that night, he was in tears due to the pain and that his whole leg hurt. He testified that he went to the emergency room at St. Anthony's, where they did x-rays and gave him pain medications. He testified that he was told he could be admitted him for pain management, but it seemed like after they put it in a brace it seemed like the pain went away. He testified that the history in the medical records was accurate that his foot was planted and that he twisted the right knee. He testified that he might have been walking down to his shed. He testified that he believed he told Dr. Mall about the incident.

On cross examination, Petitioner testified that during his time off work, he has not worked anywhere else. He testified that he received some temporary total disability benefits and also received disability benefits from Ameren. He testified that he initially received sickness and accident benefits, which was later converted to long-term disability. He testified that he is receiving SSDI benefits but is not a Medicare beneficiary. He agreed that he has group medical insurance through Respondent, and that the surgery in January would be processed through his group insurance.

On redirect, Petitioner testified that when he was working, he made a lot more than $3,500 per month. He testified that if he could go back to work, he would do so. He testified that he hopes Dr. Mall's intent is to get him back to work.

On redirect, Petitioner testified that before he went to the emergency room in January of 2016, he had not sustained any kind of trauma to his leg. He testified that he did not slip and fall, he just turned. He testified that the pictures show the knot, and that the knot is not as prominent now as in the photos but that he still has it.

On further cross examination, Petitioner testified that the pictures were from June of 2015, which was about a month after surgery.

A group exhibit of photographs dated June 3, 2015 was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The Mileage Log from April 22, 2015 through November 17, 2015 was entered into evidence at the time of arbitration as Petitioner's Exhibit 2.

The transcript of the deposition of Dr. Kriegshauser was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. [1] Dr. Kriegshauser testified that he is a board-certified orthopedic surgeon. He testified that his practice is primarily surgery of the knee and hip. (PX3).

Dr. Kriegshauser testified that he first saw Petitioner on April 23, 2015, at which time he stated that on April 4th, he was trying to pull a truck or something with a pulley and somehow ended up striking his right knee. He testified that Petitioner stated that it was quite hard and that he had immediate pain in the knee and developed swelling in the knee after the injury. He testified that Petitioner iced it but he continued to have pain, and that he continued to work but said he was having trouble working because of the pain. He testified that he was seen by a physician for his company, that x-rays were performed that revealed no fracture and that, because of continued pain and swelling, an MRI was performed which showed evidence of tears of his lateral meniscus as well as strain of his popliteus muscle, a significant bone contusion and edema of the distal femur. He testified that he recommended outpatient arthroscopic surgery primarily because of the torn lateral meniscus, and that also discussed a trephine drilling of his distal femur to try to speed up pain relief from the edema. He testified that surgery was performed on May 1, 2015. (PX3).

Dr. Kriegshauser testified that during the surgery, they also found that Petitioner had chondromalacia in the patella that was grade II-III which was fairly significant arthritis. He testified that Petitioner also had some mild chondromalacia of the lateral compartment, articular cartilage. He testified that on June 4, 2015, he noted that Petitioner had developed a small mass along the superolateral aspect of his right patella, which he did not remember being there nor did Petitioner. He testified that it ultimately went away, so he thought it was some swelling and reaction to the surgery. He testified that Petitioner's progress was not unexpected and was somewhat slow due to the contusion. He testified that most middle age and older patients had some degree of arthritis in their joint as well just from the natural aging process, so their recovery was less predictable because it was well known that meniscal tears could aggravate preexisting arthritis in a knee joint. (PX3).

[1] Any highlighting and/or marking that appears in the transcript was not made by the Arbitrator.

Dr. Kriegshauser testified that Petitioner's course of post-operative treatment had mainly been non-operative care including physical therapy and oral anti-inflammatories. He testified that Petitioner made progress with his knee from his pre-operative state, but he always continued to have some degree of pain in his knee which did not surprise him because of the arthritis primarily behind the kneecap, and also because of the edema. He testified that the subsequent MRI performed because of persistent pain pretty much showed that all of the edema in the distal femur had resolved and that he did not think that Petitioner had a new lateral meniscus tear. He testified that the idea of a knee replacement came up, but that Petitioner's arthritis was not severe enough to warrant it. He testified that his assessment was that if Petitioner did not go back to his former job or any type of job that required heavy, repetitive stress on the knee joint, he would be able to get by without getting a knee replacement. He testified that even if Petitioner had a knee replacement, he was not going back to the type of job that he had before climbing utility poles. (PX3).

Dr. Kriegshauser testified that it was safe from a medical standpoint if Petitioner wanted to try to go back to work with some restrictions, and that whether or not Petitioner would be able to do it he could not say for sure. He testified that everyone's pain tolerance for arthritis was different. He testified that Petitioner told him, and he was not surprised by it, that he could not go back to climbing poles. He testified that the activities that Petitioner was typically going to have trouble with was climbing, squatting, kneeling, any type of twisting on the knee or lifting or carrying heavy loads. He testified that if Petitioner had this type of chondromalacia of his patellofemoral joint in the knee without any specific injury, he was likely going to have it in his other knee. He testified that once there was an injury and the arthritis became symptomatic, it could be very difficult to get it back to being totally asymptomatic again. (PX3).

Dr. Kriegshauser testified that he did not have any history that Petitioner had had trouble with the knee before the accident and that he had no records saying that. He testified that his diagnosis was that of a torn lateral meniscus with a severe contusion to the right distal femur and that he thought Petitioner had grade II-III chondromalacia of his patellofemoral joint. He testified that Petitioner had some mild arthritis in his lateral compartment, and that you could not see the edema arthroscopically as it was inside the bone. He testified that Petitioner had symptomatic arthritis now in his right knee, and that the conditions that he diagnosed were related to the trauma that occurred on April 4, 2015 based on the symptomatic pain that he has now. He testified that Petitioner has objective findings making it consistent with the fact that he complains of pain in that area of the knee, and that the restrictions he suggested were a result of the conditions that he diagnosed as causally related to the April 2015 trauma. (PX3).

Dr. Kriegshauser testified that he did not believe that he had determined when or if Petitioner had attained maximum medical improvement. He testified that he would probably place Petitioner at maximum medical improvement after the second MRI on November 9, 2015 because he did not feel it showed anything that he felt further arthroscopic surgery was likely to improve his symptoms. (PX3).

On cross examination, Dr. Kriegshauser testified that when he performed surgery, Petitioner's medial meniscus looked entirely normal and that he did not do a thing to it, that his medial compartment was normal and that his lateral compartment had the tear in the latera meniscus. He testified that when he saw Petitioner he did not have any bruising so he could not say it was a direct blow, but that it hit somewhere in the front of his knee from what he understood. He testified that he did not have any indication that the blow involved the patella and that there was no fracture of the patella. He testified that a direct blow generally would not cause a tear of the lateral meniscus of the knee, and that most meniscal tears were caused by a twisting occurrence and by a natural occurrence when someone had a strong blow to the front of the knee. He testified that his hypothesis was that Petitioner got hit on the front of the knee and the objective evidence was the amount of edema seen on the MRI scan inside the bone. (PX3).

On cross examination, Dr. Kriegshauser agreed that when he saw Petitioner on April 23, 2015, his assessment was severe contusion to the right distal femur with resultant bone contusion as well as a torn lateral meniscus, and that the initial diagnosis made no reference to the patella or patellofemoral arthritis. He agreed that when he went to surgery the drilling was to the right distal femur on the outer aspect of the knee and the right lateral meniscectomy, and that he also undertook some arthroscopic chondroplasty of the patella based on the patellofemoral arthritis. He agreed that the patellofemoral arthritis preexisted the injury. He agreed that in his note dated June 18, 2015, he indicated that Petitioner had rather advanced arthritis of his patellofemoral joint and that the arthritis had almost certainly been there for a long time, was generally a gradual process and would not have been caused by the traumatic blow to the outside of the knee. (PX3).

On cross examination, Dr. Kriegshauser agreed that if you had grade II, III or IV chondromalacia such as Petitioner, it usually took months or even a few years to develop to that stage. He agreed that on October 8, 2015, he explained to Petitioner that he had grade II and grade III chondromalacia of the patella. He agreed that there was talk on that date about potential knee replacement but that he told Petitioner that he wanted to go slow because the MRI showed some improvement rather than worsening of the changes in his distal femur. (PX3).

On cross examination, Dr. Kriegshauser agreed that he was aware that a Section 12 exam was performed by Dr. Rothrock and that he subsequently reviewed the third MRI scan that was ordered at St. Luke's. He agreed that in his note of November 9, 2015, he did not talk about restrictions related to the work injury or the surgery. He agreed that it was not the surgery for the lateral meniscectomy or the drilling that he undertook in the lateral femur that was resulting in any restrictions and that it was the significant patellofemoral arthritis. He agreed that he testified that an injury of this type could aggravate underlying arthritis and that underlying arthritis could become symptomatic independent of a specific trauma. He testified that a trauma could aggravate underlying arthritis temporarily but that the more significant the arthritis, the more likely it was going to be permanent. He testified that once this type of arthritis became symptomatic, it could be very difficult, if not impossible, to get the individual back to an asymptomatic status. (PX3).

On cross examination, Dr. Kriegshauser agreed that Petitioner told him when he was released on November 9, 2015 that he felt better than when he had been seen back in April, but that he was not pain-free and that he did not feel he could go back to the job that he had before. He testified that Petitioner had a concern about there being the need to climb poles and that he also had to do a fair amount of lifting that he did not feel he was going to be able to do. He agreed that he noted consistently in his records that Petitioner's patellar tracking was normal and that he never felt that he needed a patellar realignment procedure. He agreed that on November 9, 2015, he released Petitioner from treatment and told him to come back if needed. He agreed that someone with underlying patellofemoral arthritis to the degree that Petitioner has can become symptomatic independent of trauma. (PX3).

On redirect, Dr. Kriegshauser testified that it was his testimony that the pulley hitting the lateral side of Petitioner's knee was not what caused the lateral meniscal tear and that it was being knocked to the ground, and that during that process his knee would have twisted causing the tear. He testified that Petitioner's initial MRI showed extensive edema in the distal femur and that the whole area was experienced to some trauma during the event and that it was his testimony that the injury was primarily responsible for the arthritis, which by all indication was asymptomatic before the injury, to subsequently become symptomatic. He testified that given that Petitioner had had symptoms for seven months, he believed that it was likely to continue for the foreseeable future. He testified that it was possible it could get better for him, that objectively arthritis was not going to get better but symptomatically, it could improve especially if Petitioner was not putting a lot of heavy, repetitive stress on his knee joint. He testified that the atrophy noted in Petitioner's quadriceps would be consistent with his arthritic condition being symptomatic now. (PX3).

On further cross examination, Dr. Kriegshauser agreed that when he last saw Petitioner on November 9, 2015, his atrophy had improved over what it had been immediately before surgery. He agreed that it could continue to improve if he followed through with home exercises. He agreed that chondromalacia had a significant genetic component. He testified that it would not be unusual for someone at Petitioner's age (*i.e.*, 58) and weight (*i.e.*, 217 pounds) to have some degree of underlying arthritis, whether in his knee or elsewhere. He agreed that he had treated individuals who came to him without a specific major trauma and said that there knee was killing them, and that he determined they had significant chondromalacia. (PX3).

The transcript of the deposition of Dr. Mall was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. Dr. Mall testified that he is an orthopedic surgeon and is board-certified. He testified that for the most part, he concentrated on the knee and shoulder but also did other procedures like carpal and cubital tunnel, other elbow surgeries, some ankle surgeries and hip arthroscopy. (PX4).

Dr. Mall testified that he first saw Petitioner on March 2nd for continued right knee complaints after a knee arthroscopy. He testified that the physical examination revealed that he had stable knees to stress testing of all the ligaments, that he had some weakness in the quadriceps muscle compared with the opposite extremity, that he had pain on the anterior medial aspect of the kneecap as well as under the quadriceps tendon and underneath the kneecap, that he had no significant medial joint line tenderness or lateral joint line tenderness and that there was no swelling. He testified that his assessment was that of patellofemoral pain due to muscle weakness, potentially some pain from the medial synovial plica and underlying osteoarthritis of the patella and the patellofemoral joint. He testified that an injection into the knee was performed and Petitioner was recommended to perform physical therapy. (PX4).

Dr. Mall testified that he next saw Petitioner on April 16th, at which time he reported his pain was worse after physical therapy, which oftentimes was the case. He testified that Petitioner returned on June 8, 2016, at which time he was doing somewhat better. He testified that Petitioner's strength and pain had improved. He testified that he wanted Petitioner to continue with his current work restrictions and continue with additional physical therapy. He testified that Petitioner has not yet reached maximum medical improvement. He testified that the current work restrictions were no squatting, ladders or climbing, no pushing or pulling more than 50 pounds and no lifting more than 50 pounds from floor to waist. (PX4).

Dr. Mall testified that Petitioner's diagnosis included patellofemoral pain, patellar chondrosis and pain over the plica and plical syndrome. When asked whether the conditions were related to the trauma of April 4, 2015, Dr. Mall responded that Petitioner had no recollection of any knee pain prior to the accident and that he had an MRI that demonstrated significant trauma to his knee, a meniscus tear and a traumatic cartilage loss of the kneecap, and that he felt that Petitioner's current symptoms were causally related to the accident as his symptoms had never been completely cured or alleviated since the accident occurred. (PX4).

Dr. Mall testified that degenerative findings could be both bilateral and unilateral in an individual of Petitioner's age, and that it depended on what the person did for a living and a lot of other genetic factors. He testified that in Petitioner's case in looking at his arthroscopic photographs, much of his knee looked relatively well-preserved and that the underling cartilage surfaces looked pretty which would indicate that this was more traumatic than degenerative in nature. He testified that any time there was a substantial trauma to the knee and there were some underlying conditions that were asymptomatic prior to the accident, those could very well be made symptomatic or aggravated by a significant event. He testified that if they did an injection and physical therapy and got the individual back to their prior level of function and pain then it would be deemed an exacerbation, but that the most common scenario was that they would develop an aggravation of the underlying arthritis, meaning that they were not able to return back to their prior level of function and pain. He testified that in Petitioner's case, he would deem it an

aggravation of his underluing condition in that his symptoms had not completely gone away despite efforts with conservative care. (PX4).

Dr. Mall testified that the plan was continued conservative care with the hopes that Petitioner responded well to it and, if not, then a new MRI. When asked about Petitioner's prognosis, Dr. Mall testified that it was very likely that he would be able to return to work and that whether or not he would be able to climb up and down poles for 8 hours a day given what was going on underneath his kneecap might be a bit of a stretch. He testified that oftentimes he would get an FCE. He testified that during the time he treated Petitioner, he had not complained of any problems on the left knee. (PX4).

On cross examination, Dr. Mall testified that Petitioner was referred to him by Dr. Ringhofer. When asked if at least some degree of patellofemoral arthritis was present prior to the accident, Dr. Mall responded that it was a difficult thing to say because they did not know that and that there was no MRI from before the accident or a prior arthroscopy that showed what it looked like beforehand. He testified that what he saw on the arthroscopic pictures to him appeared to be somewhat acute given the loose flaps that were seen. He testified that patellofemoral arthritis itself was a degenerative, progressive condition. (PX4).

On cross examination, Dr. Mall agreed that his treatment thus far had been conservative in nature and further agreed that physical therapy had been productive in terms of restoring function. He agreed that with continued conservative treatment, the goal would be for Petitioner to have 5/5 strength which would be normal. He agreed that on June 8th, Petitioner had no effusion. He testified that the fact that Petitioner had stable knees on varus and valgus testing meant that the medial collateral and lateral collateral ligaments were stable. He agreed that clinically, Petitioner had a basically stable knee. He agreed that he was not considering a total knee replacement at this time. He testified that if Petitioner had an unstable knee he would be looking at some sort of ligament reconstruction, but that Petitioner did not have a torn ligament of any sort. He testified that it was possible that with continued conservative treatment Petitioner could get back normal function of the knee, but that it was too early to tell. (PX4).

On redirect, Dr. Mall testified that when Petitioner presented to the office, his complaints were consistent and believable. He testified that Petitioner's subjective complaints were consistent with the objective observations that the radiologist made on the MRI performed on April 20, 2015. (PX4).

On further cross examination, Dr. Mall agreed that the he was reviewing the pictures of the arthroscopic surgery at the direction of Dr. Kriegshauser and that they were intraoperative films. When asked if he felt that Dr. Kriegshauser adequately addressed all of the acute findings within the knee during his procedure, Dr. Mall responded that it appeared that the meniscus was resected adequately and that there was not enough picture that showed the post-debridement resection fully and that there was not a great photograph of the entire patella to see how it looked after he addressed the cartilage defect. (PX4).

The medical records of Dr. Kriegshauer were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen on April 23, 2015 for evaluation of persistent right knee pain since he injured it on April 4th while working as a lineman for Ameren. It was noted that Petitioner was trying to pull a truck in and that a pulley hit hard against his right knee. It was noted that Petitioner indicated that he had immediate pain and developed swelling right after the trauma occurred, and that he continued to work but was having trouble. It was noted that Petitioner was seen by a worker's compensation physician who had obtained x-rays which did not show any fracture and that due to his swelling and pain an MRI was performed, which reported evidence of tears of the lateral meniscus as well as a strain of the popliteus muscle in addition to significant bone contusion and edema of his distal femur. The assessment was that of severe contusion right distal femur with resultant bone contusion as well as torn lateral meniscus right knee. Petitioner was recommended to undergo arthroscopic surgery for the torn meniscus, and it was noted that they might also consider trephine drilling on the lateral cortex due

to the amount of swelling in the bone to help with his pain. It was noted that Petitioner was given a work slip indicating that he could not work as a lineman or do any heavy work, but he could go in for sit-down duties only until after his surgery. (PX5).

The records of Dr. Kriegshauer reflect that Petitioner underwent surgery on May 1, 2015 for pre- and post-operative diagnoses of torn lateral meniscus, right knee with preexisting osteoarthritis of the right knee and bone edema, right distal femur. The procedures performed on that date included (1) arthroscopic partial right lateral meniscectomy; (2) arthroscopic chondroplasty of the patella, right knee; (3) arthroscopic trephine drilling, right distal femur. (PX5).

The records of Dr. Kriegshauer reflect that Petitioner was seen on May 8, 2015, at which time it was noted that he seemed to be doing very well. It was noted that Petitioner was going to be sent to physical therapy to increase his strength and motion for the next month, and that he was to remain off work unless light duty work was available. At the time of the June 4, 2015 visit, it was noted that Petitioner had developed a small mass along the superolateral aspect of his right patella. It was noted that Dr. Kriegshauser did not remember it being there before and Petitioner stated that it was not, and that he stated that it was right where the object hit his knee in the original accident. It was noted that aspiration and an injection of Cortisone was recommended and performed. It was noted that if the mass stayed there they may discuss removal, but that an x-ray would be obtained first to make sure there was no evidence of an avulsion fracture off the lateral border of the patella. Petitioner was instructed to continue his physical therapy and was allowed to return to work if there was a sit-down job available. It was noted that Petitioner stated that there was no light duty available for him. (PX5).

The records of Dr. Kriegshauer reflect that Petitioner was seen on June 18, 2015, at which time it was noted that he was doing better with his knee and that he stated that he still had soreness especially if he tried to kneel right on his knee and that he knew he could not climb poles. It was noted that Petitioner had rather advanced arthritis of his patellofemoral joint which would explain why he had a lot of pain if he tried to kneel directly on the knee. It was noted that Petitioner had just a minimal effusion at most in his knee and was ambulating without any external assistance. It was noted that the little area of swelling he had over the lateral border of the patella appeared smaller as well since the injection was performed. It was noted that Dr. Kriegshauser indicated to Petitioner that the arthritis almost certainly had been there for a long time and was generally a gradual process that occurred over years and would not have been caused by the traumatic blow to the outside of the knee. It was noted that Petitioner should be able to get back to work and that as of on June 22, 2015, Petitioner's only restrictions would be that of no climbing utility poles and no climbing ladders any higher than a 6-foot stepladder. (PX5).

The records of Dr. Kriegshauer reflect that Petitioner was seen on July 16, 2015, at which time it was noted that he had not returned to work because his employer told him that they had no work for him unless he could climb poles. It was noted that Petitioner stated his knee pain had not resolved enough for him to be able to do that and he did not think it had improved at all since the last visit. It was noted that Petitioner had an osteonecrotic-type problem in the distal femoral bone and that there was no great cure for that, and that the trephine drilling of the lesion was not giving him a lot of pain relief. It was noted that the only thing they could do was to wait and see and keep Petitioner from putting a lot of stress on the knee joint. It was noted that Petitioner was to remain off work unless there was a sit-down job available and he was instructed not to do any running- or jumping-type of activities on the knee. At the time of the August 27, 2015 visit, it was noted that Petitioner was still having persistent pain in the right knee and had a minimal effusion present. It was noted that Petitioner's tenderness was primarily with palpation of the distal femoral condyle, more so on the lateral side. It was noted that Petitioner still had good motion in the knee and good ligamentous stability, but he complained that he was getting increased episodes of the knee feeling like it wanted to give out on him. It was noted that there was no evidence of any ligamentous instability and that Dr. Kriegshauser thought it was related to the pain that he was having in the knee and that the quadriceps may briefly get weak for him causing this sensation. Petitioner was

recommended to undergo an MRI to see if there was any evidence of improvement or worsening of the osteonecrosis in the distal lateral femoral condyle. Petitioner was issued a work slip, allowing him to work sit down duty only. (PX5).

Included within the records of Dr. Kriegshauer was the interpretive report for an MRI of the right knee performed on August 27, 2015, which was interpreted as revealing (1) post-operative lateral meniscectomy changes with horizontal signal extending through the somewhat truncated post-operative anterior horn lateral meniscus and small adjacent parameniscal cyst formation; a recurrent non-displaced tear in this location would be difficult to exclude; (2) Grade III-IV patellar chondral fissuring as described with reactive edema along the medial patellar facet and anterolateral femoral condyle; (3) mild to moderate joint effusion without loose body; (4) undulation suggesting laxity on the quadriceps tendon but no tear or retraction; (5) focal reactive edema anterior lateral femoral condyle without high grade lateral patellofemoral chondrosis. The Addended Impression was that of (1) there has been interval blunting of the free margin of the body and posterior horn of the lateral meniscus likely related to partial lateral meniscectomy; there is increased intrasubstance signal involving the body and anterior horn of the lateral meniscus which may be degenerative or post-operative in etiology; a recurrent non-displaced cannot be entirely excluded; (2) significant improvement in edema throughout the lateral aspect of the distal femur as soon on the comparison exam (*i.e.*, April 20, 2015); this likely represented an impaction fracture; there is mild persistent edema involving the superolateral aspect of the lateral femoral trochlea which could represent healing; (3) no significant interval change in patellar chondral fissuring and small focus of grade IV chondrosis involving the medial patellar facet. (PX5).

The records of Dr. Kriegshauer reflect that Petitioner was seen on September 3, 2015, at which time it was noted that in comparing the two MRIs there definitely appeared to be improvement from the amount of edema in Petitioner's lateral femoral condyle compared to his previous MRI and that the radiology report indicated that as well. It was noted that Petitioner still had significant arthritis of his patella and that there were some post-operative changes of his lateral meniscus. It was noted that Petitioner's pain continued to be more of a dull arthritic achiness rather than mechanical symptoms of any meniscal tear and that he had just a minimal effusion in his knee as well. It was noted that Petitioner had good ligamentous stability and range of motion, and that his pain was worse with weight bearing. It was noted that Dr. Kriegshauser thought they should give it more time to see if his symptoms improved and that if they did, it was still possible that he could get back to work in the future and that if they did not, he was probably going to have to consider retirement from his present type of occupation that included climbing poles which put tremendous stress on his knee joint. It was noted that if Petitioner did not improve, another treatment option would include knee replacement surgery and viscous injections. Petitioner was also given the option of obtaining a second opinion. A work slip was issued on that date, allowing Petitioner to return to work sedentary duty. (PX5).

The records of Dr. Kriegshauer reflect that Petitioner was seen on October 8, 2015, at which time it was noted that his knee pain was about the same, that it was a dull ache that seemed more anterior but was also over the distal femur and that he noticed that when he sat with his knee bent for a long time, it bothered him. It was noted that Dr. Kriegshauser indicated that it was mainly the grade II and III chondromalacia that he had of his patella and that the dull ache in the distal femur was due to the bone marrow changes seen on the MRI and what appeared to be osteonecrosis. It was noted that Petitioner stated that there were days that he wished that the physician would "put a new knee in there." It was noted that Petitioner did not find the Mobic really made any difference in his pain and that he thought Aleve helped as much as anything, so he was going to continue with Aleve. A work slip was issued on that date, allowing Petitioner to return to work to primarily a sitting position, no ladder or pole climbing and no standing or walking more than 1-2 hours out of an 8-hour day. (PX5).

The records of Dr. Kriegshauer reflect that Petitioner was seen on November 9, 2015, at which time it was noted that since he was last seen Dr. Rothrock had ordered an MRI with contrast, which

reported changes secondary to previous partial lateral meniscectomy, an undersurface tear of the posterior horn of the medial meniscus and some degenerative arthritic changes in the knee. It was noted that Dr. Kriegshauser also reviewed the MRI and agreed that the intramedullary findings that had been previously present in his lateral condyle of the distal femur were indeed absent now and appeared to be healed. It was noted that Petitioner's pain was anterior in the retropatellar region, especially with flexing his knee. It was noted that Dr. Kriegshauser thought that Petitioner should be able to go back to work but that if he felt his arthritis behind his patella was keeping him from being able to climb poles, then he would have to decide to either retire or seek a different type of occupation. It was noted that the main reason for Petitioner not being able to climb poles was the arthritis behind his knee, which preexisted his work injury although it could have been exacerbated by his injury. A work slip was issued, allowing Petitioner to return to work as of November 10, 2015 with the restriction of no pole climbing. (PX5).

The medical records of Dr. Ringhofer were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner was seen on April 22, 2015, at which time it was noted that the assessment was that of knee contusion and meniscus, lateral, posterior horn derangement. Petitioner was referred to orthopedics and it was noted that he "really should be on limited duty." (PX6).

The medical records of Dr. Byler were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner was seen on April 20, 2015 with a complaint of an injury to the right knee occurring on April 4, 2015. It was noted that on that date a truck was stuck in the mud, that Petitioner and his co-workers were using pulleys to get the truck out of the mud and that one of the wires broke. It was noted that the pull flew fast and struck Petitioner on the lateral aspect of his right knee with enough force to push him to the ground, and that he experienced swelling of the knee along with pain. It was noted that Petitioner complained of persistent swelling in the knee and pain over both the medial and lateral aspects of the knee. It was noted that the swelling had improved but had not resolved, and that Petitioner complained of exquisite tenderness along the lateral aspect of the patella and some over the medial aspect of the patella. The assessment was that of contusion of the right knee with effusion. Petitioner was recommended to undergo an MRI of the right knee and to take Aleve two times per day with food. It was noted that Petitioner could continue working regular duty. (PX7).

Included within the records of Dr. Byler was an interpretive report for x-rays of the bilateral knees performed on April 20, 2015, which were interpreted as revealing (1) minimal medial and lateral compartment osteoarthritis of both knees; (2) no acute fracture deformity. X-rays of the right knee (two views) performed on the same date were interpreted as revealing (1) no fracture; (2) small joint effusion; (3) soft tissue swelling. An MRI of the right knee also performed on the same date was interpreted as revealing (1) extensive bone marrow edema involving the included distal femoral shaft extending to involve the majority of the lateral femoral condyle without fracture line seen; consistent with extensive bone bruise/contusion; there is associated overlying soft tissue swelling and thickening of the lateral retinaculum; (2) intermediate joint effusion; (3) horizontal tear of the body and both horns of the lateral meniscus, age-indeterminate; (4) patellar chondrosis/fissuring with subchondral edema; (5) low grade popliteus muscle strain; no evidence for tendon avulsion. Per the note dictated April 21, 2015, the MRI results were discussed with Petitioner and it was noted that he was advised that Dr. Byler recommended he receive further evaluation with an orthopedic surgeon and was told to work as tolerated. (PX7).

The medical records of Apex Physical Therapy were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The records reflect that Petitioner underwent physical therapy for the timeframe of May 13, 2015 through June 19, 2015. At the time of the Initial Evaluation on May 13, 2015, it was noted that Petitioner reported that he suffered a right knee injury at work on April 4, 2015 and that he was working to get a truck unstuck. It was noted that Petitioner stated that a part came loose and a 10-pound part struck him in the lateral side of the right knee. It was noted that Petitioner stated that he had pain and swelling in the knee, and that he underwent arthroscopic surgery (meniscectomy) on May 1, 2015. At the time of the May 21, 2015 visit, it was noted that Petitioner reported that he had a constant

ache in the knee and that he also voiced concern about the bump off of the lateral patellar region. The Progress Report dated June 1, 2015 noted that Petitioner reported continued pain and tightness in the right knee, that his pain was 4-6/10 which was constant in nature and that he continued to complain of tenderness in the knee most significantly over the "knot" off the lateral aspect of the knee. At the time of the June 12, 2015 visit, it was noted that Petitioner reported increased soreness on that date, a 4/10 pain rating and that his pain was intermittent. At the time of the June 19, 2015 visit, Petitioner was discharged to home exercise program. (PX8).

The medical records of St. Anthony's Medical Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The records reflect that Petitioner was seen on January 30, 2016 in the emergency room, at which time it was noted that he presented with a complaint of right knee pain of an onset 8 months ago and worsening yesterday. It was noted that Petitioner stated that his foot was planted but when he twisted his knee he felt a "snap." It was noted that Petitioner remained ambulatory immediately following the incident, but after a short period he stated that he felt like he was going to collapse secondary to the pain. It was noted that Petitioner reported that it was difficult for him to sleep last night secondary to the pain and that this morning he was unable to put weight on his right leg. It was noted that Petitioner stated that his knee felt like it was "loose," a sensation that worsens when he drives or lays down. It was noted that Petitioner had been experiencing pain in his right knee, right ankle and right calf since surgery, and that he stated that his right ankle and right calf had largely resolved but that the pain now radiated up to his right hip, right buttock and right lower back. X-rays of the right knee performed on January 30, 2016 were interpreted as revealing no joint effusion, fracture or other defect. The final impression was noted to be that of traumatic knee pain. Petitioner was instructed to use a knee immobilizer and medications until his scheduled follow-up on Monday. (PX9).

The medical records of Dr. Mall were entered into evidence at the time of arbitration as Petitioner's Exhibit 10. The records reflect that Petitioner was seen on March 2, 2016, at which time it was noted that he had right knee complaints. It was noted that Petitioner underwent a knee arthroscopy by Dr. Kriegshauser in May of 2015 and had continued right knee pain, and that he had seen several doctors who told him that he had arthritis and there was nothing that could be done for him. It was noted that Petitioner had not had a cortisone injection since about a month after the surgery, and that the cortisone injection gave him no benefit at that point. The assessment was that of (1) patellofemoral pain due to under-rehabilitated quadriceps; (2) plical syndrome. Petitioner was recommended to undergo a right knee injection with cortisone, and it was noted that if he got no benefit from the injection then Dr. Mall would recommend continued physical therapy only as there would be no role for repeat arthroscopy. It was noted that if Petitioner did get substantial benefit from the cortisone injection, once he had rehabbed the knee there may be a role for additional knee arthroscopy and debridement procedure given the appearance of the MRI and his symptoms over the plica. An injection was performed on that date, and Petitioner was recommended to undergo additional physical therapy for strengthening. (PX10).

The records of Dr. Mall reflect that Petitioner was seen on April 13, 2016, at which time it was noted that he had continued right knee pain and stated that the injection gave him no benefit. It was noted that Petitioner stated that his pain was worse after physical therapy, especially the following day he felt more unstable and more pain. The assessment was that of patellofemoral pain due to under rehabilitation of the quadriceps muscle. Petitioner was recommended to undergo continuing physical therapy to work on strengthening of the quadriceps muscle. At the time of the June 8, 2016 visit, it was noted that Petitioner was doing well and was making some progress, but still had some pain mostly in the lateral side of his knee as well as some anteromedially. The assessment was that of right knee patellofemoral pain. Petitioner was recommended to continue physical therapy for range of motion and strengthening. It was noted that at the time of reevaluation if Petitioner's symptoms did not improve, then they may need a new MRI or consider knee arthroscopy. A work slip was issued on that date, allowing Petitioner to return to work with light duty restrictions. (PX10).

The records of Dr. Mall reflect that Petitioner was seen on July 6, 2016, at which time it was noted that he had been doing physical therapy and had regained his strength nicely but had persistent pain and symptoms. The assessment was that of right knee patellofemoral pain and patellar cartilage defect. Petitioner was recommended to undergo an MRI arthrogram of the right knee to evaluate the cartilage defect further. It was noted that Petitioner had nicely regained his quadriceps strength, yet was still having persistent symptoms. It was noted that Dr. Mall believed that the symptoms were coming from an intraarticular process. A work slip was issued on that date, allowing Petitioner to return to work with light duty restrictions. At the time of the July 15, 2016 visit, it was noted that Petitioner continued to complain of medial-sided pain as well as pain in the patellofemoral location as well as over the IT band. It was noted that the MRI arthrogram demonstrated a small fissure in the lateral facet of the patella and a larger full-thickness cartilage defect of the medial aspect of the patella, but this was a focal defect and was not a widespread arthritis by any means. It was noted that there was some mild fissuring of the tibial plateau as well as what appeared to be a full-thickness focal cartilage defect as well, that there was a prior partial lateral meniscectomy, that the medial side had a clear medial meniscus tear with arthrogram gadolinium dye tracking up into the medial meniscus and that there was also some residual meniscal tearing on the lateral side. The assessment was noted to be that of (1) medial and lateral meniscal tears; (2) fairly well-preserved cartilage surfaces with some focal cartilage defects. Petitioner was recommended to undergo a right knee arthroscopy and partial medial meniscectomy, and it was noted that this appeared to be residual as he did not remember any additional swelling in his right knee following the surgery nor any new injury following his surgery. It was noted that Dr. Mall believed that it had likely been present since the initial injury and required surgical debridement of the meniscal tears and the focal cartilage defect that appeared to have a small flap associated with it as well. A work slip was issued on that date, allowing Petitioner to return to work with light duty restrictions. (PX10).

Included within the records of Dr. Mall was the interpretive report for the MRI right knee post-arthrogram dated July 15, 2016, which indicated that the films were interpreted as revealing (1) post lateral meniscectomy changes without recurrent meniscal tear; (2) horizontal tear in the posterior body and posterior horn of the medial meniscus; (3) Grade III/IV chondrosis with small chondral fissuring and 3-4 mm grade IV chondral defect in the posterior inner portion of the lateral tibial articulation; (4) mid/medial patellar grade III/IV chondrosis and small grade IV chondral defects with a 7x5mm grade IV chondral flap tear in the medial patellar articular cartilage. (PX10).

The records of Dr. Mall reflect that Petitioner was seen on October 5, 2016, at which time it was noted that he had been recommended a right knee arthroscopy and partial meniscectomy as well as continued strengthening of his knee. The assessment was noted to be that of (1) medial meniscus tear, possible lateral meniscus tear; (2) patellofemoral pain. Petitioner was recommended to continue to strengthen his knee with physical therapy, and Dr. Mall continued to recommend a right knee arthroscopy and partial medial meniscectomy with possible lateral meniscectomy. A work slip was issued on that date, allowing Petitioner to return to work with light duty restrictions. (PX10).

The medical records of ATI Physical Therapy were entered into evidence at the time of arbitration as Petitioner's Exhibit 11. The records reflect that Petitioner underwent physical therapy for the timeframe of March 7, 2016 through July 5, 2016. At the time of the Initial Evaluation on March 7, 2016, it was noted that Petitioner presented with decreased range of motion, strength, joint mobility and increased pain, as well as impairments with gait. It was noted that Petitioner was working on getting a truck unstuck from a horse pen with the 20 pound cable pulling the truck broke loose and struck him in the right knee, causing a valgus stress. It was noted that Petitioner had surgery on May 1, 2015 to repair his medial meniscus and microfracture drilling procedure, and that he continued to have pain since. It was noted that Petitioner had been through two rounds of physical therapy with minimal to no results, and that recent tests revealed arthritis in the joint. At the time of the April 18, 2016 visit, it was noted that

Petitioner reported feeling better and that he only complained of medial knee pain during weight bearing activities. (PX11).

The records of ATI Physical Therapy reflect that at the time of the April 20, 2016 visit, Petitioner reported feeling the same and stated that his knee hurt frequently when he was in the car. It was noted that Petitioner was concerned that the pain and numbness was something he was going to have to live with. At the time of the April 22, 2016 visit, it was noted that Petitioner reported feeling the same, that he overall felt like the lower extremity was strong than when initially starting physical therapy, that most of the discomfort in the right knee was upon returning from a bent position or when driving for any given length of time, that bending the knee itself was not bothersome and that he complained of numbness along the medial knee and VMO region. At the time of the April 25, 2016 visit, it was noted that Petitioner reported feeling worse, that he stated that his inner thigh felt numb most of the time and that he reported increased knee/thigh pain with walking. At the time of the April 28, 2016 visit, it was noted that Petitioner reported feeling better and that he did not have much pain on that date, that he noted numbness in the medial knee and that he did not do much but drive to Chesterfield the day before. (PX11).

The records of ATI Physical Therapy reflect that at the time of the May 2, 2016 visit, Petitioner reported feeling the same, that when he woke up that morning he felt pretty good and felt like he was walking around better and that as soon as he started on the bike he had pain on the inside of his knee. At the time of the May 6, 2016 visit, it was noted that Petitioner reported feeling the same and that the inside muscle around the knee still felt numb. The Progress Note dated May 9, 2016 noted that Petitioner noted that his pain had moved to the inferior patella and remained along the medial quad. At the time of the May 11, 2016 visit, it was noted that Petitioner reported feeling the same, that he was sore after the last treatment but it went away quickly and that he reported trying to mow the yard and had significant increased pain after. At the time of the May 16, 2016 visit, it was noted that Petitioner reported feeling the same, that he stated that his leg felt stronger but that the knee itself was not strong and was not going to hold him and that he continued to have pain. (PX11).

The records of ATI Physical Therapy reflect that Petitioner was seen on May 18, 2016, at which time it was noted that he stated that he felt like spots on his knee were cold due to numbness. At the time of the May 20, 2016 visit, it was noted that Petitioner reported that his knee had been hurting a bit more the last few days. At the time of the May 25, 2016 visit, it was noted that Petitioner reported feeling worse, that he stated that his knee had been very sore lately due to his mother-in-law being in the hospital and being with her and that he would be unable to make any appointments that week or the beginning of the next week due to the funeral. The Progress Note dated June 3, 2016 noted that Petitioner had missed the last two weeks due to losing his mother-in-law and other family issues, and that he stated that he had been feeling increasingly stiff and resuming therapy had improved his flexibility. It was noted that Petitioner had not demonstrated much progress in regards to his functional mobility in the last month and that his pain symptoms continued on the medial aspect of the knee. (PX11).

The records of ATI Physical Therapy reflect that Petitioner was seen on June 10, 2016, at which time it was noted that he reported feeling the same and that his pain was across the top of his thigh. At the time of the June 23, 2016 visit, it was noted that Petitioner stated that he had pain while on vacation and that his knee bothered him quite a bit and that standing in the ocean waist-deep bothered him. At the time of the June 27, 2016 visit, it was noted that Petitioner reported feeling the same, that he was still in pain and that most of the pain was just above the kneecap in the quad. At the time of the June 30, 2016 visit, it was noted that Petitioner stated his knee felt stronger but that he continued to have pain in various places on the knee. The Progress Note dated July 5, 2016 noted that Petitioner had been seen for 32 physical therapy visits, that he noted that he went on vacation and when he returned he felt like he was starting all over again and that the initial pain and popping of the knee returned after vacation. It was noted that Petitioner did not demonstrate any changes with strength or range of motion at that time and that the same pain remained in the knee as it did 6 weeks ago. It was noted that Petitioner had plateaued

with therapy and shown no change in status, and that he may benefit from an FCE to determine his status. The Discharge Summary dated July 22, 2016 noted that Petitioner requested to be discharged and was likely to have surgery. (PX11).

The records of ATI Physical Therapy reflect that Petitioner underwent an additional course of physical therapy beginning October 17, 2016. According to the Initial Evaluation/Plan of Care, it was noted that Petitioner presented with decreased range of motion, strength, flexibility and increased pain as well as impairments with gait. At the time of the October 20, 2016 visit, it was noted that Petitioner reported feeling the same and that his medial pain continued. At the time of the October 26, 2016 visit, it was noted that Petitioner stated that he felt like therapy made his knee more sore. At the time of the October 27, 2016 visit, it was noted that Petitioner reported that his nerve pain did not stop. At the time of the October 31, 2016 visit, it was noted that Petitioner stated that some movements really hurt the inside of his knee. At the time of the November 3, 2016 visit, it was noted that Petitioner stated that when he walked into therapy he had no knee pain and that riding the bike gave him lateral knee pain, and that after the other exercises he had medial knee pain. At the time of the November 7, 2016 visit, it was noted that Petitioner reported feeling worse and stated that he was working around the house and the outside of his knee started hurting. At the time of the November 14, 2016 visit, it was noted that Petitioner stated that the outside of his knee was hurting as well as the inside. (PX11).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 12.

The Response to 19(b) Petition was entered into evidence at the time of arbitration as Respondent's Exhibit 1.

The Group Exhibit of the reports and deposition of Dr. Rothrock was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The report of Dr. Rothrock dated November 17, 2016 noted that Petitioner's chief complaint was that of "I am hoping to have surgery on my knee and the insurance company wanted me to come back and get another opinion." It was noted that Petitioner was seen for a second evaluation on November 17, 2016, at which time it was noted that he reported that he had not been working and had been under the care of Dr. Mall. It was noted that Petitioner reported that he continued to experience pain about his right knee particularly when climbing and descending stairs, and that he denied experiencing any significant swelling or mechanical symptoms at that time. (RX2).

The report noted that Dr. Rothrock opined that Petitioner's work accident was not a causative factor in his current state of pain and dysfunction about his right knee and that he continued to suffer with preexisting patellar chondromalacia, which continued to limit his ability to return to work at full duty without any limitations. It was noted that Petitioner had had appropriate non-operative treatment of his condition to date, and that Dr. Mall's recommendation to proceed with a right knee arthroscopy was appropriate but that Petitioner's accident at work on April 4, 2015 was not the causative factor in his need for surgery. (RX2).

As set forth in the deposition transcript dated February 16, 2016, Dr. Rothrock testified that he is board-certified in orthopedic surgery. He testified that he is subspecialty-trained in orthopedics, sports medicine and shoulder and knee arthroscopy. He testified that he does only shoulder and knee arthroscopy, that all of his surgery is outpatient and that he does not do any knee replacement surgeries. (RX2).

Dr. Rothrock testified that he performed an IME on October 29, 2015, at which time Petitioner reported that he had an accident at work on April 4, 2015 in what he described was "wenching" a truck, and that the wire broke, that the pulley broke loose and that it struck the lateral aspect of his right knee with a tremendous amount of force. After identifying the medical records that he reviewed, Dr. Rothrock

testified that Petitioner was not working at the time of the evaluation. He testified that on examination, he did not see any evidence that Petitioner had swelling, that his quad had moderate atrophy but he could straight leg raise it with ease, that when he bent his knee from 0 to 130 degrees he had pain and crepitation and that Petitioner did not have any joint line tenderness. He testified that Petitioner did not have any pain with McMurray's maneuvers and that his iliotibial band on the lateral side of his knee was mildly tender but he had a negative Ober test. He testified that his diagnosis was that of resolving contusion and preexisting patellar chondromalacia as documented by both his pre-operative MRI as well as Dr. Kriegshauser's operative report, and that he recommended that an MRI arthrogram be performed. (RX2).

Dr. Rothrock testified that the MRI took place on November 2, 2015 and that he reviewed the films. He testified that the MRI demonstrated a complete resolution of the bone contusion, that there was no evidence of osteonecrosis and that a partial lateral meniscectomy had been performed. He testified that there was still patellar chondromalacia, and that it had the suggestion of a degenerative medial meniscus tear. He testified that clinically he did not find any evidence of medial meniscal pathology and that all of Petitioner's pains were patellofemoral in nature. He testified that the diagnosis was that of resolved contusion of the right lateral distal femur that resulted from the accident at work, but that all of the symptoms Petitioner was still having were related to his preexisting patellar chondromalacia. He testified that all individuals between the ages of 40 and 60 without any knee pain at all would have just as much a chance of having patellar chondromalacia as not having it regardless of occupation, and that it was not more prevalent with certain occupations versus sedentary work. (RX2).

Dr. Rothrock testified that he did not believe that the work accident was a causative factor in the development of Petitioner's patellar chondromalacia nor the current symptoms he still had as a result of his patellar chondromalacia. He testified that the symptoms that Petitioner had at the time of the evaluation were more consistent with the patellar chondromalacia and that he had resolved the contusion, the surgery and the recovery from that. He testified that he believed that Petitioner could work full duty, and that the limitations that Dr. Kriegshauser had placed on him were stemming from his preexisting patellar chondromalacia. He testified that he believed that the injury and surgery affected patellofemoral mechanics and that there was probably a temporary aggravation of the patellar chondromalacia, but it had resolved and Petitioner was now dealing with the pure preexisting patellar chondromalacia. He testified that he would not impose any restrictions on Petitioner as a result of the work-related injury and that no further treatment necessary to cure and relieve him from that injury. (RX2).

On cross examination, Dr. Rothrock testified that he found Petitioner to be forthcoming at the time of the examination and that he felt that he really did have pain in his knee. He testified that based on the symptoms Petitioner was describing, he subjectively and somewhat objectively did not feel that he could safely do his work and agreed that Petitioner was restricted from returning to work because of the knee. He agreed that Petitioner's symptomatology from the patellofemoral chondromalacia were temporarily aggravated by the work event. He agreed that Petitioner's symptoms from the patellofemoral chondromalacia had not gone away, but that they were not from the aggravation that came from the trauma. He testified that Petitioner struggled with knee pain from the time of the trauma up until the time of his examination. (RX2).

On cross examination, Dr. Rothrock testified that the presence of atrophy was not an indication that Petitioner was having pain in the knee but was more an indication that the muscle was not as big or strong as it could be. He agreed that it could be an indication that Petitioner was not using it as much and that maybe the reason for his not using it as much was because the knee was painful. He testified that if pain lead to less activity, then it could lead to atrophy. He testified that he would not correlate pain with atrophy. He testified that it was possible that Petitioner had chondromalacia in the left knee. He testified that it could either be unilateral or bilateral, and that only an MRI would be able to reveal that

definitively. He testified that based on Petitioner's age alone, there was a higher probability that he had chondromalacia in the unaffected knee. (RX2).

On cross examination, Dr. Rothrock testified that to his knowledge, Petitioner did not have any prior troubles with either knee doing the kind of work that he did. He testified that since the event, Petitioner has never been released to return to his regular job, nor was Petitioner released by him to return to his regular job. He testified that the area where Petitioner had edema did not involve the patellofemoral joint, and that it was a direct blow to the lateral femur. He agreed that he saw Petitioner on only one occasion which was about seven months after the event occurred. He testified that his understanding as to where his edema had been came directly from Petitioner pointing to the area where he was struck. (RX2).

On cross examination, Dr. Rothrock agreed that the surgery was reasonable and necessary. He testified that the only thing he may have done differently was that he may not have rushed Petitioner to surgery and may have sent him to physical therapy to see if the knee would have worked a little better without surgery. He testified that there was no doubt in his mind that the lateral meniscus tear and the need for surgery was because of the work-related injury. He testified that it was possible that older people with arthritis had a slower and less predictable outcome from a surgery such as that performed by Dr. Kriegshauser. He testified that a meniscal tear was a degenerative condition that worked in concert with the formation of arthritis. He testified that a traumatic meniscus tear could not aggravate preexisting arthritis. He testified that once the patellofemoral chondromalacia was symptomatic, it was sometimes hard to get it asymptomatic again. (RX2).

On redirect, Dr. Rothrock testified that the patellofemoral chondromalacia that was encountered by Dr. Kriegshauser at the time of surgery would have preexisted the injury at issue. He testified that underlying patellofemoral chondromalacia could delay a recovery from surgery but also not be impacted by the surgery. He testified that a patellemoral chondromalacia as present in Petitioner could be temporarily aggravated by an injury or surgery, but not permanently aggravated or affected and that it was his opinion that that was what happened here. (RX2).

CONCLUSIONS OF LAW

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of April 4, 2015.

The Arbitrator notes that the undisputed facts demonstrate that Petitioner was working full duty prior to this accidental injury. Petitioner denied having seen a doctor prior to April 4, 2015 for either of his legs, and testified that he had no issues with either leg before this accident and that he had never seen a specialist for either leg prior to the accident. No medical records were entered into evidence contrary to Petitioner's testimony on this issue. Additionally, the Arbitrator notes that the medical records in this case demonstrate a lack of progress towards resolution of Petitioner's right knee symptomatology after the arthroscopy was performed on May 1, 2015, and the Arbitrator further notes that Petitioner testified that he still has difficulties with his right knee despite ongoing post-operative conservative treatment with Dr. Mall. Even Dr. Rothrock acknowledged since the event, Petitioner has never been released to return to his regular job, nor was Petitioner released by him to return to his regular job. (RX2). Therefore, it is evident to the Arbitrator that, while Petitioner likely suffered from a pre-existing condition with respect to his right knee, the work accident of April 4, 2015 aggravated and/or accelerated his condition of ill-being in the right knee.

The Arbitrator finds to be significant Dr. Kriegshauser's testimony that an injury of this type could aggravate underlying arthritis and that a trauma could aggravate underlying arthritis temporarily but that the more significant the arthritis, the more likely it was going to be permanent. He further testified that once this type of arthritis became symptomatic, it could be very difficult, if not impossible, to get the individual back to an asymptomatic status. (PX3). This testimony, when coupled with Petitioner's testimony that he has remained symptomatic in the right knee since the time of the accident despite the ongoing medical treatment he has undergone, causes the Arbitrator to place greater reliance upon the opinions proffered by Petitioner's treating physicians, Dr. Kriegshauser and Dr. Mall, in this matter as compared to Dr. Rothrock. Furthermore, the Arbitrator notes that even Dr. Rothrock in his report dated November 17, 2016 -- albeit while disagreeing on the issue of causation -- noted that Petitioner had had appropriate non-operative treatment of his condition to date and that Dr. Mall's recommendation to proceed with a right knee arthroscopy was appropriate. (RX2).

Based upon the foregoing, the Arbitrator finds that Petitioner met his burden of proving that his current condition of ill-being is causally related to the accident of April 4, 2015.

With respect to disputed issue (J) pertaining to necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary and causally related to his work accident of April 4, 2015. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibit 12, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding as to the issue of causation, the Arbitrator finds that Respondent shall authorize the treatment recommended by Dr. Mall, including, but not limited to, the recommended arthroscopic surgery.

With respect to disputed issue (L) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits from April 22, 2015 through December 28, 2016. (AX1).

The Arbitrator notes that the medical records of Dr. Ringhofer reflect that Petitioner was seen on April 22, 2015, at which time it was noted that the assessment was that of knee contusion and meniscus, lateral, posterior horn derangement, that he was referred to orthopedics and that it was noted that he "really should be on limited duty." (PX6). The April 23, 2015 note of Dr. Kriegshauser indicated that Petitioner was given a work slip indicating that he could not work as a lineman or do any heavy work, but he could go in for sit-down duties only until after his surgery. (PX5). Dr. Krieghauser testified that the restrictions he suggested were a result of the conditions that he diagnosed as causally related to the April 2015 trauma. (PX3). Even Dr. Rothrock testified that since the event, Petitioner has never been released to return to his regular job, nor was Petitioner released by him to return to his regular job. (RX2). No evidence was proffered by Respondent that Petitioner was offered work within the restrictions placed on him by any of his treating physicians.

As a result thereof, the Arbitrator finds that Petitioner was temporarily and totally disabled for the timeframe of April 22, 2015 through December 28, 2016, a total of 88 weeks. Per the stipulation of the parties, Respondent shall be given a credit of $6,842.18 for TTD, $0 for TPD, $0 for maintenance, and $46,095.59 in net non-occupational disability benefits, for a total credit of $52,937.77.

With respect to issue (O) pertaining to other issues/mileage, the Arbitrator finds that, per the Mileage Log entered into evidence at the time of arbitration as Petitioner's Exhibit 2, Petitioner was caused to travel on two separate occasions pertaining to the IME: (1) so as to attend the IME with Dr. Rothrock on October 29, 2015 (70 miles) and (2) so as to undergo the MRI arthrogram as recommended by Dr. Rothrock on November 2, 2015 (105 miles), for a total of 175 miles round-trip. No testimony was proffered at the time of arbitration suggesting that the medical treatment received by Petitioner was not available in his city of residence, Millstock, and in fact, Petitioner testified at the time of arbitration that he was still getting physical therapy twice per week in Millstock. As a result thereof, the Arbitrator finds that Respondent shall pay the lump sum amount of $40.25 for mileage reimbursement for medical-related travel, which consists of 175 miles at the 2015 IRS mileage rate for medical purposes of $.23/mile.

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

STATE OF ILLINOIS)
) SS.
COUNTY OF 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

Marty Marquez,
Petitioner,
vs.

City of Evanston,
Respondent.

17IWCC0762

NO: 15 WC 37106

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 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 March 15, 2017 is hereby affirmed and adopted.

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

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

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: NOV 29 2017
KWL/vf
O-11/21/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0762

MARQUEZ, MARTY
Employee/Petitioner

Case# 15WC037106

CITY OF EVANSTON
Employer/Respondent

On 3/15/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.91% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5398 TURCYCHUTE LLC
PHILLIP E TURCY
218 N JEFFERSON ST SUITE 300
CHICAGO, IL 60661

0560 WIEDNER & McAULIFFE LTD
KAREN E COON
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)

)SS.

COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

17IWCC0762

Martin Marquez
Employee/Petitioner

v.

City of Evanston
Employer/Respondent

Case # **15 WC 37106**

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **10/24/2016**. 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. ☐ 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 **4/9/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$77,569.22**; the average weekly wage was **$1,491.72**.

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

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

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

This case involved no lost time or TTD benefits.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for **5.375** weeks, because the injuries sustained caused a **2.5%** loss of the right leg, as provided in §8(e)12 of the Act.

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

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

Signature of Arbitrator

March 15, 2017
Date

MAR 15 2017

INTRODUCTION

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

Petitioner was the only witness at trial.

FINDINGS OF FACT

On April 9, 2015, Petitioner Martin Marquez was working as a heating and air conditioning service technician for Respondent City of Evanston. In his job he was responsible for maintaining the HVAC equipment in over 40 city buildings. He was required to bend, stoop, squat, kneel, and use ladders to access the equipment. He was required to use various types of hand tools.

On April 9, 2015, while working on some equipment, Petitioner stepped backward and tripped on some piping, twisting his right knee. He fell to the floor and was unable to stand up because of the extreme pain in his knee.

Petitioner was seen that same day at Omega Occupational Clinic at Glenbrook Hospital (Omega). He reported the work-related injury occurring when he his lost his footing and stepped on a pipe. He reported immediate symptoms including pain and swelling and an inability to bear weight directly after the injury.

The medical history in the records included notes that Petitioner reported previous MCL and ACL injuries. Petitioner testified that this was not accurate, but did admit to a history of osteoarthritis in both knees. On examination, Petitioner had pain with drawer sign and pain with laxity with varus stress. X-rays showed no acute fracture or subluxation, and no significant soft tissue swelling. There was moderate to severe narrowing in the patellofemoral compartment with osteophyte formation throughout. This was interpreted as tricompartmental degenerative changes most advanced in the patellofemoral compartment. He was diagnosed with a knee strain, authorized off of work until Monday, and given ibuprofen and a compression sleeve.

Petitioner was seen in follow up at Omega on April 13, 2015. Although his pain and range of motion had improved, Petitioner noted that he was a runner and felt that something was wrong in the back of his knee. He was again diagnosed with knee strain,

but was prescribed a MRI to rule out a meniscal injury. He was released to return to work with restrictions.

Petitioner had an MRI on April 15, 2015. The ACL (anterior cruciate ligament) showed fraying at the distal end with associated multiloculated cyst/ganglion. The PCL (posterior cruciate ligament) was intact. The radiologist's impression included partial ACL tear, mild degenerative joint disease and osteoarthritis in the lateral compartment with severe chondromalacia patella and associated effusion. There was a small Baker's cyst with a suspected superimposed rupture.

Petitioner returned to Omega on April 17, 2015, for review of the MRI. He reported his pain and range of motion continued to improve, although he still had pain posteriorly in the lateral aspect of the knee. He was working sedentary duty and using ibuprofen as needed. The assessment was a right knee partial ACL tear. He was referred to an orthopedist for further evaluation and possible physical therapy.

Petitioner was seen by orthopedist Dr. Bradley Dunlap on April 27, 2015. Petitioner reported a history of knee arthritis on that side and that he had undergone Visco supplementation injections in the past, which did not provide much relief. The doctor reviewed the MRI and felt there was a good amount of ACL left with significant patellofemoral arthritis, which was also seen on the X-rays. His impression was right knee pain following injury with significant underlying patellofemoral arthritis and mild ACL partial tear or sprain. Dr. Dunlap did not recommend surgery as Petitioner did not have objective instability on exam. Further, given the amount of arthritis in the knee, he did not think Petitioner was a good candidate for an ACL reconstruction, particularly given that there was a significant amount of the tendon still present. The doctor instead prescribed ice, anti-inflammatories, and a strengthening program.

When he was seen by Dr. Dunlap on April 27, 2015, Petitioner complained of constant throbbing and sharp pain in the knee, with feelings of instability. On physical exam significant effusion was still present in the knee. Dr. Dunlap concurred with the radiology report findings of a partial ACL tear and noted that Petitioner may have exacerbated the arthritic changes in the knee which might pose problems going forward. Dunlap prescribed icing the knee, anti-inflammatories, and physical therapy. He continued Petitioner on light/sedentary duty and wanted to follow up in a month.

Petitioner received his physical therapy at Athletico. Therapy records noted that, by May 26, 2015, Petitioner had had 6 sessions of therapy. By that point, he reported no pain other than a catching sensation. It was reported he did try running that day, which caused medial knee pain. However, he was able to lift up to 50 pounds from the floor

without knee pain. Petitioner was discharged from physical therapy as he had met his goals.

Petitioner sought a second opinion with Dr. Roger Chams at Illinois Bone & Joint May 4, 2015. Dr. Chams reviewed the MRI, which he noted showed mild spurring in the patellofemoral compartment with an intact ACL. The doctor noted inflammation surrounding the PCL, as well as medial meniscus tear with possible lateral meniscus tear. His impression was a right knee meniscus tear with ACL sprain. Dr. Chams injected the knee and referred Petitioner for physical therapy. Petitioner's medical history form reflected that he had had prior problems, including osteoarthritis in both knees.

Petitioner returned to Omega on May 6, 2015. The report notes that Dr. Dunlap and Dr. Chams agreed with non-surgical management and physical therapy. However, while Dr. Dunlap suspected a partial ACL tear, Dr. Chams questioned the clarity of the ACL injury and expressed more concern about a PCL injury. It was noted that Petitioner had significant improvement after the injection by Dr. Chams, but still felt a sensation of something mobile within his knee.

Petitioner received his physical therapy at Athletico. Therapy records noted that, by May 26, 2015, Petitioner had had 6 sessions of therapy. By that point, he reported no pain other than a catching sensation. It was reported he did try running that day, which caused medial knee pain; however, he was able to lift up to 50 pounds from the floor without knee pain. He was discharged from physical therapy upon meeting his goals.

Petitioner returned to Dr. Chams on June 8, 2015. Petitioner at that time was released to return to work at full duty. X-rays again demonstrated mild arthritic changes. There was a final therapy appointment for July 7, 2015. There were no objective signs of a meniscal tear, but subjectively the knee would lock. It was noted he had returned to work at full duty without complaints performing activities including kneeling, crawling, standing on a ladder, or heavy lifting at times overhead. Petitioner was also back to his running regimen, 2 to 3 times per week. On exam, he had excellent knee strength. Dr. Chams diagnosed a grade 1 PCL. An additional 4 weeks of physical therapy were suggested, but no other therapy records were admitted in evidence.

Petitioner had a final appointment with Dr. Chams on August 31, 2015. The examination was negative for any abnormalities and it was noted that Petitioner had excellent strength and control. The impression was a right knee sprain. Petitioner was assessed at MMI and again released to return to full duty work with no restrictions. The

ability to return to work was confirmed by a fitness for duty evaluation at Omega on September 1, 2015.

An AMA impairment rating was performed by orthopedist Dr. Brian Cole on May 2, 2016. It was noted Petitioner was an avid runner with a known history of arthritis, for which he had received care prior to the work injury. Dr. Cole diagnosed a strain/contusion to the right knee, which had resolved. The underlying pre-existing patellofemoral osteoarthritis was unremarkable and not germane to the main impairment rating diagnosis. Petitioner's lower extremity functional score was 78 out of 80, indicating almost no difficulty with any activity. Dr. Cole found Petitioner's impairment rating regarding the right lower extremity was 0%. It was noted that the osteoarthritis was pre-existing and seen radiographically only.

Petitioner testified that he is working at his regular duties. He exercises regularly. His knee continues to give him pain, particularly at night after he has been active or on his feet a lot. He also testified that he continues to experience a sensation like something is "floating" in his knee joint and it catches or locks up several times per week, without warning, causing instability. He stated that he takes over-the-counter pain medications for relief of his symptoms.

CONCLUSIONS OF LAW

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

This issue was not genuinely dispute. Petitioner had underlying osteoarthritis in his right knee which clearly was aggravated by a workplace accident. The treating orthopedists did not find conforming diagnoses, in fact their diagnoses shifted over time. They did, however, agree that Petitioner hurt his right knee at work.

Therefore, the Arbitrator finds that Petitioner proved that his current condition of ill-being is causally related to the workplace accident on April 9, 2015.

L: What is the nature and extent of the injury?

The Arbitrator evaluated Petitioner's permanent partial disability in accord with §8.1b (b) of the Act:

(i) An AMA Impairment Rating of 0% of a lower extremity authored by Dr. Brian Cole was admitted into evidence. An AMA impairment rating is not equivalent to disability. Rather, it is but one of five factors to be evaluated in

determining permanent partial disability. The Arbitrator notes that Dr. Cole's diagnosis differed from the diagnoses of Petitioner's treating physicians. Deference is often accorded to the opinions of treating physicians because their goal is to treat and heal their patient. On the other hand, Dr. Cole was retained by an opposing party for the purposes of litigation. Accordingly, the Arbitrator gives little weight to this factor.

(ii) Petitioner was employed as an HVAC technician at the time of the accident. He was able to return to work in his prior capacity without restriction. Petitioner's job required frequent bending, stooping, crouching, kneeling, and squatting. It also requires working on ladders. Because Petitioner's job required such activities the Arbitrator finds that the aggravation of Petitioner's pre-existing arthritis may make job duties more painful and limiting. Therefore, the Arbitrator gives greater weight to this factor.

(iii) Petitioner was 54 years old at the time of the accident. At the time of his injury Petitioner had a statistical life expectancy of 26.5 years and a worklife expectancy of 10 years. Because of Petitioner's age as an older employee for the type of work performed, requiring constant bending, squatting and kneeling on his injured knee, the Arbitrator gives greater weight to this factor.

(iv) There was no evidence that Petitioner's future earning capacity has been affected by his injury. Therefore, the Arbitrator gives no weight to this factor.

(v) The Arbitrator notes that that Dr. Dunlap diagnosed with partial tearing to the ACL and meniscal cartilage in the right knee. Dr. Chams originally suspected a partial tear of the PCL, based upon his interpretation of the MRI films and his clinical examination. However, Dr. Chams ended with a discharge diagnosis of knee strain. Respondent's examining physician, Dr. Cole, also diagnosed a knee strain. Petitioner was returned to full duty work without restrictions within 5 months of the injury. Petitioner had pre-existing arthritis, which the Arbitrator believes to be the source of Petitioner's current complaints. The Arbitrator finds his testimony to be credible and supported by the medical records admitted in evidence. The Arbitrator gives greater weight to this factor.

Based upon the five factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 2.5% loss of the right leg, 5.375 weeks, pursuant to §8(d)2 of the Act.

Steven J. Fruth, Arbitrator

March 15, 2017
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLAMSON

☒ 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

Bryon Lawrence,
Petitioner,

vs.

Pinckneyville Correctional Center,
Respondent.

17IWCC0763

NO: 10 WC 43870

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent of Petitioner 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 22, 2017 is hereby affirmed and adopted.

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

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

DATED: NOV 2 9 2017
KWL/vf
O-11/21/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0763

LAWRENCE, BRYON
Employee/Petitioner

Case# **10WC043870**

PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

On 5/22/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.02% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

MAY 22 2017

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

17IWCC0763

Bryon Lawrence
Employee/Petitioner

v.

Pinckneyville Correctional Center
Employer/Respondent

Case # 10 WC 43870

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 **Glaub**, Arbitrator of the Commission, in the city of **Herrin**, on **April 12, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 3, 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 **$56,218**; the average weekly wage was **$1,081.12**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** dependent child.

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

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

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

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

ORDER

Petitioner has sustained injuries on November 3, 2010 that resulted in the 12.5% loss of use of his left arm (31.625 weeks), 12.5% loss of use of his right arm (31.625 weeks), 10% loss of use of his left hand (20.5 weeks), and 10% loss of use of his right hand (20.5 weeks), as provided in §8(e) of the Act.

Respondent shall be given a credit of 30% loss of use of the left hand, based on Section 8(e)17 of the Illinois Workers' Compensation Act. After subtracting the aforementioned credit, respondent shall pay the petitioner 83.75 weeks of compensation at a rate of $648.67.

Respondent shall pay Petitioner compensation that has accrued from February 16, 2017 through April 12, 2017, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

5/22/17
Date

MAY 22 2017

STATE OF ILLINOIS)
)SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRYON LAWRENCE,
Employee/Petitioner

17IWCC0763

v.

Case # 10 WC 43870

STATE OF ILLINOIS – PINCKNEYVILLE CORRECTIONAL CENTER,
Employer/Respondent

FINDINGS OF FACT

Petitioner is employed as a correctional officer at Pinckneyville Correctional Center. Petitioner alleges on November 3, 2010 he suffered injuries to his bilateral wrists and elbows due to repetitive trauma from his job duties. This case was tried before Arbitrator Nowak on Petitioner's 19(b) Petition on November 20, 2014. Arbitrator Nowak found Petitioner's condition of ill-being was related to the alleged work injury and awarded Petitioner prospective medical treatment by Dr. Brown, including surgery. This decision was affirmed by the Illinois Workers' Compensation Commission on April 7, 2016. This case was then tried before Arbitrator Glaub at the Herrin docket on April 12, 2017 on the issue of nature and extent.

Testimony:

Petitioner testified at Arbitration that he is the same Bryon Lawrence who testified at Arbitration on November 20, 2014. Petitioner testified that after receiving the decision from the Commission, he underwent additional care and treatment with Dr. Brown. Petitioner had surgery on his bilateral wrists and elbows. Petitioner testified that prior to undergoing his surgeries, he experienced numbness and tingling in the hands, loss of grip strength, and shooting down his arm. Petitioner testified after his surgeries, he underwent formal physical therapy and home exercises. Petitioner eventually returned to work. Petitioner testified that he was originally a correctional officer at the time of his injury, but he is now a Correctional Food Supervisor II. Petitioner testified his job duties now include unlocking multiple doors, rotating stock, making food, using cooking tools, and pushing and pulling carts. Petitioner also lifts heavy objects.

Petitioner testified that while he has improved from his surgery and physical therapy, he still has some numbness and tingling and some loss of grip strength. Petitioner testified that he also has some stiffness and pain after a prolonged use of his hands. Petitioner testified he occasionally takes ibuprofen when needed, sometimes a couple times a day, sometimes only once or twice a week.

Petitioner testified his hobbies include gardening, fishing, and normal yard work. Petitioner testified he still has some gripping issues with his hands and when he went fishing a couple weeks prior, he had a hard time controlling the filet knife. Petitioner also testified he has some pain and tenderness while performing certain activities of yard work and gardening.

On cross examination, Petitioner testified that he is currently working full duty. Petitioner testified that he can perform his job duties. Petitioner testified that he has some issues performing his job duties, but he has not reported those issues to any of his supervisors. Petitioner testified he has not had any complaints from supervisors regarding his work or bad evaluations since he returned to work.

Petitioner testified that he is not currently seeing a doctor for his condition and is not undergoing physical therapy. Petitioner does not take any prescription medication for his condition and is not required to wear any kind of brace or protective device.

Petitioner admitted that in his new position of Food Supervisor II there are offenders available to perform some of the duties in the dietary area. The offenders help with the rotation of stock, preparing food, using utensils, pushing carts, and lifting heavy objects. Petitioner testified the Food Supervisor II position is a promotion from the correctional officer position.

Petitioner testified that he has not started lifting weights again yet because he is waiting to get more improvement from the surgery. Petitioner testified that he was released at maximum medical improvement on February 16, 2017 and his last doctor's appointment was February 13, 2017. This was approximately two months prior to the Arbitration hearing. Petitioner testified that his doctor told him that he would continue to improve as time progressed. Petitioner also testified he would return to the doctor if he had any additional problems and he has not returned to his doctor.

Major Lively of Pinckneyville Correctional Center was present as a representative for Respondent.

Medical Treatment:

On November 3, 2010, Petitioner presented to Dr. David Brown at the Orthopedic Center of St. Louis complaining of progressive numbness and tingling in both hands. (PX3). Petitioner indicated he worked as a correctional officer since 1998 and his job duties included turning keys repeatedly, cuffing and uncuffing inmates, passing food trays, and carrying property boxes. (PX3). It was noted Petitioner had a history of high blood pressure. (PX3). Dr. Brown found Petitioner had symptoms and findings consistent with bilateral carpal tunnel syndrome, possibly cubital tunnel syndrome. (PX3). Dr. Brown recommended splints and anti-inflammatory medication and referred Petitioner for nerve conduction studies. (PX3). Petitioner was to continue working full duty with no restrictions. (PX3).

On November 3, 2010, Petitioner presented to Dr. Daniel Phillips for electrical diagnostic studies to evaluate bilateral upper extremity pain and numbness. (PX4). The impression of the

studies was moderate bilateral sensory motor median neuropathies across the carpal tunnels and moderate left and milder right predominantly demyelinative ulnar neuropathies across the elbows. (PX4).

On November 5, 2010, Petitioner filled out an Employee's Notice of Injury form. (RX2). Petitioner indicated he injured his hands and arms due to repetitive motions with a manifestation date of November 3, 2010. (RX2).

On December 8, 2010, Petitioner followed up with Dr. Brown. (PX3). Petitioner indicated he had had no relief from his symptoms. (PX3). Dr. Brown indicated Petitioner's nerve conduction studies were positive for bilateral carpal tunnel syndrome and cubital tunnel syndrome. (PX3). Dr. Brown noted Petitioner had failed conservative measures and was a surgical candidate. (PX3). Petitioner was to continue working full duty with no restrictions. (PX3).

On April 29, 2015, Petitioner presented to Dr. George Paletta at the Orthopedic Center of St. Louis. (PX5). Petitioner complained of pain in his elbows and numbness in his fingers. (PX5). Dr. Paletta's impressions were bilateral carpal tunnel syndrome and cubital tunnel syndrome. (PX5). Dr. Paletta recommended Petitioner undergo new electrodiagnostic studies. (PX5). Petitioner was to continue working full duty with no restrictions. (PX5).

On April 29, 2015, Petitioner returned to Dr. Phillips for electrical diagnostic studies. (PX4). The impressions were: relatively moderate sensory motor median neuropathy across the right carpal tunnel, predominantly sensory median neuropathy across the left carpal tunnel, mild demyelinative ulnar motor neuropathies across the elbows with partial sensory axonal involvement, worse on the left, and this makes the lesions more significant. (PX4).

On April 30, 2015, Dr. Paletta reviewed Petitioner's EMG/nerve conduction study. (PX5). Dr. Paletta's impression were: mild demyelinative ulnar neuropathy bilateral elbows with partial sensory axonal involvement, left greater than right, moderate right carpal tunnel, and mild left carpal tunnel. (PX5). Dr. Paletta recommended surgical intervention. (PX5).

On October 5, 2016, Petitioner returned to Dr. Paletta. (PX5). Petitioner continued to complain of bilateral elbow and wrist pain as well as numbness and tingling. (PX5). It was noted that Dr. Paletta previously diagnosed Petitioner with bilateral carpal and cubital tunnel syndromes and had recommended surgery; however, Petitioner had elected to defer proceeding with surgery under his private health insurance and await a final decision from workers' compensation. (PX5). Dr. Paletta diagnosed Petitioner with chronic bilateral cubital and carpal tunnel syndromes and recommended repeat EMG/nerve conduction studies. (PX5).

On October 5, 2016, Petitioner returned to Dr. Phillips for electrical diagnostic studies. (PX4). The impressions were: relatively severe sensorimotor median neuropathy across the right carpal tunnel, less severe sensorimotor median neuropathy across the left carpal tunnel, and relatively mild and predominantly demyelinative ulnar motor neuropathies across the elbows with partial ulnar sensory axonal involvement which makes the lesions more significant. (PX4).

On October 5, 2016, Dr. Paletta reviewed Petitioner's EMG/nerve conduction study. (PX5). Dr. Paletta's impressions were: moderately severe carpal tunnel syndrome bilaterally and moderately severe cubital tunnel syndrome with sensory axonal loss. (PX5). Dr. Paletta recommended surgical intervention. (PX5).

On November 9, 2016, Petitioner returned to Dr. Brown. (PX3). Petitioner complained of continued numbness and tingling in all of his fingers and that his symptoms were worse when he bent at the elbows. (PX3). Petitioner indicated his workers' compensation case was adjudicated through the Commission and he was awarded treatment. (PX3). Dr. Brown's diagnosis was chronic, progressive bilateral carpal tunnel syndrome and cubital tunnel syndrome confirmed on multiple occasions by electrodiagnostic studies. (PX3). Dr. Brown noted they would proceed with scheduling surgery. (PX3). Petitioner was to continue working full duty with no restrictions.

On December 15, 2016, Petitioner underwent a right carpal tunnel release and decompression of the ulnar nerve, right cubital tunnel performed by Dr. Brown. (PX6). Petitioner tolerated the procedure well. (PX6).

On January 5, 2017, Petitioner underwent a left carpal tunnel release and decompression of the ulnar nerve, left cubital tunnel performed by Dr. Brown. (PX6). Petitioner tolerated the procedure well. (PX6).

On January 16, 2017, Petitioner followed up with Dr. Brown. (PX3). Petitioner indicated his numbness and tingling had improved since surgery. (PX3). Petitioner's incisions were healing well and he had good active range of motion of both extremities. (PX3). Petitioner was to continue physical therapy for four weeks and return. (PX3). Petitioner was given work restrictions of 10 pound lifting limit of the right upper extremity, two pound lifting limit of the left upper extremity, and no sustained repetitive activities with either extremity. (PX3).

On February 13, 2017, Petitioner returned to Dr. Brown. (PX3). Petitioner indicated he had improved since surgery. (PX3). On physical examination, Petitioner had some mild tenderness over the scars in his palms which is to be expected, good active range of motion of both elbows, wrists, hands, and all fingers, and grip strength of 110 pounds on the left and right. (PX3). Dr. Brown noted Petitioner had done very well and released him to return as needed. Petitioner was released full duty with no restrictions with regard to the right upper extremity. (PX3). Petitioner was given a 15 pound lifting restriction with the left upper extremity until February 15, 2017. (PX3). Petitioner was then released to full duty with no restrictions on February 16, 2017. (PX3).

Petitioner's physical therapy records were admitted as Petitioner's Exhibit 8. (PX8). On February 9, 2017, Petitioner indicated that he was healing very well and only had tenderness in the scar tissue of the carpal tunnel incisions bilaterally. (PX8). Petitioner further indicated he was able to do a lot more with his hands. (PX8). Petitioner indicated he did not want to come back for a functional progress report. (PX8). On February 13, 2017, Petitioner was discharged from formal therapy. (PX8).

No further medical records were admitted into evidence.

CONCLUSION OF LAW

Issue (L): What is the nature and extent of the injury?

Petitioner was 42 years old at the time of his injury and employed as a correctional officer at Pinckneyville Correctional Center. There is no direct evidence of diminished future earning capacity in the record. Petitioner is still employed at Pinckneyville Correctional Center and has recently received a promotion to the position of Correctional Food Supervisor II. Petitioner is currently working full duty with no restrictions.

Petitioner testified that while he has improved from his surgery and physical therapy, he still has some numbness and tingling and some loss of grip strength. Petitioner testified that he also has some stiffness and pain after a prolonged use of his hands. Petitioner testified he occasionally takes ibuprofen. Petitioner testified he had some difficulties engaging in his hobbies. However, this is not support by his medical records. Petitioner's physical therapy records note Petitioner indicated that he was healing very well and only had tenderness in the scar tissue of the carpal tunnel incisions bilaterally. Also, when Petitioner was released by Dr. Brown on February 13, 2017, Petitioner indicated he had improved since surgery and did not give any complaints of numbness or tingling. At that time, it was noted Petitioner had good range of motion of both upper extremities and excellent grip strength of 110 pounds in both hands. Petitioner has not returned to Dr. Brown with additional complaints regarding his bilateral wrists and elbows since his release and Dr. Brown indicated Petitioner's symptoms would improve with time. Petitioner also testified that he does not take any kind of prescription medications for his wrists and elbows and has not received any complaints since his return to work. Petitioner is still able to work in his labor intensive position as a Correctional Food Supervisor II.

Based upon the foregoing, the Arbitrator finds that Petitioner has sustained injuries on November 3, 2010 that resulted in the 12.5% loss of use of his left arm (31.625 weeks), 12.5% loss of use of his right arm (31.625 weeks), 10% loss of use of his left hand (20.5 weeks), and 10% loss of use of his right hand (20.5 weeks), as provided in §8(e) of the Act. Based upon stipulation of the parties, Petitioner's average weekly wage is $1,081.12, with a corresponding permanent partial disability rate of $648.67.

Further, Petitioner has a previous workers' compensation case, 10 WC 06978, which was settled between Petitioner and Respondent for 30% loss of use of the left hand. When the case at bar was previously tried on Petitioner's 19(b) petition on November 20, 2014, Respondent entered into evidence Respondent's Exhibit #17, Illinois Workers' Compensation Commission printouts showing a 30% loss of use of the left hand credit in case 10 WC 06978. This exhibit was entered into evidence with no objection from Petitioner. As such, Respondent shall be given a credit of 30% loss of use of the left hand, based on Section 8(e)17 of the Illinois Workers' Compensation Act. The total award after applying the credit equates to 83.75 weeks of compensation at a permanent partial disability rate of $648.67.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ Affirm and	☐ 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 Johnson,
Petitioner,
vs.

City of Springfield,
Respondent.

17IWCC0764

NO: 15 WC 33640
16 WC 18869

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 11, 2017 is hereby affirmed and adopted.

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

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

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: NOV 2 9 2017
KWL/vf
O-5/11/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0764

JOHNSON, JAMES
Employee/Petitioner

Case# **16WC018869**

15WC033640

CITY OF SPRINGFIELD
Employer/Respondent

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

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

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

4494 SGRO, HANRAHAN DURR RABIN
ALEX RABIN
1119 S 6TH ST
SPRINGFIELD, IL 62703

0332 LIVINGSTONE MUELLER ET AL
DENNIS S O'BRIEN
620 E EDWARD ST 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(c)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

17IWCC0764

JAMES JOHNSON
Employee/Petitioner

v.

CITY OF SPRINGFIELD
Employer/Respondent

Case # 16 WC 18869

Consolidated cases: 15 WC 33640

An *Application for Adjustment 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 **March 27, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 8, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$74,284.80**; the average weekly wage was **$1,428.55**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

The Arbitrator finds that Petitioner failed to prove that he sustained a repetitive trauma injury that arose out of and in the course of his employment, or that Petitioner's current condition of ill-being is causally related to the injury.

Compensation is therefore denied.

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

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

Signature of Arbitrator

5/10/17
Date

MAY 11 2017

17IWCC0764

FINDINGS OF FACT

Petitioner testified that he is a fire investigator/fire inspector for the City of Springfield, having worked for the fire department for over 16 years. He said that on September 8, 2014 he was an active duty firefighter as a captain of the Station 8 rig. On that date there was a fire at Merlin Muffler at 9:35 PM. The large commercial building was heavily involved in fire, getting reassigned to Engine 1 at 1 AM, with the call ending at 3:30 AM followed by trips to two other firehouses before getting back to his firehouse at 4 AM. He then slept for about two hours as the work shift was to end at 7 AM. He said that when he woke up he vas very tired and his back was extremely sore.

Petitioner said he did not seek medical treatment on that day. It was much more painful the following morning and he believed he saw a Prompt Care physician at that time due to lower back pain. He said Prompt Care prescribed muscle relaxers and anti-inflammatories. Petitioner said he saw his regular physician, Dr. Kellenberger, two to three weeks after the injury, though it may have been Dr. Sagins as he was changing doctors at that time. He believed he was told to take about two weeks off work by whichever doctor it was. He said he had to go to training in Chicago soon thereafter and had difficulty, having to stand for portions of his class. He said he saw two different chiropractors in Springfield, Dr. Kennedy and Dr. Durham, with minimal relief.

Petitioner said he had a second accident on February 25, 2015 which is the subject of a separate Application for Adjustment of Claim, 15 WC 33640, which was consolidated for arbitration but is the subject of a separate Decision of Arbitrator. That accident also involved injuries to the low back with treatment from multiple physicians as well as another chiropractor in the Virgin Islands while on vacation. Petitioner underwent a microdiscectomy at L4/5 by Dr. VanFleet on October 30, 2015.

Petitioner testified to seeing a chiropractor in July of 2015 after an increase in his low back pain after building brick fence posts in his yard. He said he had continued to work up to the time of surgery, but with great difficulty. He said he had intermittent low back pain prior to the September 8, 2014 fire which would typically resolve within a day or two. He felt he had only missed one day of work due to those problems.

Petitioner testified that as of the date of arbitration he had significant improvement, though he continued to have significant back pain nearly every day. He said he continues to have circulation problems in his right leg and there were repetitive type tasks he could no longer perform, such as pulling weeds or working on vehicles.

Petitioner said he had not had to take any extended time off from work since he had returned to work and he may have returned to see his orthopedist once at the conclusion of his physical therapy.

On cross-examination Petitioner agreed he had seen Chiropractor Kennedy on December 19, 2012 for sharp, intense low back pain. He said he went to the chiropractor one hour after the onset of that pain, which began when, while driving, he arched his back to get his cell phone out of a back pocket. He said that at that time sitting, standing, walking and movement made it worse, that he could hardly walk and that he needed assistance getting on and off the chiropractor's table. He said if the chiropractor's records reflected he was kept off work for two weeks at that time he would not disagree with that. The chiropractor's records do reflect those restrictions. (RX #1) Petitioner agreed he had also called his primary care physician three days after injuring his back in December of 2012, Dr. Drapiza, and spoke to her nurse, as the doctor was unavailable, requesting muscle relaxers as he was in great pain and his taking

Advil or Naproxyn every 8 or 12 hours wasn't helping the pain. Petitioner agreed that his low back pain at that time was bad enough he continued to be treated by the chiropractor and saw Dr. Drapiza on December 31, 2012 as his back pain had gotten worse and he was prescribed a muscle relaxer. (RX #2)

Petitioner did not recall going to Prompt Care and seeing Dr. Allen due to low back pain which was worse on the left, of telling that doctor that he had no injury, but thought he had overdone it the day before, rating his pain as 5/10. The medical records of Springfield Clinic reflect those complaints being made to Dr. Allen on August 13, 2014, less than four weeks prior to the alleged accident. (RX #2)

Petitioner said he did see Dr. Sagins on September 10, 2014 and did tell him that he had been having low back pain on and off over the previous year. He said he did tell Dr. Sagins of a back injury about a year earlier but did not remember telling that physician that a few weeks prior to September 10, 2014 he had hurt his back. The records of Dr. Sagins for that date reflect he did give that history. (RX #2)

Petitioner said he did not describe the pain coming on during the fire of September 8, 2014, telling him that he had woken up with the pain. Petitioner said if Dr. Sagins records reflected he was told to return to work on September 15, 2014 and therefore he only missed one shift of work, he would agree with that.

Petitioner said he probably told physical therapists on November 13, 2014 that he was not really having any back pain at that time. The next time Petitioner saw a physician in regards to his back would have been after his February 25, 2015 accident, on March 16, 2015, when he saw Dr. Sagins. (RX #2)

Petitioner admitted having an automobile accident prior to seeing Dr. Sagins on March 16, 2015 and his back pain acting up. He requested a muscle relaxer from Dr. Sagins at that time, and he was taking over the counter pain medication for it at that time. (RX #2)

CONCLUSIONS OF LAW

Issue C and F: Did an Accident occur that arose out of and in the course of Petitioner's employment by Respondent and is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that the Petitioner failed to prove that he suffered an accident which arose out of and in the course of his employment by Respondent on September 8, 2014, and that Petitioner's current condition of ill-being is not causally related to the alleged. In rendering his decision, the Arbitrator relies on Petitioner's testimony including his pre-existing low back problems, his description of the pain not occurring while performing his physical labor as a captain of the fire department, his pain first being noticed after he woke from sleep, and the records of his treating physicians and chiropractor which indicate ongoing low back complaints during the year preceding September 8, 2014 including less than four weeks prior to that date.

The Supreme Court has held that "an injury is accidental within the meaning of the Act when it is traceable to a definite time, place and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee." International Harvester Co. vs. Industrial Commission, 56 Ill.2d 84, 89 (1973); Elliott vs. Industrial Commission, 707 N.E.2d 228,231 (1999);

Petitioner neither proved a definite time, date and occurrence for his back injury nor repetitive tasks causing his injury. No expert testimony was introduced to prove a causal connection or medical theory for compensability, nor are the required facts present for a "chain of events" theory of causation present, as

Petitioner did not prove a pre-existing state of good health, based upon his medical treatment by Dr. Allen at Prompt Care less than a month prior to this alleged accident, nor was any definitive diagnosis for a long term condition or permanent aggravation proven, as evidenced by Petitioner's statement to his physical therapist that he was not having back pain as of two months following this alleged accident.

Compensation is therefore denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0764

JOHNSON, JAMES
Employee/Petitioner

Case# **15WC033640**

16WC018869

CITY OF SPRINGFIELD
Employer/Respondent

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

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

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

4494 SGRO HANRAHAN DURR RABIN
ALEX RABIN
1119 S 6TH ST
SPRINGFIELD, IL 62703

0332 LIVINGSTONE MUELLER ET AL
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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

17IWCC0764

JAMES JOHNSON
Employee/Petitioner

v.

CITY OF SPRINGFIELD
Employer/Respondent

Case # 15 WC 33640

Consolidated cases: 16 WC 18869

An *Application for Adjustment 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 **March 27, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0764

FINDINGS

On **February 25, 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 **$74,284.80**; the average weekly wage was **$1,428.55**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Petitioner has failed to prove that his current condition of ill-being is causally connected to the accident of February 25, 2014.

Compensation is therefore denied.

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

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

Signature of Arbitrator

5/10/17
Date

MAY 11 2017

FINDINGS OF FACT

Petitioner testified that he is a fire investigator/fire inspector for the City of Springfield, having worked for the fire department for over 16 years. He said that on September 8, 2014, five-and-a-half months before this accident, he was an active duty firefighter as a captain of the Station 8 rig. On that date there was a fire at Merlin Muffler at 9:35 PM. The large commercial building was heavily involved in fire, getting reassigned to Engine 1 at 1 AM, with the call ending at 3:30 AM followed by trips to two other firehouses before getting back to his firehouse at 4 AM. He then slept for about two hours as the work shift was to end at 7 AM. He said that when he woke up he vas very tired and his back was extremely sore. That alleged accident is the subject of a separate Application for Adjustment of Claim, 16 WC 18869, which was consolidated for arbitration but is the subject of a separate Decision of Arbitrator.

Petitioner said he did not seek medical treatment on September 9, 2014. It was much more painful the following morning and he believed he saw a Prompt Care physician at that time due to lower back pain. He said Prompt Care prescribed muscle relaxers and anti-inflammatories. Petitioner said he saw his regular physician, Dr. Kellenberger, two to three weeks after the injury, though it may have been Dr. Sagins as he was changing doctors at that time. He believed he was told to take about two weeks off work by whichever doctor it was. He said he had to go to training in Chicago soon thereafter and had difficulty, having to stand for portions of his class. He said he saw two different chiropractors in Springfield, Dr. Kennedy and Dr. Durham, with minimal relief.

Petitioner said he then had this accident on February 25, 2015. On that date Petitioner said he was working as a fire investigator/fire inspector, and he was going to a class on fire sprinkler systems with several co-workers. When walking on the top of the parking ramp next to fire station #1 he slipped on a patch of ice. He said he immediately had pain in his right leg and lower back which continued through that day and for a period of time thereafter. He said he had not had radiating pain in his right leg prior to the fall on the ice.

Petitioner said he saw Dr. Kellenberger two or three times and an MRI was eventually ordered. He said he was referred to an orthopedic surgeon, Dr. VanFleet, who later performed surgery on October 20, 2015. He said he went back to work about November 3, 2015 on light duty. Before seeing Dr. VanFleet he said he saw a chiropractor, either Dr. Durham or Dr. Kennedy. He said changed chiropractors from Dr. Durham to Dr. Kennedy as Dr. Durham did some range of motion exercises Dr. Kennedy did not perform. He said he also saw a chiropractor in the Virgin Islands while on vacation. He said that in July when he saw the chiropractor he told him of having worked on a fence at home, where he was building brick corner posts and intermediate posts and had an increase in pain after being outside working.

Petitioner said he had continued working until the time of his surgery, but with difficulty. He said he had intermittent low back pain prior to the September 8, 2014 fire which would typically resolve within a day or two. He felt he had only missed one day of work due to those problems.

Petitioner testified that as of the date of arbitration he had significant improvement, though he continued to have significant back pain nearly every day. He said he continues to have circulation problems in his right leg and there were repetitive type tasks he could no longer perform, such as pulling weeds or working on vehicles.

Petitioner said he had not had to take any extended time off from work since he had returned to work and he may have returned to see his orthopedist once at the conclusion of his physical therapy.

On cross-examination Petitioner agreed he had seen Chiropractor Kennedy on December 19, 2012 for sharp, intense low back pain. He said he went to the chiropractor one hour after the onset of that pain, which began when, while driving, he arched his back to get his cell phone out of a back pocket. He said that at that time sitting, standing, walking and movement made it worse, that he could hardly walk and that he needed assistance getting on and off the chiropractor's table. He said if the chiropractor's records reflected he was kept off work for two weeks at that time he would not disagree with that. The chiropractor's records do reflect those restrictions. (RX #1) Petitioner agreed he had also called his primary care physician three days after injuring his back in December of 2012, Dr. Drapiza, and spoke to her nurse, as the doctor was unavailable, requesting muscle relaxers as he was in great pain and his taking Advil or Naproxyn every 8 or 12 hours wasn't helping the pain. Petitioner agreed that his low back pain at that time was bad enough he continued to be treated by the chiropractor and saw Dr. Drapiza on December 31, 2012 as his back pain had gotten worse and he was prescribed a muscle relaxer. (RX #2)

Petitioner did not recall going to Prompt Care and seeing Dr. Allen due to low back pain which was worse on the left, of telling that doctor that he had no injury, but thought he had overdone it the day before, rating his pain as 5/10. The medical records of Springfield Clinic reflect those complaints being made to Dr. Allen on August 13, 2014, less than four weeks prior to the alleged accident. (RX #2)

Petitioner said he did see Dr. Sagins on September 10, 2014 and did tell him that he had been having low back pain on and off over the previous year. He said he did tell Dr. Sagins of a back injury about a year earlier but did not remember telling that physician that a few weeks prior to September 10, 2014 he had hurt his back. The records of Dr. Sagins for that date reflect he did give that history. (RX #2)

Petitioner said he did not describe the pain coming on during the fire of September 8, 2014, telling him that he had woken up with the pain. Petitioner said if Dr. Sagins records reflected he was told to return to work on September 15, 2014 and therefore he only missed one shift of work, he would agree with that.

Petitioner said he probably told physical therapists on November 13, 2014 that he was not really having any back pain at that time.

Following this February 25, 2015 accident Petitioner first sought medical treatment three weeks later, on March 16, 2015, when he saw Dr. Sagins for a pre-scheduled med check and for an infected ingrown toe nail. He said it was possible that he told the doctor that he again had low back pain and that he might have told him that he had been in a car accident where his son was driving and that his back pain had acted up. He said he requested a muscle relaxer from the doctor at that time, and he was taking over-the-counter pain killers for the pain.

Petitioner could not recall if he told Dr. Sagins of the February 25, 2015 parking lot accident at that time, or if the auto accident was then only accident he told him of. Dr. Sagins records for that date only mention the auto accident. (RX #2)

Petitioner said he next saw a doctor about two months later, on May 19, 2015, when he saw Dr. Kellenberger. He said he was probably seen for several problems on that date including sleep apnea, cluster headaches, high cholesterol and back pain. He did not recall telling Dr. Kellenberger that the pain had started eight months earlier with no known precipitating injury. He said he he probably mentioned the fire incident of September 8, 2014 to the doctor on that date, and he thought he would have mentioned the fall on the ice three months earlier to Dr. Kellenberger, just as he thought he had

mentioned the auto accident two months earlier. Dr. Kellenberger's office records for that date do not include histories of the fire, ice or motor vehicle accidents. (RX #2)

Petitioner agreed he did not have numbness, tinging or weakness in his legs as of May 19, 2015, three months after the fall on the ice.

Petitioner testified that if the records showed he told Chiropractor Kennedy on July 23, 2015 that he was having severe pain in his low back and right hip for the last day he would not argue with what was in the records. He agreed he had told the doctor that the day before he had been laying brick and his body had been twisted for prolonged periods of time. He said at that time he had pain radiating into his right buttock and right leg. He said when he saw Dr. Kennedy again the next day he again mentioned the brick laying incident and he again had right leg radiating pain. Dr. Kennedy's records reflect those histories were given by Petitioner. (RX #1)

When Petitioner saw Dr. Kellenberger on August 20, 2015 he said he complained of radiating symptoms in his right foot. He said his radiating pain was substantially the same when he saw the chiropractor and Dr. Kellenberger.

Petitioner said he thought he had made complaints of radiating pain prior to seeing Dr. Kennedy to Dr. Kellenberger and Dr. Sagins. The medical records of those doctors do not reflect radiating pain complaints prior to Petitioner's seeing Dr. Kennedy in July of 2015. (RX #2)

Petitioner said he was certain he told Dr. Kellenberger of the March 2015 motor vehicle accident. Dr. Kellenberger's records do not reflect any mention of that motor vehicle accident. (RX #2) He didn't know if he told Dr. Kellenberger of the brick laying incident but he did believe he told him of having been treated by a chiropractor after that incident. Dr. Kellenberger's records do not reflect a history of that incident or chiropractic care being given to him. (RX #2)

Petitioner agreed that when he saw Dr. VanFleet he filled out a questionnaire where he was asked how the accident or injury occurred and that it was possible he wrote "stressed back at fire; started next morning." He said it was possible he did not mention the slip on the ice, the motor vehicle accident or the brick laying incident or prior back problems which had caused him to get chiropractic care. (PX #2)

Petitioner's surgery on October 20, 2015 was an outpatient microdiscectomy. He said that when he back to see Dr. VanFleet on October 30, 2015 he was doing well, his back pain was much better, and he was allowed to return to work with restrictions of no lifting over 10 pounds and no repetitive bending or twisting. He said the fire department accommodated his restrictions and he made the same pay as he had previously.

Petitioner said that when he saw Dr. VanFleet on December 2, 2015 he told the doctor he had no back or leg pain and was doing well. Dr. VanFleet at that time released him to full duty work effective January 4, 2016. He said he did so, receiving the same rate of pay. Petitioner said he had not returned to see Dr. VanFleet since December of 2015.

CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner failed to prove that his current condition of ill-being is causally related to the accident of February 25, 2015.

While Petitioner did suffer an accident on that date, he did not seek any medical attention in the three weeks following that accident, and the visit with Dr. Sagins on March 16, 2015, was a pre-scheduled med check and for an infected ingrown toe nail. While Petitioner mentioned his back pain acting up at that time, he attributed it to a car accident where his son had driven into a ditch. No mention of the fall on the ice was made during that visit. (PX #1)

Petitioner did not mention the fall on the ice when he next sought medical treatment on May 19, 2015, instead telling Dr. Kellenberger that the back pain started eight months earlier with no precipitating injury. It is of note that when Petitioner saw Dr. Kellenberger on that date he told that physician that he had no numbness, tingling or weakness in his legs. (PX #1)

Petitioner had another intervening injury on July 22, 2015 while laying brick for a fence at home, seeing Dr. Kennedy the next day complaining of severe pain in his low back and right hip and telling the chiropractor that he had pain radiating into his right buttock and down his right leg, radicular complaints he had denied two months earlier when seen by Dr. Kellenberger. He had the same complaints when seen by Dr. Kennedy the next day. (PX #3)

Petitioner also had radicular complaints the next time he was seen by Dr. Kellenberger on August 20, 2015. It was at this visit , one month after the brick laying incident and one month after his first radicular complaints that he first mentioned falling on the ice to Dr. Kellenberger or any other medical provider. He did not tell Dr. Kellenberger of that brick laying incident or of his treatment by the chiropractor the following day with radicular complaints. (PX #1)

Petitioner did not have an MRI until August 28, 2015, after the motor vehicle accident and the brick laying incident which had initiated radicular complaints. (PX #1)

When Petitioner first saw orthopedic surgeon Dr. VanFleet the questionnaire he himself filled out did not mention the slip on the ice, the motor vehicle accident or the bricklaying accident, instead only mentioning the pain coming on in the morning following stress to his back at a fire. (PX #2)

No physician rendered an opinion in regards to causal connection. A chain of events theory of causal connection can not support a finding of causal connection in this case as Petitioner's low back was not in a state of good health prior to the accident, he did not seek immediate medical treatment, when he did seek medical treatment he did not have radicular complaints and he gave no history of this accident but instead mentioned a motor vehicle accident causing his back pain to act up. In addition there was another intervening accident in July 2015 which precipitated radicular complaints.

Compensation is therefore denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick Cox,
Petitioner,
vs. NO: 16 WC 30382

Peabody Energy (Wildcat Hills),
Respondent,

17IWCC0765

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 25, 2017, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $47,900.00. 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: NOV 3 0 2017
o111617
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

COX, RICK
Employee/Petitioner

Case# **16WC030382**

PEABODY ENERGY (WILDCAT HILLS)
Employer/Respondent

17IWCC0765

On 5/25/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0299 KEEFE & DePAULI PC
NEIL A GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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

RICK COX
Employee/Petitioner

v.

PEABODY ENERGY (WILDCAT HILLS)
Employer/Respondent

Case # 16 WC 30382

Consolidated cases: ____

17IWCC0765

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 Glaub**, Arbitrator of the Commission, in the city of **Herrin**, on **April 12, 2017**. By stipulation, the parties agree:

On the date of accident, **May 3, 2016**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$79,826.24**, and the average weekly wage was **$1,535.12**.

At the time of injury, Petitioner was **51** years of age, ***married*** with **1** dependent child.

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

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

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 **$755.22**/week for a further period of **63.25** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **the 12.65% loss of his body as a whole.**

Respondent shall pay Petitioner compensation that has accrued from **February 14, 2017,** through **April 12, 2017,** and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

May 25, 2017
Date

MAY 25 2017

FACTS

Petitioner is a right-handed, mine examiner at Respondent's Wildcat Hills Mine. (T.9) The Parties stipulated that on May 3, 2016, Petitioner sustained accidental injuries in the course and scope of his employment when, while driving a slinger/battery-powered vehicle in the return area of the mine, he ran over some loose rock or other soft materials that caused the steering wheel to spin and pop his right shoulder. (T.9-10) At Arbitration, Petitioner testified to a prior right shoulder injury that occurred about 8 years ago while roof bolting for Respondent. (T.10) Petitioner testified that he did not file a workers' compensation claim or receive any money following that prior incident. (T.10-11)

After the accident of May 3, 2016, Petitioner sought medical care and treatment with Dr. Ford. (PX3, 5/5/16) Dr. Ford recorded the history of the injury and noted that Petitioner was having pain over the back and front of his right shoulder, worse with abduction. *Id.* Range of motion was limited and there were positive orthopedic tests. *Id.* The assessment was right rotator cuff tendinitis/right rotator cuff strain with probable tear. *Id.* Petitioner was prescribed medication and physical therapy and referred to an orthopedist. *Id.*

Respondent then referred Petitioner to Dr. Lenarz. On May 16, 2016. Dr. Lenarz saw the petitioner, recorded the history of the injury and stated that Petitioner's condition was dramatically better in terms of range of motion and strength (PX4, 5/16/16). Dr. Lenarz diagnosed that the injury caused a right shoulder strain. *Id.* He recommended continuing medication and home exercises. *Id.* Petitioner returned to Dr. Lenarz one month later, and reported his symptoms were worsening with increased activity. (PX4, 6/13/16) Dr. Lenarz recommended an MRI of Petitioner's right shoulder. *Id.* This was performed at St. Luke's Hospital Center for Diagnostic Imaging on June 20, 2016. The MRI was interpreted to show a partial thickness tear of the rotator cuff near the supraspinatus tendon. The MRI did not show evidence of a full thickness tear of the rotator cuff. (PX5, 6/20/16) Dr. Lenarz recommended a cortisone injection and therapy. *Id.*

On July 18, 2016, Petitioner returned to Dr. Lenarz with reports of persistent pain and little improvement. (PX4, 7/18/16) The injection offered mild relief for a brief period of time. *Id.* Dr. Lenarz anticipated that Petitioner would need surgery. *Id.* In a July 22, 2016 addendum to the July 18, 2016 visit note, Dr. Lenarz stated:

> At Mr. Cox's most recent visit to my office a recommendation for surgery was made. This would include an arthroscopic rotator cuff repair, biceps tenodesis and subacromial decompression. His MRI findings are consistent with the reported mechanism of injury Mr. Cox sustained on May 3, 2016 when he was driving the "stinger" and hit the bump with caused the steering wheel to turn causing shoulder disruption and a notable pop, as the prevailing factor in the current conditions of his shoulder. [Sic] The MRI shows a high grade (50% tendon thickness) partial thickness rotator cuff tear adjacent to the biceps and likely involving the biceps pulley. (PX4, 7/22/16)

Petitioner saw Dr. Lenarz on August 1, 2016, but surgery was not scheduled and Petitioner was told to return on September 12, 2016. (PX4, 8/1/16)

On September 13, 2016, Petitioner saw a physician of his own choosing, Dr. Nathan Mall. (PX7, 9/13/16) Dr. Mall recorded the history of the injury, noted that Petitioner was sent by Respondent to Dr. Lenarz, and noted that after Dr. Lenarz recommended surgery, Petitioner was referred yet again by Respondent, this time to Dr. King. *Id.* Dr. King's report was not offered by Respondent. Dr. Mall's examination was consistent with that of Dr. Lenarz, as was his MRI review. *Id.* Dr. Mall concurred with Dr. Lenarz that Petitioner needed surgery. *Id.* The petitioner underwent surgery on September 20, 2016. Dr. Mall performed a right shoulder rotator cuff repair, subcoracoid decompression and coracoplasty, subacromial decompression and acromioplasty and an open biceps tenodesis. (PX8) Petitioner reported that surgery improved his right shoulder condition. Physical therapy further improved his condition. (PX6)

At Arbitration, Petitioner testified that his dominant right arm lacks strength when performing overhead reaching and grasping. (T.14-16) Petitioner's job requires him to reach up to sign and/or hang tags or flags on roof bolts. (T.15) He believes his strength in his right shoulder is about 75% less and that he cannot lift as much as he could before. (T.15-16) His hobby of working on Suzuki Samurais has been adversely affected. (T.16) Petitioner testified that he takes Aleve, Tylenol and occasional prescription medication for his pain on an as-needed basis. (T.16-17) petitioner testified that because of the accident, he has less endurance in his right arm and has learned to use his left arm more. (T.17-18)

CONCLUSION

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. The Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to serve as a mine inspector performing duties that require overhead work and have been adversely affected by the injury. (T.15) The Arbitrator gives greater weight to this factor.

(iii) **Age**: Petitioner was 51 years old at the time of his injury. He has diminished healing capacity as a result thereof but must yet live and work with his disability for a number of working years. The Arbitrator gives greater weight to this factor.

(iv) **Earning Capacity:** There is no direct evidence of reduced earning capacity contained in the record. The Arbitrator gives no weight to this factor.

(v) **Disability:** As a result of the injury, Petitioner sustained a right shoulder rotator cuff tear, biceps instability, and subcoracoid and subacromial impingement. (PX8) This failed conservative treatment and required surgical intervention by way of rotator cuff repair, subcoracoid decompression and coracoplasty, subacromial decompression and acromioplasty, and open biceps tenodesis. Petitioner testified that despite the improvement resulting from surgery, his dominant right arm lacks strength when performing overhead reaching and grasping. (T.14-16) Petitioner's job requires him to reach up to sign and/or hang tags or flags on roof bolts. (T.15) He suffered loss of strength and endurance in his right shoulder. (T.15-18) He takes medication for his symptoms and his hobbies have been adversely affected. (T.16-17) The Arbitrator finds Petitioner's subjective complaints supported by the record.

Based on the foregoing, the Arbitrator finds Petitioner sustained serious and permanent injuries that resulted in the 12.65% loss of the body as a whole.

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

Walter Faber,

Petitioner,

vs. NO: 10 WC 05589

Campus Club Bar & Grill and
State Treasurer, Ex-Officio
Custodian of the Illinois
Injured Worker Benefit Fund,

Respondent,

17IWCC0766

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 8, 2017, is hereby affirmed and adopted.

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

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

17IWCC0766

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: NOV 30 2017
o111617
DLG/mw
045

David L. Gore

Deborah L. Simpson
Deborah Simpson

Stephen J. Mathis
Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

FABER, WALTER
Employee/Petitioner

Case# **10WC005589**

CAMPUS CLUB BAR & GRILL AND STATE TREASURER EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

17IWCC0766

On 3/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
JOHN W POWERS
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0000 CAMPUS BAR & GRILL
1000 W LINCOLN HWY
DeKALB, IL 60115

5462 ASSISTANT ATTORNEY GENERAL
MAGGIE TIMLIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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
AMENDED ARBITRATION DECISION

Walter Faber
Employee/Petitioner

Case # **10** WC **5589**

v.

Consolidated cases: **N/A**

Campus Club Bar & Grill and State Treasurer, *Ex-Officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

17IWCC0766

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Geneva**, on **December 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On **December 12, 2009**, Respondent *was* operating under and subject to the provisions of the Act as explained *infra*.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to this accident as explained *infra*.

In the year preceding the injury, Petitioner earned **$17,940.00**; the average weekly wage was **$345.00** as explained *infra*.

On the date of accident, Petitioner was **32** years of age, ***single*** with **0** dependent children as explained *infra*.

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

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

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

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

ORDER

Injured Workers' Benefit Fund

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.

As explained more fully in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has failed to establish that he sustained a compensable accident at work as claimed. By extension, all other issues are rendered moot and all requested compensation and benefits are denied.

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

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

Signature of Arbitrator

March 6, 2017
Date

ICArbDec p 2

MAR 8 - 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED ARBITRATION DECISION *ADDENDUM*

Walter Faber
Employee/Petitioner

v.

Case # **10** WC **5589**

Consolidated cases: **N/A**

Campus Club Bar & Grill and State Treasurer, *Ex-Officio* Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

FINDINGS OF FACT

Walter Faber (Petitioner) claims that he was injured while working for Campus Club Bar & Grill (Respondent) on December 12, 2009. Arbitrator's Exhibit[1] ("AX") 1. Petitioner filed a third Amended Application for Adjustment of Claim ultimately against Respondent and the Injured Workers' Benefit Fund (IWBF). PX8.

Petitioner submitted a copy of notice served on Respondent via certified mail dated October 4, 2016 to 1000 W. Lincoln Highway, DeKalb, IL 60115. PX1. The return receipt dated October 11, 2016from the U.S. Postal Service for the certified mail piece indicates that it was returned as undeliverable because the forwarding order had expired. *Id.* Petitioner also submitted a certification from Lain Hines from the National Council on Compensation Insurance (NCCI) in a letter dated November 8, 2013 affirming that there is no insurance coverage for Respondent on the alleged date of accident. PX2.

No one appeared on Respondent's behalf at the hearing. However, counsel for the IWBF appeared at the hearing and disputes Petitioner's claims regarding employer/employee relationship, accident, notice, causal connection, earnings, age, marital status, dependency, unpaid medical bills, and the nature and extent of Petitioner's injury. AX1.

Background

Petitioner testified that on the alleged date of accident, December 12, 2009, he was 32 years old, single, and had no dependents. He testified that he was employed by Respondent, Campus Club Bar & Grill, located at 1000 W. Lincoln Highway. Petitioner explained that Respondent operated a 21 and over night club, bar and restaurant that had video games for patrons and served alcohol which was consumed by patrons on Respondent's premises.

Petitioner testified that he began working for Respondent on the first day that they opened five-to-six months before he injured his arm. Petitioner testified that Rahem Mooney (Mr. Mooney) was the floor manager that hired him as Head of Security. On cross examination, Petitioner testified that Respondent's owners were two brothers and a sister with whom he interacted a couple of times at meetings, but he was interviewed and hired by Mr. Mooney. Petitioner was unable to recall the names of the owners.

[1] The Arbitrator similarly references the parties' exhibits herein, if any. Petitioner's exhibits are denominated "PX," Respondent's exhibits are denominated "RX," and the IWBF's exhibits are denominated "IWBF" with a corresponding number as identified by each party.

Petitioner explained that his job duties included floating around the floor, picking up drinks for patrons' safety, stopping fights, cleaning up, and otherwise protecting the owners, bar staff and customers. He explained that he worked inside the bar as well as in the parking lots located on the side, back, and in front of the bar. Petitioner testified that there were plenty of fights in the parking lots and he was required to stop those fights in his position as Head of Security.

Petitioner explained that previously there had been fights and police were called to Respondent's location. On November 1, 2009, Petitioner testified that shots were fired and the police were called. Petitioner testified that he spoke with the police, which was part of his job duties. There were other incidents on December 6, 2009 and December 11, 2009 to which the police were called and at which times he spoke with police.

Petitioner testified that he was paid hourly $11.50 per hour. Petitioner testified that Mr. Mooney, his supervisor, determined how much he was paid. Petitioner worked five days per week and was off on Sundays and Mondays. Petitioner testified that he was paid weekly. He began work at 4:30 p.m. and finished at 2:00 a.m. Petitioner testified that Mr. Mooney and one of the owners determined his schedule. Petitioner testified that there was no written employment contract with Respondent. On cross examination, Petitioner testified that he received a check bi-weekly check for 30 hours of work per week totaling $345.00. He testified that no taxes were withdrawn and he did not receive any W-2's. Petitioner testified that he had no concurrent employment. On re-direct examination, Petitioner clarified that he was paid by Respondent in cash, not by check.

December 12, 2009

On December 12, 2009, Petitioner testified that he was at the bar working. At approximately 10:00/10:30 p.m., patrons were drinking and going outside to a patio. Petitioner explained that two male patrons were yelling at each other and he "got in the middle." Another person put his arms around Petitioner and lifted him off the ground slamming him into the ground crushing his whole left arm. Petitioner testified that he hit the pavement, something broke, and his arm was dangling.

Petitioner testified that he did not have any left arm symptoms or treatment prior to his accident at work.

Notice

Petitioner testified that Respondent called an ambulance for him and he went to the hospital around midnight. He testified that he reported this to Mr. Mooney on the same night. Petitioner testified that he did not work after December 12, 2009 and he did not receive any payment from Respondent for his time off of work or any medical benefits.

On cross examination, Petitioner testified that he had a conversation with Mr. Mooney roughly around the time after he had his cast removed. He testified that he told Mr. Mooney that he was in physical therapy about a month after his cast was removed.

Medical Treatment

The medical records reflect that Petitioner presented to the emergency room at Kishwaukee Community Hospital on December 13, 2009. PX1. The emergency room physician, Dr. Buckingham, noted the following history in pertinent part:

> Patient is a 32-year-old who tonight slipped on ice and fell on his right arm. Patient complaints of upper arm pain, no wrist drop and his sensory and vasculature are intact. Patient denies any other mechanism of injury occupational therapy any other sites of pain. All other review of systems negative and noncontributory.

Id. Dr. Buckingham's handwritten notes reflect a report that Petitioner "slipped on ICE & fell on arm [right] no wrist drop VASC/sensory intact[.]" *Id.* Petitioner's left arm x-ray report reflects that Petitioner presented for "[p]ain after falling" and the interpreting radiologist noted a fracture of the mid-humeral shaft with a 13 mm displacement of the distal fragment with respect to the proximal fragment. *Id.* Dr. Buckingham administered morphine for pain and placed Petitioner in a splint. *Id.* He was discharged home and instructed to follow up with an orthopedist. *Id.*

On cross examination, Petitioner acknowledged that he told his doctors that he fell on ice. However, Petitioner testified that the fall occurred when the patron's friend grabbed him and they slipped on ice.

The medical records reflect that Petitioner saw Troy Choi, M.D. (Dr. Choi) on December 16, 2009. PX3. Dr. Choi noted the following history:

> The patient is a 32-year-old, left-hand dominant white male who slipped on the ice at a public restaurant and fell onto an outstretched arm. He had pain afterward and a deformity of his left arm and went to the emergency room. He was seen and x-rays were taken, which showed he had a midshaft humerus fracture. He was placed in a splint and instructed by the emergency room physician, Dr. Buckingham, to follow up with an orthopedic physician.

Id. Dr. Choi noted that Petitioner had a left humerus fracture that was not in optimal alignment. *Id.* He noted that "[h]istorically, these fractures have been treated conservatively and have done fine since the shoulder can tolerate some angular deficits. I recommended that he undergo closed reduction and splinting to put the fracture in a better position." *Id.*

Petitioner saw Dr. Choi at Kishwaukee Community Hospital on December 17, 2009 for the recommended left humerus closed reduction and application of a functional brace under anesthesia. PX2. Dr. Choi diagnosed Petitioner pre- and post-procedure with a left humerus midshaft fracture. *Id.* Dr. Choi also noted the following indications for the procedure in pertinent part:

> Walter is a 32-year-old left hand dominant white male who fell last weekend on the ice sustaining a left humerus midshaft fracture. He was seen in the emergency room and placed in a coaptation splint and posterior mold but the posterior mold and coaptation splint stopped at the fracture site. He had significant varus angulation still greater than 30° on the AP view and given the amount of angulation, I discussed options with him and he elected to proceed with closed reduction and functional bracing. ....

Id. Petitioner was discharged home with after-care instructions. *Id.*

On December 21, 2009, Dr. Choi noted Petitioner's report that he never received the Percocet that was prescribed for him post-reduction, but he kept wearing his sling. PX3. After an examination and additional x-rays, Dr. Choi noted that Petitioner's alignment had improved. *Id.* Petitioner was given another prescription and instructed to follow up weekly for x-rays. *Id.*

Petitioner testified that he was hospitalized from December 31, 2009 through January 3, 2010. Dr. Choi's December 31, 2009 progress note reflects that Petitioner presented with an infection around the brace site. PX3. Petitioner reported that he had been showering and that he perspired a lot. *Id.* He also reported that he was unable to afford the prescribed Percocet. *Id.* Dr. Choi consulted with some colleagues, who also examined Petitioner, and Petitioner was diagnosed with a staph infection due to dampness of the brace. *Id.* Petitioner was admitted to the hospital for IV antibiotics. *Id.* The Kishwaukee Community Hospital records reflect that Petitioner was admitted on December 31, 2009. PX6.

On January 4, 2010, Petitioner reported to Dr. Choi that he had been in the hospital the prior weekend for a bacterial infection around the brace site for which he was given Cipro and wound dressings. PX3. Dr. Choi noted that Petitioner would return for placement in the brace again after the wound healed. *Id.* Petitioner cancelled his appointment with Dr. Choi on January 7, 2010, but reported that he was able to pick up his Cipro and Vicodin. *Id.*

On January 11, 2010, Dr. Choi instructed Petitioner to resume using his brace, but noted that he should take care to keep the area dry and clean. PX3. He was also given a refill on Norco. *Id.* On January 20, 2010, Petitioner returned for x-rays and was instructed to keep the brace high and tight on the arm. *Id.*

On February 11, 2010, Petitioner saw Dr. Choi's certified physician's assistant, Marie Gabel, MPAS, PA-C. PX3. Ms. Gabel noted that Petitioner had failed to show for his last two appointments[2] and that he had been non-compliant with his brace. *Id.* He also reported that he had been taking three Norco per day, but ran out and asked for a medication refill. *Id.* Petitioner further reported that he "has been doing exercises on his own that he feels are appropriate with lifting weights at his side. He had not done any formal physical therapy. He is a self-pay patient." *Id.* Ms. Gabel noted that Petitioner "works security at a local nightclub." *Id.* Ms. Gabel noted his concern about Petitioner's non-compliance with his care, she did not recommend that he perform exercises alone at home, and he should follow up with Dr. Choi the following week. *Id.* Ms. Gabel also indicated that she did not feel comfortable prescribing narcotics to Petitioner. *Id.*

Petitioner testified that February 11, 2010 was his last visit to Dr. Choi's office. He explained that this was his last visit because his insurance stopped paying for the medical services. Petitioner testified that he did not seek additional medical treatment and to the best of his knowledge his bills remain unpaid.

Additional Information

Regarding his current condition, Petitioner testified that his left arm swells in the cold and he has swelling by the location of the fracture as well as in the left hand. Petitioner explained that he has weakness in his left arm and can hardly use a hammer. He also testified that he cannot lift over 10 pounds whereas before his accident he could lift up to 60-75 pounds in his left hand. Petitioner also testified that he feels a pins and needles sensation in his left hand when he wakes up and aching in his left arm when it rains. He explained that he takes over-the-counter medications including ibuprofen, Tylenol, and Advil several times a day, every day.

Petitioner testified that he did find two jobs after his accident working in construction or lifting lumber, but he was terminated from both jobs for inability to perform the job duties. Petitioner testified that he did not work anywhere while he was off of work. Petitioner testified that Respondent told him that they would pay for "everything," but did not do so. On cross examination, Petitioner acknowledged that he did not give

[2] Petitioner had also missed or rescheduled several other appointments with Dr. Choi throughout treatment. PX3.

Respondent any off work slips. He also acknowledged that he did not ask to return to work. However, Petitioner testified that after his cast was removed, he told Mr. Mooney that he did not want to go back although Mr. Mooney wanted him back. Petitioner explained that he did not think that it was fair that Respondent did not pay him what they promised to pay him.

ISSUES AND CONCLUSIONS

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

In support of the Arbitrator's decision relating to the admissibility of Petitioner's Exhibit 7, the Arbitrator finds the following:

Petitioner offered his Exhibit 7 into evidence, which is comprised of several police reports from the DeKalb Police Department for incidents occurring and reported on November 1, 2009, November 17, 2009, and December 6, 2009. The IWBF objected to the admissibility of Petitioner's Exhibit 7 based on the hearsay nature of the exhibit or its lack of relevance to the issues relating to Petitioner's claimed date of accident while working for Respondent on December 12, 2009. Petitioner asserts that the reports are not hearsay and that they are being offered for the relevant purpose of determining whether there was an employment relationship between Petitioner and Respondent. After considering Petitioner and the IWBF's arguments and examining the exhibit, the Arbitrator overrules the IWBF's objections to Petitioner's Exhibit 7 on both bases. The police reports are hearsay exceptions, not being offered for the truth of the matters asserted therein, and limitedly relevant to the issue of Petitioner's employment with Respondent, Respondent's business type (i.e., a bar/club), and how police officers per during a six-week period prior to his alleged accident at work. Based on all of the foregoing, Petitioner's Exhibit 7 is admitted into evidence.

In support of the Arbitrator's decision relating to Issue (A), whether Respondent was operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds the following:

The Illinois Workers' Compensation Act ("Act") defines those businesses that are considered "employers" and, thus, come under its jurisdiction. Under Section 3, various types of businesses automatically come under the Act's jurisdiction including "[e]stablishments open to the general public wherein alcoholic beverages are sold to the general public for consumption on the premises." 820 ILCS 305/3 (LEXIS 2005).

Petitioner gave unrebutted testimony that Respondent's business involved the sale of alcohol for consumption on the premises and the medical records corroborate Petitioner's testimony that he worked at a local nightclub, albeit unnamed, at the time of his alleged accident. Thus, the Arbitrator finds that Respondent was operating as an employer on the claimed date of accident under and subject to the Act.

In support of the Arbitrator's decision relating to Issue (B), whether there was an employee-employer relationship on the claimed dates of accident, the Arbitrator finds the following:

The existence of an employer-employee relationship between Petitioner and Respondent is a prerequisite to determining further compensability of his claim. The Illinois Supreme Court has articulated various factors to

be considered in determining whether a claimant is an employee under the Act including: "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; and whether the employer supplies the person with materials and equipment." *Roberson v. Industrial Comm'n*, 225 Ill.2d 159, 175 (2007) (*citing Wenholdt v. Industrial Commission*, 95 Ill. 2d 76, 81 (1983), *quoting Morgan Cab Co. v. Industrial Comm'n*, 60 Ill. 2d 92, 97 (1975)). Determination of the existence of an employer-employee relationship rests on the totality of the circumstances in each case; however, the "right to control the manner in which work is performed is the most important consideration, among others, in determining whether an employer/employee relationship existed." *Roberson*, 225 Ill.2d at 175.

Petitioner gave unrebutted testimony that he was hired by Mr. Mooney to work for Respondent as an employee approximately five-to-six months before his injury at work. His work schedule was set by Mr. Mooney. He was supervised by Mr. Mooney and his job duties were set by Respondent. Petitioner worked 30 hours per week and was paid $11.50 per hour in cash every two weeks. Respondent did not withhold taxes or make deductions. Moreover, the medical records of Dr. Choi reflect that Petitioner worked in security for a local, albeit unnamed, nightclub. In addition, the police reports offered into evidence by Petitioner establish that Petitioner had been held out as an employee to local law enforcement officials on several occasions in November and December of 2009. No one appeared on Respondent's behalf at the hearing and no other evidence was submitted regarding Petitioner's employment. Based on all of the foregoing, the Arbitrator finds that an employee-employer relationship existed on the claimed date of accident.

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent as claimed and the date of such accident, 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 2010). 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 his injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

Petitioner testified that he was working for Respondent when on December 12, 2009 his left arm was injured and he was transported by ambulance from Respondent's premises to an emergency room for immediate care. However, the medical records from Kishwaukee Community Hospital and Dr. Choi controvert Petitioner's testimony about the mechanism of injury or any report that they occurred while at work. Those records reflect Petitioner's report in the emergency room on December 13, 2009 that Petitioner "tonight slipped on ice and fell on his right arm... Patient denies any other mechanism of injury." PX1. Dr. Choi's office note of December 16, 2009 also reflects Petitioner's report that he "slipped on the ice at a public restaurant and fell onto an outstretched arm." PX3. The following day when he presented for the closed reduction of the humerus fracture under anesthesia, Dr. Choi noted a history that Petitioner reported that he "fell last weekend on the ice[.]" *Id.*

While Petitioner testified that he fell at work, he provided detailed testimony about an altercation with two patrons located on Respondent's premises in which he was thrown to the ground or, also, that during the altercation the patron that grabbed him slipped with him onto the ground in the course of the altercation. None of the medical records reflect any indication that Petitioner's fall occurred at work, in the course of his employment, or in the course of an altercation. No ambulance records regarding Petitioner's transportation from Respondent's premises to the emergency room or any bills for such services were offered into evidence, which might support or controvert Petitioner's testimony about the altercation with patrons while at work causing a slip-and-fall mechanism that he maintains caused his left arm fracture.

Based on all of the foregoing, the Arbitrator does not find Petitioner's testimony to be credible as it is controverted by the records submitted into evidence and, consequently, finds that Petitioner has failed to establish that an accident occurred that arose out of and in the course of Petitioner's employment with Respondent on December 12, 2009 as claimed. By extension, all other issues are rendered moot and all requested compensation and benefits are denied.

In support of the Arbitrator's decision relating to Issues (H) and (I), Petitioner's age, martial status and dependency, the Arbitrator finds the following:

While Petitioner has failed to establish that he sustained a compensable accident at work as claimed, Petitioner testified that he was 32 years old on the date of accident, single with no dependent children. The medical records corroborate Petitioner's testimony and reflect his date of birth on February 18, 1977 and single status. Thus, the Arbitrator finds that Petitioner was 32 years old and single with no dependants at the time of his injury at work.

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

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work. Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

While Petitioner has failed to establish that he sustained a compensable accident at work as claimed, Petitioner has also failed to establish that he would be entitled to temporary total disability benefits during the claimed period of December 13, 2009 through February 11, 2010. Petitioner testified that he was placed off of work, but acknowledged on cross examination that he did not provide any off work slips to Respondent. Thus, the Arbitrator finds that Petitioner has failed to establish that he is entitled to temporary total disability benefits as claimed.

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

LAURIE CHAPMAN,

Petitioner,

vs. NO: 09 WC 29095

MARION HIGH SCHOOL,

Respondent.

17IWCC0767

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

This matter came up for arbitration hearing on November 15, 2016 following a complicated procedural history. At hearing the parties disputed the wage differential due to Petitioner. The arbitrator ordered payment of $507.53 per week wage differential for the duration of Petitioner's disability pursuant to Section 8(d) 1 of the Act. The Commission modifies the manner of calculation employed by the Arbitrator and utilizes the method of calculation that reflects a 37- week work year as opposed to the 52- week work year utilized by the Arbitrator.

It is undisputed, based upon the Marion Education Association Contract for years 2015-2016 and 2016-2017, entered into evidence, that had Petitioner not sustained work related injuries to her back that, in her prior employment as a physical education teacher with Respondent Marion High School, her annual earnings would be $68,388.00 based upon a 37-week work year. Assuming Petitioner worked 75% of a full teaching workload in her prior employment, as she does in her present employment, her salary would be $ 51,291.00.

Petitioner is currently employed by Southern Illinois University as an instructor of Kinesiology on a non-tenure track. Petitioner has been so employed since August 17, 2015.

The Commission finds, based upon the evidence, that Petitioner is medically stable and likely to maintain her current earning capacity for the foreseeable future. While Petitioner continues to have open medical rights pursuant to Section 8(a) of the Act and continues to receive conservative treatment there are no medical procedures planned that will impact Petitioner's earning capacity. Likewise, there are no medical restrictions that limit Petitioner to working a 75% workload at Southern Illinois University. The 75% workload represents the personal choice of Petitioner.

In Petitioner's current employment as an instructor at Southern Illinois University, she currently earns $21,600.00, based on a 75% of full teaching load and a 32-week school year. As noted, in her prior employment with Respondent, Petitioner had a 37-week school year. In order to compare "apples to apples," the Commission notes the value of a 75% of full teaching load, 37-week teaching contract at Southern Illinois University would be $24,975.00 ($21,600 x 37/ 32). An annual difference in earnings would be $26,316.00 ($51,291.00 - $24, 975.00) corresponding to a weekly difference of $974.66, based on a 37-week work year. This yields a wage differential of $649.77 ($974.66 x 2/3).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $649.77 per week commencing August 17, 2015 for the duration of Petitioner's disability as provided in §8 (d) 1 of the Act, for the reason that the injuries sustained caused Petitioner to become partially incapacitated from pursuing her usual and customary line of employment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $1,077.49/week for 17 5/7 weeks, commencing April 15, 2015 through August 16, 2015, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED that Respondent shall be given a credit of "all paid" for TTD, $0 for TPD, $19,067.63 for maintenance, and $0 in other benefits for which credit may be allowed under Section 8(j) of the Act.

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

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

17IWCC0767

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.

NOV 30 2017

DATED:
o: 10/12/17
SM/msb
44

Stephen Mathis

David L. Gore

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHAPMAN, LAURIE
Employee/Petitioner

Case# **09WC029095**

MARION HIGH SCHOOL
Employer/Respondent

17IWCC0767

On 2/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0355 WINTERS BREWSTER CROSBY ET AL
THOMAS F CROSBY
111 W MAIN ST
MARION, IL 62959

2904 HENNESSY & ROACH PC
MICHAEL J HOLT
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

17IWCC0767

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

Laurie Chapman
Employee/Petitioner

v.

Marion High School
Employer/Respondent

Case # 09 WC 29095

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Herrin**, on **November 15, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 8, 2008,** Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$61,485.65**; the average weekly wage was **$1,616.24.**

On the date of accident, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$ALL PAID** for TTD, **$0** for TPD. **$19,067.63** for maintenance, $0 in other benefits for which credit may be allowed under Section 8(j) of the Act.

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

ORDER

Respondent shall pay Petitioner maintenance benefits of **$1,077.49/week** for **17 5/7 weeks, commencing April 15, 2015 through August 16, 2015,** as provided in Section 8(a) of the Act.

Respondent shall be given a credit of **$ALL PAID** for TTD, **$0** for TPD, **$19,067.63** for maintenance, $0 in other benefits for which credit may be allowed under Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing August 17, 2015, of **$507.53/week** for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

Melinda M. Pope-Sullivan
Signature of Arbitrator

2/1/17
Date

ICArbDec p. 2

FEB 6 - 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Laurie Chapman
Employee/Petitioner

Case # **09** WC **29095**

v.

Consolidated cases: **N/A**

Marion High School
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The Arbitrator notes that following the Commission Decision & Opinion on Review, Petitioner participated in vocational rehabilitation with Ms. Liala Slaise. It is not disputed that Petitioner located a teaching position at Southern Illinois University ("SIU") within the Department of Kinesiology, which she commenced on August 17, 2015. It is also not disputed that, due to her permanent work restrictions, Petitioner was not able to resume her former position with Respondent as a physical education teacher and department head, even with accommodations.

The controlling issue in the current proceedings is permanency, and the parties postured the trial on an agreed basis pursuant to Section 8(d)(1) of the Act. Further, the parties stipulated that, if Petitioner could resume full employment in her prior position with Respondent, she would be entitled to an annual salary of $68,388.00 for the 185-day school year. Thus, the main issue to be resolved at this time is the "lower wage bracket" figure of the wage differential equation as set forth by Section 8(d)(1). The other issues in dispute are temporary partial disability benefits and penalties/attorney's fees.

Petitioner's Exhibit 5 consists of three "Notice of Faculty Appointments" by which Petitioner was employed to teach at SIU within the Department of Kinesiology. (PX5). These embrace the Fall 2015, Spring 2016 and Fall 2016 college semesters. Initially, Petitioner was hired to teach 66 2/3rds of full time at a monthly salary equivalent of $3,200.00/month. For Spring 2016 and Fall 2016, Petitioner was hired to teach at 75% of full time. It is not disputed that full time teaching equates to 12 semester hours. Petitioner taught 8 hours during the Fall 2015 and 9 hours each during the Spring and Fall 2016 college semesters, respectively.

The school semesters generally ran about 16 weeks. For example, per Respondent's Exhibits 6 and 7, the Fall 2016 semester ran between August 23 and December 15, 2016. (RX6). The Spring 2016 semester ran between January 19 and May 13, 2016. (RX6; RX7). Petitioner's Exhibit 4 contains the associated payroll slips from SIU, and these reflect the following payments to Petitioner:

Payment Date	Amount
9/1/15	$1,066.72
10/1/15	$2,133.44
10/30/15	$2,133.44
12/1/15	$2,133.44

1/4/16	$2,133.44
1/29/16	$2,400.00
2/29/16	$2,400.00
3//31/16	$2,400.00
4/29/16	$2,400.00
5/31/16	$1,200.00
8/31/16	$1,200.00
9/30/16	$2,400.00
10/31/16	$2,400.00

In reviewing these payroll figures, the Arbitrator determines that Petitioner earned $9,600.48 for her services during the Fall 2015 semester; Petitioner earned $10,800.00 during the Spring 2016 semester; and Petitioner's pay for the Fall 2016 semester was incomplete given that she had not concluded teaching that semester at time of trial herein. However, she had earned $6,000.00 to date.

Respondent's admitted trial exhibits include biographies of the Department of Kinesiology as contained on the SIU website, including that of Petitioner. (RX4; RX5). Of note, Petitioner is listed as having both a Bachelor and Master's level of education with over 20 years of teaching in the Illinois public school system. (RX5).

At trial, Petitioner testified that the SIU teaching position is non-tenure track. She testified that she does not have a doctorate degree, so she does not qualify for tenure. Petitioner testified she is not physically able to work full time as it is too physically demanding on her low back. In Spring 2016, she worked 5 days a week, and the cumulative strain on her low back increased her pain levels. The commute from her home to SIU is 43 minutes one way, and the drive aggravates her back. She testified that she wears a back brace and participates in physical therapy to keep her pain and associated dysfunction under better control. She testified that she is only able to work at the 75% level of teaching, and even with this, she requires accommodations from SIU. The accommodations include SIU modifying her schedule to permit Petitioner to teach remotely from home. Further, in lieu of actual class time, Petitioner serves as the Physical Education Program Director for which she is still paid as if she were teaching regular class work. Petitioner has received a handicapped parking sticker from Dr. Park, her family doctor, to help her park closer to her SIU office. Petitioner testified that plans to follow up with Dr. Gornet in early 2017 to address possible surgery to her low back.

Petitioner called Juliane Wallace as a witness. Ms. Wallace is the chair of the Department of Kinesiology. She testified that Petitioner has an outstanding work ethic. She testified that she would love to hire Petitioner full time, but she does not think she is able to work full time due to the physical demands of teaching. Also, Ms. Wallace has never been authorized to hire Petitioner full time, and this is due in part to low student enrollment within the Kinesiology program. Because Petitioner does not have a doctorate degree Petitioner can only work as an instructor, and her salary is limited accordingly to $3,200.00 monthly salary equivalent. Petitioner cannot work as a lecturer either (which permits a higher level of pay) since she only has a Master's level of education.

Ms. Wallace testified that she has observed Petitioner to have an irregular gait and that she changes positions frequently during the work day. When Petitioner worked full time in Spring 2016, Petitioner's pain and limitations worsened. SIU has provided Petitioner accommodations to help her with her pain, including modifying her work week down to two days per week from five and allowing her to

teach remotely. For the Spring 2017 semester, while final hiring has not been determined, Ms. Wallace testified that the plan is to have Petitioner return as an instructor.

Respondent called Ms. Liala Slaise to testify regarding Petitioner's earning potential. Ms. Slaise is a certified rehabilitation counselor. She testified regarding her prior meetings with Petitioner, including an initial vocational assessment and subsequent meetings on an interval basis leading up to Petitioner being offered the SIU position. Ms. Slaise then closed her file but was asked by Respondent to re-open it for purposes of updating her prior opinions on Petitioner's earning capacity. She authored Respondent's Exhibit 14 which summarizes her opinions. (RX14).

Ms. Slaise testified that, in her opinion, Petitioner is capable from the vocational perspective to work 100% or 12 credit hours and not just the 66 2/3% or 75% levels that Petitioner has worked to date. In determining Petitioner's full earning potential at SIU, Ms. Slaise made a number of telephone calls to SIU, ultimately talking with "Susan," the business manager of the Department of Kinesiology. It was Ms. Slaise's understanding that Petitioner could work as an "instructor," not merely as a "lecturer." She testified that had the capacity to earn between $35,000 and $40,000.00 annually if she worked full time as an instructor within the Department of Kinesiology.

The Arbitrator has reviewed Petitioner's exhibits as they pertain to the interval medical treatment she has received since the matter was last tried. The records reflect that Petitioner has continued to follow up with Dr. Parks approximately every three months for management of her chronic low back pain. He has prescribed physical therapy; prescription medications; a handicapped parking permit; and a new TENS unit. The Arbitrator notes, however, that no new medical restrictions were imposed. (PX2).

The medical records of SIH Herrin Hospital/Rehab Unlimited were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner underwent physical therapy between the timeframe of July 25. 2016 and October 17, 2016. At the time of the initial evaluation on September 19, 2016, it was noted that Petitioner felt "swollen all over" and that her fingers were swollen, that her right lateral leg felt hot and both legs felt heavy and that she had a new pain along the right rib cage. It was noted that Petitioner did not take any medications for pain. Petitioner was apparently discharged on August 24, 2016, at which time it was noted that she wished to hold therapy at that time. At the time of the Initial Evaluation on July 25, 2016, it was noted that Petitioner stated that she was starting to have the right-sided pain that traveled to her lateral hip and then anteriorly to her quad, then over to her peroneal nerve area. It was noted that Petitioner had cramping in the right calf and low back, and that the spasms in the back were almost constant. It was noted that Petitioner had a long history of low back pain, and that she was a PE teacher and first injured it at work. It was noted that Petitioner had a lumbar fusion and had had physical therapy several times over the years to "calm down" exacerbating pain. (PX1).

The records of SIH Herrin Hospital/Rehab Unlimited reflect that Petitioner was ordered to undergo x-rays of the left foot on May 4, 2016, which were interpreted as revealing a fracture of the proximal phalanx of the fifth digit. (PX1).

The records of SIH Herrin Hospital/Rehab Unlimited reflect that Petitioner underwent an Initial Evaluation on April 1, 2016, at which time it was noted that she complained of spasms in the lumbar region, upper back and right rhomboids area, and that it also radiated to the posterior thigh area on the right and peroneal nerve distribution on the left. It was noted that there was a change in Petitioner's schedule last January, having more full hours at work which might have caused the increase in pain levels and that prior to that, Petitioner was able to rest in between work days. The May 18, 2016 Discharge Note noted that Petitioner sustained an ankle injury and was recommended for discharge from physical therapy interventions until her current condition had been addressed. (PX1).

The medical records of Logan Primary Care were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on October 31, 2016, at which time it was noted that she was exhausted from her back pain and that she was mentally fatigued from fighting the pain. Petitioner was ordered to undergo aqua therapy. It was noted that Petitioner was to call Dr. Gornet for follow-up. At the time of the September 13, 2016 visit, Petitioner was seen for a second opinion for disability paperwork. It was noted that Dr. Oestmann agreed with part-time work, a brace and a physical therapy evaluation. (PX2).

The records of Logan Primary Care reflect that Petitioner was seen on September 7, 2016, at which time it was noted that she was teaching 3 sessions at SIUC, that she only taught two days per week and that it was hard to drive from her home to the office. It was noted that Petitioner had burning and pain in the right lower extremity on the outside of the right hip and thigh, and that she had a knot in her gastroc muscle that was always very tender. Petitioner was given a Physician's Certification of Disability and given an order to continue physical therapy. It was noted that Petitioner would benefit from a TENS unit. At the time of the March 3, 2016 visit, it was noted that Petitioner denied new problems or complaints and indicated that her back was the same. At the time of the December 1, 2015 visit, it was noted that Petitioner was being seen for a second opinion regarding disability paperwork. It was noted that Petitioner had been off work from December 2011 until August 2013 when she started teaching part time at SIU teaching PE teachers. It was noted that Dr. Parks agreed with part time employment. (PX2).

The records of Logan Primary Care reflect that Petitioner was seen on November 30, 2015 for follow-up on her chronic back pain. It was noted that Petitioner had been "forced" to teaching at SIU and that she found that the prolonged standing, walking and 90-minute round trip commute all aggravated her low back pain. It was noted that Petitioner had an episode of visual change and numbness in her face that was self-terminating, and that her work-up at the Emergency Room was negative. Petitioner was recommended to undergo various testing including an MRI of the head and cervical spine, among others. At the time of the August 31, 2015 visit, it was noted that Petitioner went back to work at SIU part time and was teaching classes. It was noted that Petitioner stated that she was exhausted but she had not had a typical work week yet. It was noted that her biggest concern was driving a 40-minute commute each way, and that she asked for a disability parking permit because she was afraid that walking at work would aggravate her lower back, particularly in the winter. (PX2).

The records of Logan Primary Care reflect that Petitioner was seen on June 1, 2015, at which time it was noted that she was receiving vocational assistance to find a job that would fit with her limitations. It was noted that Petitioner needed a lower back brace. At the time of the March 23, 2015 visit, it was noted that Petitioner's symptoms had not improved and that she still had lower back pain that was worse with activities of daily living and particularly standing, walking and bending. Petitioner was encouraged to lose weight. At the time of the December 8, 2014 visit, it was noted that Petitioner was being seen for a second opinion regarding disability paperwork. It was noted that Dr. Parks agreed with Petitioner's current off work status. At the time of the November 24, 2014 visit, it was noted that Petitioner remained disabled and could not work. (PX2).

The Marion Education Association Contract 2015-2016, 2016-2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The SIU Payslips were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The SIU Semester Staff Appointment Contracts were entered into evidence at the time of arbitration as Petitioner's Exhibit 5.

The Penalty Petition was entered into evidence at the time of arbitration as Petitioner's Exhibit 6.

The Physical Therapy Bills at Herrin Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 7.

The Decision & Opinion on Review and 19(b) Arbitration Decision were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The Letter to Respondent re: Wage Differential Payment was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The September 2, 2015 Letter from Respondent re: Wage Differential Payment was entered into evidence at the time of arbitration as Petitioner's Exhibit 10. The Vocational Closure Letter Dated July 1, 2015 was entered into evidence at the time of arbitration as Petitioner's Exhibit 11. The May 2015 Respondent Letter re: Accommodation was entered into evidence at the time of arbitration as Petitioner's Exhibit 12.

The Sandner Group TTD Payment Ledger was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The Sandner Group Medical Bill Payment Ledger was entered into evidence at the time of arbitration as Respondent's Exhibit 2.

The Fall 2016 SIUC Kinesiology Course Description was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The SIUC Website/Page Kinesiology Faculty Listings with Photographs was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The SIUC Bio for Laurie Chapman was entered into evidence at the time of arbitration as Respondent's Exhibit 5.

The KIN 202 Syllabus (Fall 2016) was entered into evidence at the time of arbitration as Respondent's Exhibit 6. The KIN 314 Syllabus (Fall 2016) was entered into evidence at the time of arbitration as Respondent's Exhibit 7. The KIN 323 Syllabus (Spring 2016) was entered into evidence at the time of arbitration as Respondent's Exhibit 8.

The Triune Report #1 was entered into evidence at the time of arbitration as Respondent's Exhibit 9. The reporting period was noted to be that of April 6, 2014 through May 1, 2015. It was noted that at the time of the April 15, 2015 meeting, Petitioner expressed concerns about being able to work an 8-hour shift 5 days per week, that she stated that she usually lies down 2-3 times per day 20-60 minutes at a time and that there were some days on which she could not get out of bed. (RX9).

The Triune Report #2 was entered into evidence at the time of arbitration as Respondent's Exhibit 10. The reporting period was noted to be that of May 2, 2015 through May 21, 2015. The report reflects that during the reporting period, Petitioner scheduled and completed an interview with SIUC for the PETE position, among other job leads. (RX10).

The Triune Report #3 was entered into evidence at the time of arbitration as Respondent's Exhibit 11. The reporting period was noted to be that of May 22, 2015 through June 11, 2015. It was noted that on June 4, 2015 the CRC, Liala Slaise, learned that Petitioner was interviewed and offered the PETE position at SIUC. (RX11).

The Marion Education Association Contract 2015-2016, 2016-2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 12. The exhibit was duplicative of that as contained in Petitioner's Exhibit 3. (RX12; PX3).

The Department Head Payment Schedule with Calculation was entered into evidence at the time of arbitration as Respondent's Exhibit 13.

The Triune Post-Placement Report was entered into evidence at the time of arbitration as Respondent's Exhibit 14. The reporting period was noted to be that of July 2, 2015 through November 3, 2016. It was noted that Ms. Slaise was asked to reopen Petitioner's file to reevaluate her earning potential given her employment with SIUC. It was noted that it was Ms. Slaise's opinion that Petitioner's earning

potential as an instructor was between $35,000 and $40,000 at full time status, and it was noted that Petitioner was currently working part time hours and had a monthly salary of $3,200. (PX14).

The Crosby Letter of August 18, 2015 was entered into evidence at the time of arbitration as Respondent's Exhibit 15. The exhibit is effectively duplicative of that as contained in Petitioner's Exhibit 9. (RX15; PX9).

The Response to Penalties Petition was entered into evidence at the time of arbitration as Respondent's Exhibit 16.

CONCLUSIONS OF LAW

The Arbitrator notes at the outset that the controlling issue in the current proceedings is that of permanency, and that the parties postured the trial on an agreed basis pursuant to Section 8(d)(1) of the Act. Further, the parties stipulated that, if Petitioner could resume full employment in her prior position with Respondent, she would be entitled to an annual salary of $68,388.00 for the 185-day school year. Thus, the main issue to be resolved at this time is the "lower wage bracket" figure of the wage differential equation as set forth by Section 8(d)(1). The other issues in dispute are temporary partial disability benefits and penalties/attorney's fees. (AX1).

With respect to disputed issue (K) pertaining to temporary partial disability benefits, the Arbitrator notes that Petitioner claims entitlement to temporary partial disability (TPD) benefits pursuant to Section 8(a) of the Act for the timeframe of August 17, 2015 through November 15, 2016. (AX1). The Arbitrator finds the TPD provision of the Act inapplicable as this case is at the permanency phase. Petitioner located or was placed in the SIU job after achieving maximum medical improvement and following the prior Commission Decision & Opinion on Review, which awarded vocational rehabilitation services to Petitioner. To the extent Petitioner is entitled to benefits after starting the job at SIU, it is a wage differential award pursuant to Section 8(d)(1) of the Act. As a result thereof, the Arbitrator denies Petitioner's request for the award of temporary partial disability benefits.

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injury, the Arbitrator notes that "To receive an award under section 8(d)(1), an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill.2d 519, 844 N.E.2d 414 (Ill. 2006). The Arbitrator finds that both of these elements have been met by the evidence in this case.

Per the stipulation made by the parties at the time of hearing, the parties agree that, if Petitioner could resume her employment with Respondent, she would be earning $68,388.00 over the 185-day high school year. Given that the Arbitrator is adjudicating a section 8(d)(1) wage differential, the language of that section controls over Section 10, which provides the formula for calculating average weekly wage. The proper denominator in calculating the upper wage bracket in this matter is a 52-week denominator, not a 185-day denominator which is proper when calculating average weekly wage for school teachers. Thus, for section 8(d)(1) purposes, the Arbitrator determines the upper wage bracket to be $1,315.15/week (*i.e.*, $68,388.00/52). This is the average amount that Petitioner would be able to earn in the full performance of her duties over a calendar year but for the injury.

Although Petitioner introduced interval records of Dr. Parks, and physical therapy records, the Arbitrator notes that nothing in these exhibits changes the permanent restrictions issued by Dr. Gornet as

referenced in the prior Commission Decision & Opinion on Review. (PX8). The Arbitrator notes, then, that Petitioner does not have formal driving restrictions, nor is she medically restricted from working full-time work at SIU.

The Arbitrator notes that Petitioner in her proposed decision seeks to limit the lower wage bracket figure to her current part-time earnings at SIU. The records reflect that Petitioner's earnings history at SIU, summarized above, reflect that Petitioner's initial appointment (*i.e.*, Fall 2015) at SIU was for a 66 2/3% pay level, but she worked the 75% pay level for both the Spring 2016 and Fall 2016 semesters. The evidence reflects that a full teaching load is 12 semester hours. Assuming Petitioner could earn only earn 75% of a $3,200.00 monthly salary equivalent, she would earn $10,800.00 a semester. Petitioner's Exhibit 4 consists of the payroll figures covering Petitioner's job at SIU, and these demonstrate total earnings of $10,800.00 for the spring 2016 semester. (PX4). If Petitioner could work 2 college semesters at 75% of a $3,200.00 monthly salary equivalent, then her annual earnings at SIU would be $21,600.00. Assuming Petitioner could teach 12 semester hours at a $3,200.00 monthly salary equivalent, the SIU payroll figures suggest she would receive 4 checks at $3,200.00 and one check at $1,600.00, for a total of $14,400.00. Over two semesters, she would earn thereby $28,800.00.

In her final report and as testified to at the time of arbitration, Ms. Slaise opined that Petitioner had earnings potential of between $35,000.00 and $40,000.00 if she worked full-time as an instructor within the SIU Department of Kinesiology. (RX14). While this is Ms. Slaise's opinion within a reasonable degree of vocational certainty, it is arguably too theoretical for the Arbitrator and as such, the Arbitrator finds that the more persuasive evidence would be the actual earnings of Petitioner measured on a full-time teaching basis of 12 credit hours per semester. Stated otherwise, the Arbitrator believes Petitioner's earnings capacity is full-time employment of 12 credit hours per semester, for a two semester annual year, or $28,800.00, which equates to $553.85/week.

Accordingly, the Arbitrator finds that Petitioner is entitled to 2/3rds of $761.30 ($1,315.15 - $553.85), or $507.53/week, for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

With respect to disputed issue (M) pertaining to penalties and attorney's fees, the Arbitrator notes that Petitioner bases her request for penalties on non-payment by Respondent of either a TPD or wage differential benefit after Petitioner began employment at SIU and prior to hearing. (PX6). As the Arbitrator has already denied that Petitioner was entitled to TPD benefits, penalties are accordingly moot on this aspect of Petitioner's claim.

With respect to non-payment of wage differential benefits, the Arbitrator finds that Respondent was not required to pay Petitioner pending final hearing a wage differential benefit. Only at time of hearing can the upper and lower wage bracket figures be determined. See *Cassens*, 218 Ill.2d 519, 844 N.E.2d at 422 ("[T]he Act establishes that employees and employers alike must use the opportunity of their initial hearing to present evidence showing the likely duration of an injury and its effect on the claimant's earning capacity.") In her penalty petition, the Petitioner cites to *DiBenedetto v. Illinois Worker's Compensation Comm'n*, 2015 IL App. (1st) 133233WC, for the premise that Respondent herein was required to pay Petitioner a wage differential prior to hearing. However, as Respondent herein argued in its penalty responsive pleading, the court in *DiBenedetto* reaffirmed long standing Illinois law to the effect that the upper and lower wage bracket figures in the wage differential calculation are determined as of the hearing date. In particular, *DiBenedetto* stated as follows: "In particular, this court has held that a wage-differential benefit must be 'based on the amount the employee would have been able to earn at the time of the arbitration hearing, not the amount he or she was actually earning at the time of the injury' [citation omitted] and that a claimant must 'establish his current earning capacity' ". *DiBenedetto*, 2015 IL App (1st) 13323WC at page 3-4. (RX16).

Further, the Arbitrator notes that the parties' exhibits reveal a lack of agreement as to the upper and lower bracket figures to be used in the wage differential calculation. (PX9; PX10). The parties still disagree over the lower wage bracket figure, and the main issue at trial in this matter was to resolve the proper value of the lower section 8(d)(1) figure. For the foregoing reasons, Petitioner's request for the assessment of penalties and attorney's fees is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Sefton,

Petitioner,

vs. NO: 15WC009161

State of Illinois Department of Transportation,

Respondent.

17IWCC0768

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein and proper notice given, the Commission, after considering the issues of permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 13, 2017 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.

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: NOV 30 2017

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

SJM/sj
o-11/16/2017
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0768

SEFTON, DAVID
Employee/Petitioner

Case# **15WC009161**

15WC030125

SOI/DEPARTMENT OF TRANSPORTATION
Employer/Respondent

On 6/13/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.10% 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:

2934 BOSHARDY LAW OFFICE PC
JOHN V BOSHARDY
1610 S 6TH ST
SPRINGFIELD, IL 62703

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' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 13 2017

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

17IWCC0768

STATE OF ILLINOIS)
)
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

David Sefton
Employee/Petitioner

Case # 15 WC 09161

v.

15wc30125

State of Illinois/ Illinois Department of Transportation
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 Edward Lee, Arbitrator of the Commission, in the city of Mt. Vernon, on April 6, 2017. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

L. [x] What is the nature and extent of the injury?

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On January 5, 2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ 72,078.24; the average weekly wage was $ 1,386.12.

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

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

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

Respondent shall be given a credit for $21,254.80 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $21,254.80.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 924.08/week for

22 & 6/7 weeks, commencing October 9, 2014 through March 18, 2015, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ 721.66/week for 100 weeks, because the injuries sustained caused 20 % loss of the (person as a whole) as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from January 5, 2014 through April 6, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay $ 12,817.99 for medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

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

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

Ellen Lee
Signature of arbitrator

6/9/17
Date

ICArbDec p. 2

JUN 13 2017

David Sefton vs. State of Illinois/DOT
IWCC No. 15 WC 09161

ATTACHMENT F

In support of the Arbitrator's findings on the issue of **(F) Is the petitioner's present condition of ill-being causally related to the injury?,** the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Two cases were consolidated for arbitration. Apart from the accidental injury discussed herein, Petitioner sustained another work accident on August 31, 2015 which was assigned the Commission case number 15 WC 30125. A separate decision is issued concerning the accident and injuries Petitioner sustained in case number 15 WC 30125.

The parties stipulated that Petitioner sustained an accidental injury on January 5, 2014 when the truck plow that he was operating to remove snow from a roadway lost traction and skidded off the road, rolling over into a culvert on the side of the road. The truck came to rest on the passenger's side. Petitioner had just picked up a co-worker who was traveling in the passenger seat of the truck when it rolled. Petitioner's passenger needed to help pull him out of the driver's side because he could not use his arms. The parties stipulated that Petitioner sustained injury to his cervical spine as a result of this accident.

Petitioner noted that when the truck rolled, he grabbed the steering wheel so tightly to brace himself for the impact that he bent the steering wheel. Petitioner also stated that when the truck rolled over his right knee struck the floor mounted gear shift.

Petitioner noticed that he had the immediate onset of neck and shoulder pain, right knee pain and lower back pain. Petitioner did not seek treatment immediately after the accident.

The accident occurred shortly before the end of Petitioner's shift. Petitioner notified his supervisor and returned to the hotel where he and his co-workers were staying during the snow storm.

Petitioner testified credibly that before the accident at issue the Petitioner had experienced backaches in the past. However, prior to January 5, 2014 his doctor never recommended that he pursue treatment regarding any lower back complaints. Petitioner did not seek treatment immediately but noted that his symptoms worsened.

On March 21, 2014 the Petitioner sought treatment from his primary care physician, Dr. Carl Castle. Petitioner advised Dr. Castle of the accident and his symptoms. (PX 2) Dr. Castle noted that if Petitioner rotated his neck he felt tingling in his left upper extremity and he had left sided neck, rib and shoulder pain and his lower back hurt more. (PX 2) On examination, there was tenderness in Petitioner's cervical spine and lumbar spine, and at his left shoulder at the AC joint. (PX 2) Cross body testing on the left for rotator cuff pathology was positive. (PX 2) Petitioner was placed on light duty but continued working. (PX 2)

Dr. Castle ordered an MRI of Petitioner's cervical and lumbar spine and referred Petitioner to an orthopedic surgeon. (PX 2)

On April 11, 2014 Petitioner returned to Dr. Castle where it was noted that Petitioner carried a diagnoses of cervical radicular pain, mononeuritis of an unspecified site and low back pain. (PX2) Petitioner remained on light duty. (PX 2)

MRI of Petitioner's cervical spine taken on March 25, 2014 revealed moderate to severe degenerative changes with antero-listhesis of C3 on C4 and retrolisthesis of C6 on C7, moderate to severe spinal stenosis at C5-6 and C6-7 and bilateral foraminal stenosis at 3-4. (PX 3) The lumbar spine MRI showed Petitioner had multilevel degenerative changes at L3-4 with paracentral protrusion causing moderate to severe spinal stenosis and due to superimposed epidural lipomatosis. (PX 3)

On April 30, 2014 Petitioner was seen by Dr. Timothy Van Fleet of the Orthopedic Center of Illinois. (PX 4) Dr. Van Fleet was advised of the Petitioner's medical history, the work accident, his treatment to date and his current symptoms. (PX 4) Petitioner was noted to be suffering from moderate neck pain which radiated to both shoulders, arms and hands. (PX 4) Dr. Van Fleet also noted that Petitioner complained of left greater than right lower back pain radiating to bilateral thighs, lower legs and feet. (PX 4)

Examination of the cervical spine revealed reduced range of motion in rotation and flexion and extension, symmetric diminished reflexes bilaterally in both upper and lower extremities. (PX 4)

Dr. Van Fleet diagnosed Petitioner with lower back pain and neck pain. (PX 4) Dr. Van Fleet recommended an EMG and a left L4 transforaminal injection. (PX 4)

An EMG was performed by Dr. John Watson on May 20, 2014 which was read as demonstrating severe acute chronic right upper extremity C8 radiculopathy, moderate chronic bilateral upper extremity C6-7 radiculopathy and severe bilateral carpal tunnel syndrome. (PX 4)

Petitioner stated that he did not file a claim requesting compensation for carpal tunnel syndrome and he has sought no treatment for the condition.

Petitioner underwent the left L4 epidural injection on June 17, 2014. (PX 4) Petitioner stated that the lumbar epidural injection provided short term relief and his pain returned.

Petitioner was seen by Dr. Van Fleet on July 11, 2014 where it was noted the lumbar spine epidural provided 20 days of relief. (PX 4) Dr. Van Fleet recommended an epidural steroid injection into the cervical spine before proceeding with surgery. (PX 4)

On July 29, 2014 Petitioner was sent for a Section 12 exam with Dr. James B. Steihl. (RX 3, dep. Ex. 2) Dr. Stiehl has offices in Centralia, Illinois. (RX 3, p. 5) Fifty percent of Dr. Stiehl's practice involves performing IMEs. (RX 3, p. 27-8) He performs between two and seven per week and has examined 15 to 30 people at the request of Respondent since 2013. (RX 3, p. 28) Dr. Stiehl's practice is general orthopedics and he no longer performs major total joint replacements. (RX 3, p. 29) He has not performed a spinal surgery since 1982. (RX 3, p. 29)

Petitioner was sent to Dr. James Stiehl for a Section 12 exam. (RX 3 Dep Ex 2) Dr. Stiehl examined Petitioner on July 29, 2014 and noted Petitioner complained of neck, back, right knee and shoulder pain. (RX 3, Dep Ex 2) Dr. Stiehl examined Petitioner's right shoulder and noted sub acromial pain to palpation indicating impingement syndrome. (RX 3, p. 45) Dr. Stiehl noted reproducible pain in the posterior and medial portion of the right knee which he felt revealed evidence of a torn medial meniscus. (RX 3, p. 45) Dr. Stiehl noted Petitioner continued to complain of right knee pain, right shoulder pain and lower back pain. Dr. Stiehl did not believe that these conditions were caused or aggravated by the fall, opining that the conditions were preexisting and chronic. Dr. Stiehl was presented with no medical records indicating that Petitioner ever sought treatment for his right shoulder, right knee or lower back before the accident of January 5, 2014. (RX 3, p. 9, 19, 46, 48-9, Dep. Ex. 2)

Dr. Stiehl causally related the Petitioner's cervical condition and need for surgery to the accident at issue. (RX 3, Dep. Ex. 2) Dr. Stiehl was of the opinion that all other conditions were preexisting and not causally related to the accident. (RX 3, Dep Ex 2)

Petitioner underwent a C7-T1 epidural steroid injection performed by Dr Paul Smucker on August 19, 2014. (PX 4)

Petitioner returned to Dr. Van Fleet on September 10, 2014 where it was noted that Petitioner had not improved and surgery consisting of anterior cervical discectomy of C5-6 and C6-7 was recommended and discussed. Petitioner stated that he wished to proceed with surgery. Dr. Van Fleet noted that with such a procedure the possibility existed that petitioner might develop transitional syndrome in the future. (PX 4)

Respondent stipulated that Petitioner's cervical spine condition was causally related to the accident of January 5, 2014. Respondent authorized Petitioner's cervical spine surgery but denied all treatment to Petitioner's lumbar spine.

On October 9, 2014 Petitioner underwent a C5-6 and C6-6 anterior cervical discectomy and fusion which was authorized under Respondent's workers' compensation's coverage. (PX 5)

Dr. Van Fleet examined Petitioner's surgical site on October 22, 2014 and held Petitioner off of work. (PX 4)

On November 19, 2014 Petitioner returned to Dr. Van Fleet for a follow up of his cervical spine surgery noting that he continued to have pain in the left neck, and the left and right periscapular areas. Petitioner rated his pain as a four out of ten. (PX 4) At the same visit Dr. Van Fleet recommended that Petitioner proceed with bilateral L3-4 and L4-5 laminotomies. (PX 4)

Dr. Van Fleet reiterated his recommendation for the lumbar spine laminotomies on December 17, 2014 and noted that Petitioner continued to await "work comp approval". (PX 4) On February 13, 2015 Petitioner returned to Dr. Van Fleet where it was noted that Petitioner's request for authorization of the lumbar spine surgery was denied. (PX 4)

On March 18, 2015 Petitioner returned to Dr. Van Fleet noting that he continued to have pain in the neck of a four out of ten and headaches. (PX 4) Petitioner was released to return to

work without restrictions relative to his cervical spine, but advised to remain off work due to his lumbar spine. (PX 4)

Petitioner's workers compensation temporary total disability benefits were terminated based on Dr. Stiehl' s Section 12 opinions and Petitioner returned to work because he could not afford to remain off of work. Petitioner resumed his normal work activities. Petitioner did not return to Dr. Van Fleet for further treatment of his lumbar spine.

Dr. Stiehl testified that Petitioner's lumbar spine condition was the result of spinal stenosis and he could not find any relationship between the work accident of January 5, 2014 and Petitioner's lumbar back pain. (RX 3, p. 17, 19) On cross examination Dr. Stiehl acknowledged that spinal stenosis describes a process not a condition and is basically a description of the process in which the neural foramen begin closing. (RX 3, p. 39) Dr. Stiehl agreed that the closing of the neural foramen can be caused by congenital narrowing, degeneration, osteophytes and bulging or herniated disks. (RX 3 p. 39-40) Dr. Stiehl also agreed that when there is preexisting degeneration causing stenosis, it can be further aggravated by bulging or herniated disks. (RX 3, p. 40) Stenosis can cause impingement of the nerves. (RX 3 p. 41)

Dr. Stiehl did not examine Petitioner between July 29, 2014 and October 28, 2015. (RX 3 p. 44)

Dr. Timothy Van Fleet testified in this matter. Dr. Van Fleet is board certified in orthopedic surgery and has published numerous articles on spinal surgery. (PX 11, Dep Ex 1) Dr. Van Fleet tries to limit his practice to conditions of the spine and performs from 400 to 450 spinal surgeries per year and has been doing so for the previous 19 years. (PX 11 p. 5)

Dr. Van Fleet stated that when he first examined Petitioner he complained of neck and lower back pain, with bilateral leg pain. (PX 11 p. 7)

Dr. Van Fleet agreed that some of the radiological findings on Petitioner's cervical and lumbar spine were degenerative and predated the accident of January 5, 2014. (PX 11, p. 21) Dr. Van Fleet noted however that pre-existing conditions can remain without any symptoms without trauma. (PX 11, p. 21) Dr. Van Fleet agreed that stenosis is a description of the narrowing of the canal within which the nerve roots exit the spine. (PX 11, p. 24)

Dr. Van Fleet testified that it was his opinion the accident of January 5, 2014 aggravated Petitioner's pre-existing cervical and lumbar spine condition to the point that Petitioner required surgery. (PX 11, p. 22-23) Dr. Van Fleet stated that the accidental injuries the Petitioner sustained were the type that he would expect might aggravate a spinal stenosis. (PX 11, p. 24-5) Absent the accident of January 5, 2014, Dr. Van Fleet stated that there would be no way to know whether Petitioner might have ever needed surgery for either condition. (PX 11, p. 23) Dr. Van Fleet was of the opinion that the herniated disk in Petitioner's lumbar spine occurred after the second accident of August 31, 2015 and worsened the lumbar spine condition. (PX 11, p. 23-4)

The Arbitrator notes Dr. Stiehl's opinions but does not adopt his opinion that the Petitioner's lumbar spine, right shoulder and knee conditions were pre-existing conditions which were not aggravated by the accident of January 5, 2014. The Arbitrator notes that Respondent offered no evidence that Petitioner had actively received medical care for his lumbar spine, right shoulder and knee before the accident of January 5, 2014. Petitioner testified credibly that he had normal backaches but never sought care for his lumbar spine, right shoulder or knee before January 5, 2014. A chain of events analysis provides sufficient proof of a causal relationship between the accident of January 5, 2014 and these conditions.

The Arbitrator further notes that had Petitioner proceeded with the surgery to the lumbar spine that Dr. Van Fleet recommended that the surgery was also causally related to the accident of January 5, 2014. The Arbitrator also finds that Petitioner's cervical spine condition, two level cervical fusion of C5-6 and C6-7, right knee medial meniscus tear and right shoulder impingement syndrome were also causally related to the accident of January 5, 2014 based both on the testimony of Dr. Van Fleet and a chain of events analysis.

However, as the Petitioner returned to work after his cervical spine surgery and sustained a second accident to his lumbar spine which caused a lumbar spine herniated disk and further aggravated Petitioner's pre-existing degenerative disk disease, the Arbitrator finds the issues of what temporary totally disability, medical and permanency benefits are due Petitioner for his lumbar spine surgery and condition are best addressed in the Decision in case number 15 WC 30125.

ATTACHMENT J

In support of the Arbitrator's findings on the issue of **(J) Were the medical services that were provided to the petitioner reasonable and necessary?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Petitioner submitted medical expenses as Group Exhibit 7. The medical bills which are found causally related to the accident of January 5, 2014 were reasonable and necessary and should be paid by Respondent as follows:

Medical bills:

Vandalia Healthcare Center, 3/21/14-4/11/14	$ 250.00
Fayette County Hospital, 3/25/14	$ 4,740.49
Orthopedic Center of IL, 10/22/14-3/18/15	$ 4,613.00
Associated Anesthesiologists, 10/9/14	$ 2,448.00
Clinical Radiologists, 3/25/14	$ 715.50
Clinical Radiologists, 10/9/14	$ 51.00
Total:	**$12,817.99**

All other medical bills listed in Petitioner's Exhibit 7 relate to treatment of the lumbar spine after the accident in case number 15 WC 30125 and are addressed in the Decision in said case.

Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. 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.

David Sefton vs. State of Illinois/DOT
IWCC No. 15 WC 09161

ATTACHMENT K

In support of the Arbitrator's findings on the issue of **(K) What amount of compensation is due for Temporary Total Disability?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

The parties stipulated that Petitioner was temporarily and totally disabled as a result of the cervical spine condition from October 9, 2014 through March 18, 2015, a period of 22 and 6/7 weeks.

Respondent shall be given credit for temporary total disability benefits paid to Petitioner.

ATTACHMENT L

In support of the Arbitrator's findings on the issue of **(L). What is the nature and extent of the injury?** the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Petitioner underwent a two level cervical fusion of C5-6 and C6-7.

Under the amended Illinois Workers' Compensation Act the Arbitrator notes that the Commission shall base its Decision on five enumerated factors. All of the factors need not be present to award permanent partial disability.

(i) the reported level of impairment;

(ii) the occupation of the injured employee;

(iii) the age of the employee at the time of injury;

(i) the employee's future earning capacity;

(ii) Evidence of disability corroborated by medical records.

Therefore:

With regard to (i) of Section 8.1(b) of the Act:

Respondent offered an impairment rating of prepared by Dr. James Steihl dated October 28, 2015. Dr. Steihl found that Petitioner was due an impairment rating of 7%, of which 1 grade was attributed to the lumbar spine.

With regard to (ii) of Section 8.1(b) of the Act:

Petitioner was released without restrictions and continues to work for the Respondent in a different position which aggravates his symptoms. Petitioner notes that he has difficulty operating machinery due to his cervical fusion and the limitation of motion he experiences.

With regard to (iii) of Section 8.1(b) of the Act:

The Petitioner was 60 years old at the time of injury. The Arbitrator notes that the Petitioner has remaining work life and has returned to work with the Respondent.

With regard to (iv) of Section 8.1(b) of the Act:

The Arbitrator concludes that the Petitioner's future earning capacity has not been impacted by the injury.

With regard to (v) of Section 8.1(b) of the Act:

Petitioner notes that he continues to experience daily burning neck pain for which he takes over the counter pain medication. Petitioner continues to experience headaches but they have occurred less than they were before surgery. Petitioner also notices that he has difficulty rotating his head. Petitioner explained that when operating a piece of equipment at work that he has to be aware of his surroundings and he must turn to look behind him. Petitioner stated that he had to turn his whole body initially to look behind him. He stated that now his ability to rotate his head has improved but it's not where it needs to be. Petitioner described that when he rotates or turns

his head, he must point his head down because if he keeps his head up and rotates his neck pops and locks.

Petitioner described that he has difficulty sleeping because he cannot get comfortable due to the non-stop pain. Petitioner notices that if he works with his arms above his shoulders he begins to develop pain which will increase until the arms go numb. Petitioner did not testify to any ongoing difficulties with his right knee.

The Arbitrator notes that Dr. Van Fleet in his last office note addressing the cervical spine dated September 18, 2015 stated that Petitioner continued to have left sided neck pain and continued to carry a diagnosis of cervical stenosis and cervical radiculopathy. (PX 4)

Respondent's Section 12 examiner examined Petitioner on October 28, 2015 and noted Petitioner continued to have discomfort over the right shoulder consistent with impingement syndrome, (RX 3, Dep. Ex. 3)

The Arbitrator finds the injuries sustained caused 20% permanent partial disability to Petitioner's body as a whole.

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

David Sefton,

Petitioner,

vs.

NO: 15WC030125

State of Illinois Department of Transportation,

17IWCC0769

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the both parties herein and proper notice given, 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 June 13, 2017 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.

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: NOV 30 2017

Stephen J. Mathis

David L. Gore

SJM/sj
o-11/16/2017
44

DISSENT

I respectfully dissent from the Decision of the majority. I would have found that Petitioner did not prove causation to the current condition of ill-being of his lumbar spine and denied compensation for that condition.

The parties stipulated that on January 5, 2014, Petitioner sustained a work-related accident in which his snow-plow truck slid off the highway and turned over on the passenger side. Petitioner alleged he sustained injuries to his cervical and lumbar spine in the motor vehicle accident. Respondent has accepted liability for Petitioner's cervical condition but disputed that Petitioner's lumbar condition was caused by the accident. Prior to arbitration, Petitioner alleged another accident on August 31, 2015, in which he reinjured/aggravated his lumbar spine when he was carrying a five-gallon bucket of water. Respondent still maintained Petitioner's lumbar condition was not caused by a work-related accident. The claims were consolidated and heard at arbitration simultaneously.

A lumbar MRI taken on March 25, 2014, showed multilevel degenerative changes greatest at L3-4 with right paracentral protrusion causing moderate to severe spinal stenosis and severe thecal sac stenosis, due to superimposed lipomatosis. A lumbar MRI taken on March 23, 2016 showed moderate lumbar spondylosis with facet arthropathy causing spinal canal and foraminal stenosis. The radiologist noted that there was little, if any, significant change compared to the study two years earlier. Respondent's Section 12 medical examiner, Dr. Stiehl, examined Petitioner on July 29, 2014 and October 28, 2015. In his first report, Dr. Stiehl opined that Petitioner's cervical condition was aggravated by the motor vehicle accident, but his lumbar condition was a preexisting condition that was "not significantly changed or altered" by the accident. In his second report, Dr. Stiehl reiterated that Petitioner's lumbar stenosis was a chronic, long-standing, degenerative condition and not related to either the initial motor vehicle in 2014 or the later lifting/carrying accident in 2015. In his deposition, Dr. Stiehl noted that spinal stenosis is a chronic condition, which cannot be attributed "to an industrial injury." He also noted there was no significant change in the lumbar MRI findings from 2014 and 2016.

I find the opinions of Dr. Stiehl persuasive. Therefore, I would have found that Petitioner did not prove causation to his current condition of ill-being of his lumbar spine and denied compensation resulting from that condition. For these reasons, I respectfully dissent.

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SEFTON, DAVID
Employee/Petitioner

Case# **15WC030125**

15WC009161

SOI/DEPT OF TRANSPORTATION
Employer/Respondent

17IWCC0769

On 6/13/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.10% 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:

2934 BOSHARDY LAW OFFICE PC
JOHN V BOSHARDY
1610 S 6TH ST
SPRINGFIELD, IL 62703

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' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 13 2017

Ronald A. Piasia

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

17IWCC0769

STATE OF ILLINOIS)
)
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

David Sefton
Employee/Petitioner

Case # 15 WC 30125
15wc 9161

v.

State of Illinois/Department of Transportation
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 Edward Lee, Arbitrator of the Commission, in the city of Mt. Vernon, on April 6, 2017. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

H. ☐ What was Petitioner's age at the time of the accident?

I. ☐ What was Petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

L. ☒ What is the nature and extent of the injury?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On August 31, 2015, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $ 72,078.24; the average weekly wage was $ 1,386.12.

On the date of accident, Petitioner was 61 years of age, *single* with 0 dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for $0 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 924.08/week for

43 & 2/7 weeks, commencing September 18, 2015 through July 18, 2016, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ 755.20/week for 50 weeks, because the injuries sustained caused 10 % loss of the person as a whole as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from August 31, 2015 through April 6, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay $ 24,557.00 for medical services, as provided in Section 8(a) of the Act. Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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

6/9/17
Date

ICArbDec p. 2

JUN 13 2017

David Sefton vs. State of Illinois/DOT
IWCC No. 15 WC 30125

ATTACHMENT F

In support of the Arbitrator's findings on the issue of **(F) Is the Petitioner's present condition of ill-being causally related to the injury?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Two cases were consolidated for arbitration. Petitioner sustained an injury to his cervical spine, lumbar spine, right shoulder and knee in an accidental injury on January 5, 2014. The accident of January 5, 2014 was assigned Commission case number 15 WC 09161. A separate decision is issued concerning the accident and injuries Petitioner sustained in case number 15 WC 09161.

As noted above, Petitioner sustained an injury to his lumbar spine on January 5, 2014, among other injuries. Petitioner was advised by his treating doctor, Dr. Timothy Van Fleet, to have lumbar laminotomies at L3-4 and L4-5. Respondent refused to authorize the surgery based on a Section 12 examination report it obtained. Petitioner received treatment for his other work related injuries sustained as a result of the accident of January 5, 2014 but did not pursue further treatment to the lumbar spine once authorization was denied and returned to work for Respondent without restrictions. Petitioner stated that his back pain did not improve after returning to work.

The parties stipulated that on August 31, 2015 Petitioner sustained a work related accident when he was carrying a 5 gallon bucket of soapy water up a new track hoe to wash it. Petitioner placed the bucket on the tracks of the hoe. Petitioner climbed onto a platform on the track hoe to lift the bucket from the track to the top platform. Petitioner lifted the bucket and turned to the right and felt a pop and noted worsening pain in his back.

Petitioner returned to the surgeon who had treated him for the injuries he sustained in case number 15 WC 09161, Dr. Timothy Van Fleet.

Petitioner was examined by Dr, Van Fleet on September 18, 2015. Petitioner told Dr. Van Fleet about the accident of August 31, 2015 lifting the bucket of soapy water and that Petitioner had pain in his right hip, right buttock, right thigh, bilateral lower back pain. (PX 4) Dr. Van Fleet noted Petitioner was experiencing constant pain at a level of 8 out of 10. Examination of the lumbar spine revealed positive tension sign on the left. (PX 4)

Dr. Van Fleet reviewed the MRI taken during the treatment of Petitioner's injuries in case number 15 WC 09161 and noted that Petitioner had "high grade" lumbar stenosis and a small extrusion on the right side at L3-4. (PX 4) Dr. Van Fleet ordered physical therapy and a new MRI of the lumbar spine for which he sought workers' compensation approval. (PX 4)

Respondent refused to authorize the MRI. Petitioner sought to have the MRI using his health insurance but was advised to have physical therapy before the MRI would be authorized by his health insurance.

On October 28, 2015 Respondent sent Petitioner to Dr. James Stiehl, the same physician that examined Petitioner in case number 15 WC 09161, for a Section 12 exam. (RX 3, Dep. Ex 3) Fifty percent of Dr. Stiehl's practice involves performing IMEs. (RX 3, p. 27-8) He performs between two and seven per week and has examined 15 to 30 people at the request of Respondent since 2013. (RX 3, p. 28) Dr. Stiehl's practice is general orthopedics and he no longer performs major total joint replacements. (RX 3, p. 29) He has not performed a spinal surgery since 1982. (RX 3, p. 29)

On October 28, 2015 Dr. Stiehl was informed of the accident of August 31, 2015 and that Petitioner felt this accident aggravated his lumbar spine. (RX 3, Dep. Ex. 3) On the face of Dr. Stiehl's report of the October 28, 2015 exam there is no indication that Dr. Steihl examined Petitioner's lumbar spine except for a notation of normal straight leg raise. (RX 3, Dep. Ex 3, p. 57) Dr. Stiehl did not offer an opinion as to whether the accident of August 31, 2015 aggravated Petitioner's condition or caused any new conditions. (RX 3, Dep. Ex 3) Dr. Stiehl did not review the MRI films taken on March 23, 2016. (RX 3, Dep. Ex. 3)

Petitioner underwent physical therapy at Phoenix Physical therapy between December 2, 2015 and January 18, 2016 without improvement. (PX 4 & 6)

Petitioner returned to Dr. Van Fleet on March 16, 2015 where it was noted that Petitioner had completed his physical therapy and that his constant pain remained an 8 out of 10. Petitioner also continued to have numbness of the left leg, right hip, buttock, thigh, groin, calf and lower back pain. (PX 4) X-rays of the lumbar spine showed Petitioner "listed off to the left side". (PX 4)

Examination of Petitioner's lumbar spine on March 16, 2015 revealed that Petitioner listed to the left side, and had a positive straight leg raise on the right with diminished reflexes. (PX 4)

Dr. Van Fleet noted on March 16, 2016 that Petitioner was "getting worse clinically" wished to have the new MRI before recommending surgery. (PX 4)

The Arbitrator notes that after the first accident in case number 15 WC 09161 Dr. Van Fleet's records reveal that Petitioner did not complain of pain that exceeded a 4 out of 10, had no leg or buttock, thigh or groin pain, had only numbness in his lower extremities, and there were no positive straight leg raise signs. Subjectively, Petitioner's symptoms worsened significantly after the accident at issue here on August 31, 2015. (PX 4)

A second lumbar MRI was taken on March 23, 2016 which noted the previous spinal stenosis but also a right paracentral disk protrusion at L3-4 which worked in conjunction with Petitioner's facet arthropathy and ligamentum flavum thickening to result in severe spinal stenosis. (PX 4)

Petitioner was also seen by Dr. Van Fleet on March 23, 2016 to review the MRI scan. (PX 4)

Dr. Van Fleet noted Petitioner's complaints remained in the same location but were rated as a 7 out of 10 in severity. (PX 4) Dr. Van Fleet reviewed the new MRI and noted that the MRI revealed a large central disk protrusion and canal stenosis with the canal 80% obliterated. (PX 4) Dr. Van Fleet recommended L3-4 and L4-5 laminotomies and Petitioner chose to proceed with surgery using his health insurance. (PX 4)

On April 15, 2016 Petitioner underwent a L3-4 and L4-5 hemi-laminotomies, partial medial facectomies and foraminotomies with right sided L3-4 discectomy. (PX 4)

Dr. Van Fleet examined Petitioner on May 10, 2016 noting Petitioner had no back or leg pain. (PX 4) Dr. Van Fleet ordered physical therapy and Petitioner received physical therapy from Phoenix Physical Therapy between May 16, 2016 and June 24, 2016. (PX 8)

Petitioner returned to Dr. Van Fleet on July 8, 2016 where it was noted Petitioner was experiencing intermittent pain of a 7 out of ten. (PX 4) Dr. Van Fleet stated that he felt Petitioner was doing well and released him to return to work and from his care. (PX 4)

Dr. Stiehl testified that he did not find any relationship between the accident of August 31, 2015 and the Petitioner's lumbar spine condition. (RX 3, p. 17, 19) Dr. Stiehl was of the opinion that all of Petitioner's lumbar spine condition was due to pre-existing spinal stenosis. (RX 3, p. 20-22) Dr. Stiehl was unsure whether he had reviewed the MRI of March 23, 2016. (RX 3, p. 54)

Dr. Stiehl stated that when he examined Petitioner on October 28, 2015 Petitioner had no radicular leg pain, no straight leg raising, no calf discomfort and that Petitioner had axial back pain. (RX 3, p. 63) Dr. Stiehl did acknowledge that Dr. Van Fleet in his exam of September 18, 2015 noted pain extending down his whole leg. (RX 3, p. 68) Dr. Stiehl stated that the axial back pain could be related to something he lifted but he did not know. (RX 3, p. 63, 69)

On cross examination Dr. Stiehl admitted that the last medical record he reviewed was Dr. Van Fleet's examination report dated September 18, 2015. (RX 3, p. 27) Dr. Stiehl did not have the benefit of the MRI taken on March 23, 2016.

Dr. Timothy Van Fleet testified in this matter. Dr. Van Fleet is board certified in orthopedic surgery and has published numerous articles on spinal surgery. (PX 11, Dep Ex 1) Dr. Van Fleet tries to limit his practice to conditions of the spine and performs from 400 to 450 spinal surgeries per year and has been doing so for the previous 19 years. (PX 11 p. 5)

Dr. Van Fleet agreed that some of the radiological findings on Petitioner's cervical and lumbar spine were degenerative and predated the accident of January 5, 2014 as noted in the Decision in case 15 WC 09161. (PX 11, p. 21) Dr. Van Fleet noted however that pre-existing conditions can remain without any symptoms without trauma. (PX 11, p. 21) Dr. Van Fleet agreed that stenosis is a description of the narrowing of the canal within which the nerve roots exit the spine. (PX 11, p. 24)

Dr. Van Fleet stated that stenosis in the lumbar spine will probably cause low back pain and nerve impingement will cause more radicular complaints in the lower extremities. (PX 11, p. 31)

Doctor Van Fleet acknowledged that herniated disks can result from degeneration. (PX 11, p. 27) However, Dr. Van Fleet was of the opinion that the herniated disk in Petitioner's lumbar spine probably occurred as a result of the second accident of August 31, 2015 and worsened the lumbar spine condition. (PX 11, p. 23-4, 30-1)

Dr. Van Fleet did not agree with the radiologist who read the MRI of March 23, 2016 as showing "little, if any significant change" when compared to the previous MRI. (PX 11, p. 27-8) Dr. Van Fleet stated that the herniation he saw on the MRI of March 23, 2016 was not present in the previous MRI. (PX 11, p. 28)

The Arbitrator finds that the accident of August 31, 2015 caused Petitioner's L3-4 herniated disk and aggravated his lumbar spinal stenosis. The Arbitrator further finds that the Petitioner's lumbar surgery of April 15, 2016 was causally related to the accident of August 31, 2015.

ATTACHMENT J

In support of the Arbitrator's findings on the issue of **(J) Were the medical services that were provided to the Petitioner reasonable and necessary?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Having found the lumbar spine surgery performed by Dr. Van Fleet was causally related to the accident, the Arbitrator further notes that the surgery improved Petitioner's lumbar spine complaints and enabled him to be released to return to work within three months of the surgery. The Arbitrator finds the Petitioner's medical treatment was reasonable and necessary and awards only the medical expenses related to the lumbar spine incurred after the accident date of August 31, 2015. The Respondent shall pay the medical expenses listed below:

Medical bills:

Orthopedic Center of IL, 3/16/16-7/8/16	$21,358.00
Phoenix Physical Therapy, 5/16/16-6/24/16	$ 3,199.00
Total:	**$24,557.00**

Respondent is entitled to credit for any actual related medical expenses paid by any group 8(j) health provider and Respondent is to hold Petitioner harmless for any claims for reimbursement from said group health insurance provider and shall provide payment information to Petitioner relative to any credit due. 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.

ATTACHMENT K

In support of the Arbitrator's findings on the issue of **(K) What amount of compensation is due for Temporary Total Disability?**, the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

Petitioner returned to Dr. Timothy Van Fleet after the accident of August 31, 2015. Dr. Van Fleet never released Petitioner to return to work from the injury to his lumbar spine resulting from the accident of January 5, 2014 in case number 15 WC 09161. (See note of March 18, 2015, PX 4)

Dr. Van Fleet continued to restrict Petitioner from work with respect to his lumbar spine injury as of September 18, 2015 as Dr. Van Fleet only released Petitioner to return to work on that date for the cervical spine condition injured as a result of the accident in case number 15 WC 09161. (PX 4, 10)

Therefore, Dr. Van Fleet removed Petitioner from work from September 18, 2015 through July 18, 2016. (PX 4, 10)

The Arbitrator finds that Petitioner was temporarily and totally disabled from his employment as a result of the accident of August 31, 2015 from March 18, 2015 through July 18, 2016, a period of 43 & 2/7 weeks.

Respondent paid no temporary total disability benefits to Petitioner during this period and is due no credit.

ATTACHMENT L

In support of the Arbitrator's findings on the issue of **(L). What is the nature and extent of the injury?** the Arbitrator finds the following facts:

The findings of fact stated in other parts of this decision are adopted and incorporated by reference here.

On April 15, 2016 Petitioner underwent L3-4 and L4-5 hemi-laminotomies, partial medial facectomies and foraminotomies with right sided L3-4 discectomy. (PX 4)

Petitioner notices that if he turns at the hips he feels a sharp, pinching pain in his lower back. Petitioner becomes uncomfortable sitting for a few minutes. Petitioner notices that if he walks on uneven ground he develops shooting back pain. Petitioner states that he continues to lean to the right when he stands.

Under the amended Illinois Workers' Compensation Act the Arbitrator notes that the Commission shall base its Decision on five enumerated factors. All of the factors need not be present to award permanent partial disability.

(i) the reported level of impairment;
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of injury;
(i) the employee's future earning capacity;
(ii) Evidence of disability corroborated by medical records.

Therefore:

With regard to (i) of Section 8.1(b) of the Act:

Neither party offered a valid impairment rating report pursuant to the Guides for the Evaluation of Permanent Impairment Sixth Edition relative to this claim. An impairment examination was performed on October 28, 2015 by Dr. James Stiehl before Petitioner underwent spine surgery as a result of the accident herein alleged. At the time Dr. Stiehl performed the impairment rating of October 28, 2015 Petitioner had not reached maximum medical improvement from the injury he sustained as a result of the accident of August 31, 2015. The Guides to the Evaluation of Permanent Impairment, Sixth Edition, of which the Arbitrator takes judicial notice, states that one of the Fundamental Principles of the Guides

to the Evaluation of Permanent Impairment, Sixth Edition is that the rating of impairment cannot be performed before the Petitioner has reached maximum medical improvement. Guides to the Evaluation of Permanent Impairment. Page 20 Table 2-1. Therefore, no valid impairment rating was admitted into evidence relative to the accidental injury sustained on August 31, 2015 and the Arbitrator does not consider this factor.

With regard to (ii) of Section 8.1(b) of the Act:

Petitioner was released without restrictions and continues to work for the Respondent in a different position. Petitioner has some difficulty operating machinery in performing his work.

With regard to (iii) of Section 8.1(b) of the Act:

The Petitioner was 61 years old at the time of injury. Petitioner is now 63 years old. The Arbitrator notes that the Petitioner has remaining work life and has returned to work with the Respondent.

With regard to (iv) of Section 8.1(b) of the Act:

The Arbitrator concludes that the Petitioner's future earning capacity has not been impacted by the injury.

With regard to (v) of Section 8.1(b) of the Act:

Petitioner notices that if he turns at the hips he feels a sharp pinching pain in the lower back. Petitioner becomes uncomfortable sitting for a few minutes. Petitioner notices that if he walks on uneven ground he develops shooting back pain. Petitioner states that he continues to lean to the right when he stands. On July 8, 2016 when asked about Petitioner's condition, Dr. Van Fleet stated " he was cured" and and "was capable of performing full duty work without restrictions". (PX 8 p. 20,29)

The Arbitrator finds the injuries sustained caused 10% permanent partial disability to Petitioner's body as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☒ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nathan Benson,
Petitioner,

No. 14 WC 036242

vs.

Kirby Medical Center,
Respondent.

17IWCC0770

DECISION AND OPINION ON REVIEW

Timely Petition for Review under having been filed by Petitioner herein and notice given to all parties, the Commission, after considering issues including employee-employer relationship, accident, and causal connection, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, a copy of which is attached hereto and made a part hereof.

Petitioner, a 24-year-old janitor, asserted that he broke his left foot "pinky toe" on September 11, 2014 when, while on a work-related errand, he jumped off a loading dock instead of taking the available stairs. The Arbitrator denied the claim in its entirety on the overlapping grounds that: (1) an employee-employer relationship did not exist (that is, Petitioner took himself out of the scope of his employment when he jumped off the loading dock, purportedly in violation of rules and for his own benefit); and (2) his injury did not "arise out of" nor was it "in the course of" employment.

The Commission finds that Petitioner did establish an employee-employer relationship at the time of the injury. The Commission does not disturb the Arbitrator's ultimate determination, however, that the injury is not compensable insofar as it did not "arise out of" his employment.

BACKGROUND

Petitioner, 24, was hired as a janitor at Respondent, Kirby Medical Center, in March 2014. His duties included transporting hospital linens via company truck. These duties had him, on a daily basis, ascending and descending a ramp-like loading dock, which dock was immediately adjacent to the office of his supervisor, Jody Bettis. On the afternoon of September 11, 2014, Petitioner discovered that the linens truck was out of gas. He went to Ms. Bettis' office to ask for the company credit card so that he could buy gas. Ms. Bettis gave him the card and directed that he go fill the truck's gas tank and return with the credit card. Petitioner exited Ms. Bettis' office. While on his way back to the truck, he used the "shortcut" of jumping off the loading dock instead of taking the stairs at the end of the dock. As depicted in security video of the incident, while hopping off the dock, his right foot and leg made contact with the side of a piece of equipment -- a hydraulic lift -- that was abutting the dock. Instead of landing on the ground (which appeared to be about 3 feet below) on both feet, he tumbled and fell to the ground, inverting his left foot. (RX 1).

Petitioner was immediately in pain but got up and finished his errand of filling the truck and returning to Ms. Bettis' office with the credit card and gas receipt. He testified that, by the time he got back to Ms. Bettis' office, his left foot was throbbing and he could not put weight on it. Ms. Bettis instructed him to get checked out at the Emergency Department. There, Petitioner was assessed with a closed fracture of the fifth metatarsal bone, put in a soft cast, and referred to Carle Orthopedics, where he treated conservatively through October 23, 2014.

At hearing, Petitioner testified that taking the "shortcut" of jumping off the loading dock was his usual, routine way of exiting the loading dock. He testified that this was the quickest way off the dock and he took this route because "every day I was under heavy time constraints." (Tr. 34-35). According to Petitioner, he exited the dock in this manner at least 3 or 4 times per day and his employer acquiesced in his action inasmuch as Ms. Bettis (and at least one other superior) had witnessed him jumping off the dock a "half dozen times or so" prior to the accident without ever instructing him against doing this. (Tr. 39-41). Ms. Bettis denied ever witnessing Petitioner jumping off the dock. (Tr. 65-66).

DISCUSSION

As mentioned above, the Arbitrator found that: (1) there was no employer-employee relationship, and (2) the injury did not "arise out of" nor was it "in the course of" employment. His reasoning is summarized in the concluding paragraph of his decision, where he wrote:

> "[T]he Arbitrator finds that when Petitioner ventures from a safe route provided by the employer for ingress/egress and instead, purposefully jumps from a loading dock onto a hydraulic lift thus falling off to the ground, he has exposed himself to an unnecessary personal risk for his own personal convenience.[1] Therefore, any left foot claim sustained while performing this activity is not within the employee/employer relationship and does not arise out of or in the course of the employment with Respondent."

---

[1] The Commission notes that the assertion that Petitioner's choice of route off the loading dock was strictly "for his own personal convenience" is not sound. As Petitioner testified, on the date of accident, he was finishing his errand pursuant to the instruction of his supervisor.

Regarding the Arbitrator's finding that there was no employer-employee relationship inasmuch as Petitioner took himself out of the course of employment – the Commission does not take so draconian a view. Case precedent finds that for conduct to produce severance from employment, such conduct must be egregious, reckless, or unrelated to the claimant's employment; mere negligence or violation of a safety rule will not in and of itself suffice to sever an employee from the employment risk when an employee's actions were otherwise aimed at the furtherance of his employment duties. See, e.g., *Chadwick v. Industrial Commission*, 179 Ill.App.3d 715 (4th Dist. 1989) (an employee who fell to his death because he had not tethered himself to a scaffold was nevertheless held to be within the course and scope of his employment). Here, even assuming *arguendo* that Petitioner's action on September 11, 2014 violated a safety rule, it was nonetheless neither egregious nor done for personal convenience. As such, Petitioner's injury occurred while he was acting within the course and scope of his employment.

Nevertheless, Petitioner's injury is not compensable under the Act. While his injury occurred "in the course of" his employment, it did not "arise out of" the employment. The "arising out of" component is primarily concerned with causal connection between the employment and the accidental injury, and the mere fact that an incident occurred on the premises of the employer is not sufficient to fulfill the "arising out of" requirement. *Builders Square v. Industrial Commission*, 339 Ill. App. 3d 1006, 1010-11, 791 N.E.2d 1308, 274 Ill. Dec. 897 (2003). "The words 'arising out of' refer to the origin or cause of the accident and presuppose a causal connection between the employment and the accidental injury." *Jones v. Industrial Comm'n*, 78 Ill.2d 284 (1980) (citations omitted).

In the instant case, Petitioner has not proven causal connection between his employment and his injury insofar as his injury did not stem from any employment requirement such as would have exposed him to risk greater (qualitatively or quantitatively) than that faced by the general public. Petitioner acknowledged that his employer had never required him to exit the dock by jumping off it. He testified that, on the date of accident, while Ms. Bettis told him to do his task quickly, she did not direct him to jump off the dock. (Tr. 51-52).

Further, Petitioner's preferred route off this particular dock – a dock not too far off the ground, and free of any debris or premises defect -- was not especially risky. While the parties may assume reasonably that the stairs would have been a less risky route than the non-stairs option selected by Petitioner, the proposition that Petitioner's chosen route (regardless of whether Respondent acquiesced in this choice) was inherently dangerous is not warranted. The reality is that, on September 11, 2014, Petitioner's fall did not stem from any dangerous conditions of his employment or work-related increased risk of harm, but from a fluke – video of this incident shows that he was intending to clear the side of the lift, but inexplicably, one foot was caught on the lift and caused him to fall. As he testified, he just took a misstep; "my foot slipped out from under me." (Tr. 45-46).

In conclusion, Petitioner's accident, while unfortunate, did not originate in any cognizable employment risk and therefore did not "arise out of" employment. The Commission finds that an employee-employer relationship did exist between Petitioner and Respondent on the date of asserted accident, but affirms the Arbitrator's decision as to the non-compensability of the accident for the reasons stated above.

17IWCC0770

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 29, 2016 is hereby modified as stated herein and otherwise 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: NOV 30 2017

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jdl/ac
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Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BENSON. NATHAN
Employee/Petitioner

Case# **14WC036242**

KIRBY MEDICAL CENTER
Employer/Respondent

17IWCC0770

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:

3269 SPIROS LAW PC
STEPHANIE A WEBER
2807 N VERMILION
DANVILLE, IL 61832

2965 KEEFE CAMPBELL BIERY & ASSOC
NATHAN S BERNARD
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

17IWCC0770

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

Nathan Benson
Employee/Petitioner

Case # 14 WC 36242

v.

Setting Lee/Urbana

Kirby Medical Center
Employer/Respondent

An Application for Adjustment of Claim was filed on this matter and Notice of Hearing was mailed to each party. The matter was heard by the Honorable Arbitrator Lee of the Workers' Compensation Commission, in the City of Urbana on January 29, 2016. After reviewing all evidence presented, the Arbitrator makes the following findings of fact and rulings on the disputed issues below.

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 September 11, 2014, Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship *did not* exist between Petitioner and Respondent.

On these dates, 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.

Petitioner is not entitled to medical and TTD benefits.

ORDER

No benefits are awarded.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Edward Lee 3/19/16

Signature of Arbitrator Date

MAR 29 2016

17IWCC0770

ILLINOIS WORKERS' COMPENSATION COMMISSION

Nathan Benson
Employee/Petitioner
v.
Kirby Medical Center
Employer/Respondent

Case # **14 WC 36242**

Setting **Lee/Urbana**

ARBITRATION DECISION

An Application for Adjustment of Claim was filed on this matter and Notice of Hearing was mailed to each party. The matter was heard by the Honorable Arbitrator Lee of the Workers' Compensation Commission, in the City of Urbana on January 29, 2016. After reviewing all evidence presented, the Arbitrator makes the following findings of fact and rulings on the disputed issues below.

DISPUTED ISSUES:

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. Was there an 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?

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. What temporary total benefits are due?

L. What is the nature and extent of the injury?

FINDINGS OF FACT

Petitioner is a twenty-five year old, male, janitor who filed an application for adjustment of claim to the left foot for an incident alleged on September 11, 2014. Kirby and Carle medical records confirmed treatment for a non-operated left fifth metatarsal (the "pinky toe") fracture with casting and release to full duty/MMI approximately two months later. (Px. A, B). On October 25, 2014 Petitioner related in Carle medical records to "having zero pain" and x-rays showed healed fracture of the base of the fifth metatarsal compared with September 25, 2014 - otherwise no acute findings. (Px. B). Petitioner testified to returning to work elsewhere as a roofer with extensive time spent on his feet as a laborer without significant complaints other than the need to take occasional over the counter pain medication.

In advance of testimony, Petitioner was provided with a copy of a surveillance video by Kirby Medical Center depicting the alleged incident on September 11, 2014. Petitioner established the video was accurate and did not appear altered in any way. It was admitted into evidence without objection. (Rx.1).

The surveillance video showed Petitioner jumping from a loading dock onto a hydraulic lift and falling to the ground. Petitioner testified he purposefully jumped from the loading dock in order to get down to the ground quicker so he could enter a company vehicle parked in the loading dock bay area. Petitioner testified there were stairs to the immediate right he could have taken which he estimated would have taken an extra 30 seconds to get off the loading dock. Petitioner also testified there were another set of stairs on the other end of the loading dock he could have taken which he estimated would have taken an extra 60 second to get off the loading dock.

Petitioner testified the hydraulic lift was for the transportation of linens and other freight and not for employees to get down off the loading dock, like an elevator. Petitioner also testified his supervisor did not direct, nor had ever previously directed, him to jump off the loading dock. Petitioner testified he had jumped off the loading dock before, approximately a dozen times, and other supervisors had observed this and allowed him to do it – Petitioner did not call any other witnesses or supervisors to support this testimony that he had been observed previously jumping off the loading dock, or using the hydraulic system other than for the movement of freight.

In reviewing a job description on cross-examination, Petitioner admitted his job duties had him on the loading dock for the transportation of linens on a daily basis but that he was not directed, either verbally or in writing, to ever jump from the loading dock or use the hydraulic lift to get down off the loading dock. Petitioner

admitted, as the job description established, that safety comes first and "not to jeopardize one's own or other's safety". (Rx. 3).

Petitioner testified Jodie Bettis was his direct and only supervisor. Jodie Bettis, Director of Environmental Services, testified she was Petitioner's only supervisor and had been the one to hire him. Ms. Bettis testified she had never observed Petitioner jump from the loading dock before and if she had she would have advised him to take the stairs. Ms. Bettis laid a foundation for an incident report admitted into evidence which confirmed Petitioner was advised to use the stairs following the alleged incident. (Rx. 2).

Ms. Bettis also laid a foundation for a job description admitted into evidence which confirmed Petitioner's job duties did not direct him to jump from the loading dock or use the hydraulic lift to get down off the loading dock, and Petitioner was to observe all safety protocols. Ms. Bettis testified she had requested Petitioner go to a company vehicle parked in the loading dock bay area to get gas for the vehicle and return with the company credit card before she had to leave for the day but she did not direct Petitioner to jump from the loading dock.

RULING

In support of the Arbitrator's decision regarding the question of whether Petitioner and Respondent were operating under the Illinois Workers' Compensation or Occupational Diseases Act, and their relationship was one of employee and employer, the Arbitrator finds the following facts and makes the following rulings:

The Illinois Supreme Court has held where an employee incurs a danger of his own choosing, outside of any reasonable exercise of his employment, the act is not an incident to employment. *Lumaghi Coal Co. v. Industrial Commission et al. 318 Ill. 151. No. 16627 (June 18. 1925).* The employer is not liable for every accidental injury which may happen to an employee during his employment. *Id.* The employer is not liable where the employee exposes himself to a danger which is not one arising from the employee's employment. *Id.*

In *Lumaghi*, a mine inspector used an electric motor which hauled coal to the bottom of the shaft and sustained a non-compensable injury. The claimant, as a mine examiner, had nothing to do with operating the motors. *Id.* The claimant used the motor for the purpose of riding on it to the place on the other side of the mine as it was a quicker route. *Id.* Similarly, here Petitioner's injury were not a result of fulfilling any duties required of his employment but according to his own testimony "hopping off" a hydraulic system by means of the loading dock was for the purpose to get down quicker rather than using the stairs that would have taken an extra 30-60 seconds. (Rx. 2).

It is clear from the surveillance video, Petitioner actions took him entirely out of the sphere of his employment and he was injured while violating common sense safety rules. (Rx. 1, 3). It cannot be then said that any accident was due to employment and in such a case no compensation can be recovered. *Id.* 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).* 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).*

Petitioner chose to voluntarily, without the knowledge of Respondent, engage in a hazardous method of taking him off the loading dock when his duties required him to make the trip in a safer manner. (Rx. 1,2,3). In doing so he voluntarily went

outside of the reasonable sphere of his employment, and put himself beyond the protection of any implied undertaking of his job duties.

Petitioner was leaving the premises to get gas in a company vehicle. He testified had jumped off the loading dock before and other supervisors had observed this and allowed him to do it. Petitioner did not call any other witnesses or supervisors to support that the route of jumping off the loading dock, or using the hydraulic lift other than for the movement of freight, was a customary or permitted route. In fact, Petitioner admitted the hydraulic lift was not for getting down off the loading dock. Also, Petitioner testified he had only jumped off the loading dock a dozen or so times, and thus it was not an everyday occurrence despite the fact he was on the loading dock transporting linens on a daily basis.

The Arbitrator finds the testimony of Jodie Bettis, Director of Environmental Services, to be more credible than Petitioner. Ms. Bettis confirmed she had never observed Petitioner jump from the loading dock before and if she had, as his direct supervisor, she would have advised him to take the stairs. This is supported by an incident report admitted into evidence which confirmed Petitioner was advised to use the stairs following the alleged incident. (Rx. 2). Ms. Bettis also laid a foundation for a job description admitted into evidence which confirmed Petitioner's job duties did not direct him to jump from the loading dock or use the hydraulic lift to get down off the loading dock. (Rx. 3). Petitioner admitted on cross examination he was aware he was to observe safety protocols as part of his job duties. Ms. Bettis testified she had never and did not direct him to jump off the loading dock.

The facts here are on point with those in *Lumaghi* and others cases mentioned in further detail below when a claimant takes an alternative route or shortcut. In those cases, it was found to be irrelevant that other employees took the same route, or claimant had done it before, or the employer was aware of this practice and never attempted to stop it. "Employer acquiescence alone cannot convert a personal risk into an employment risk." *Orsini, 117 Ill.2d at 47, 109 Ill.Dec. 166, 509 N.E.2d 1005, citing Yost v. Industrial Comm'n, 76 Ill.2d 548, 31 Ill.Dec. 812, 394 N.E.2d 1189 (1979), and Lynch Special Services v. Industrial Comm'n, 76 Ill.2d 81, 27 Ill.Dec. 738, 389 N.E.2d 1146 (1979).* Accordingly, Illinois courts have consistently held that "where the injury results from a personal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable." *Orsini, 117 Ill.2d at 47, 109 Ill.Dec. 166, 509 N.E.2d 1005.*

In *Hatfill v. Industrial Commission, 202 Ill.App.3d 547, 560 N.E.2d 369, 148 Ill.Dec.67 (1990)* the claimant stated he had jumped the ditch on the employers premises in the past, just as others had done, to get to his car in the parking lot quicker. *Id.* The claimant was unaware of anything in the employee's handbook which stated that jumping the ditch was a safety violation. *Id.* The claimant's had never been formally written up for a safety violation for jumping the ditch, and he had not been told that this practice was not allowed. *Id.* Claimant had observed 10 to 15 persons a day jumping the ditch. *Id.* Compensability was denied in *Hatfill* as there was no reason for the claimant to jump over a ditch just as likewise there was no reason for Petitioner here to jump off the loading dock onto a hydraulic lift to get down quicker. Regardless of whether Petitioner may or may not have done it before does not mean that the practice was required by the job or a reasonable expectation of the job. Choosing to work in an unsafe manner does not make such voluntary acts compensable, nor is Respondent required to police routes of ingress and egress to prevent all unsafe voluntary acts. *Id.*

Petitioner's left foot claim was not a result of fulfilling any duties required of his employment and thus there was no employee/employer relationship at the time of the accident.

In support of the Arbitrator's decision regarding the question of whether an accidental injury occurred which arose out of and in the course of the Petitioner's employment by the Respondent, the Arbitrator finds the following facts and makes the following rulings:

Under the Illinois Workers' Compensation Act, only those injuries which "arise out of" and "in the course of" the employment relationship are compensable. *820 ILCS 305/2, Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275, 241 Ill.Dec. 820 (1999).* The phrases "arising out of" and "in the course of" are used conjunctively, and thus require the existence of both elements to make the claim compensable under the Workers' Compensation Act. *Id.*

Whether an employee's injuries "arose out of" the employment may be determined under two different approaches. An injury arises out of the employment where its origin stems from a risk connected with, or incidental to, the employment. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. *Dodson v. Industrial Commission*, 241 Ill.Dec. at 823. Also, an injury arises out of the employment where it is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment *Id.* Under either approach, an injury does not

arise out of the employment where an employee voluntarily exposes himself to an unnecessary personal danger solely for his own convenience. *Id.*

The "in the course of" element refers to the time, place and circumstances under which the accident occurred. *Catepillar Tractor v. Industrial Commission, 129 Ill.2d 52, 541 N.E.2d 665, 133 Ill.Dec. 454 (1989).* It is not enough Petitioner is working when an injury is realized. 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).*

First, when an employee voluntarily exposes himself to an unnecessary personal danger solely for his own convenience, then the case law is clear that such an injury does not arise out of employment. *Orsini v. Industrial Commission, 117 Ill.2d 38, 109 Ill.Dec. 166, 509 N.E.2d 1005 (1997); Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275, 241 Ill.Dec.820 (1999); and, Hatfill v. Industrial Commission, 202 Ill.App.3d 547, 560 N.E.2d 369, 148 Ill.Dec.67 (1990).*

While Petitioner was attempting to leave the premises, he voluntarily chose to take a shortcut, an alternative dangerous route, for his own convenience because it was quicker. There was no benefit to Kirby Medical Center in Petitioner jumping off the loading dock rather than taking the stairs. To the contrary, Jodie Bettis, Director of Environmental Services, rebutted Petitioner's assertions and testified he had never been observed jumping from the loading dock. Ms. Bettis testified if she had observed Petitioner jump from the loading dock, as his only direct supervisor, she would have objected to getting off the loading dock in this fashion for safety reasons. Further, Ms. Bettis actually objected to Petitioner jumping off the loading dock and directed him to take the stairs in the future upon reviewing the surveillance video. (Rx. 1, 2).

In *Hatfill*, the claimant was on the employers premises en route to his car parked in the employee parking lot. *Id.* Instead of using the walkway located fifty feet to his left and right, the claimant took a shortcut by jumping across some water that had accumulated at the foot of an incline leading to the employer's parking lot. Id. While doing so, the claimant sustained an injury. *Id.* In reviewing these facts, the Appellate Court found that the claimant's accident was not compensable because his injuries resulted from a personal risk assumed by him for his own benefit and

not that of the employer. *Hatfill, 202 Ill.App.3d at 554, 148 Ill.Dec.67 560 N.E.2d 369.*

In *Dodson v. Industrial Commission*, the claimant was on the employer's premises and proceeded down several steps of concrete sidewalk leading to the employee parking area and, because it was raining hard, she left the sidewalk and walked across a grassy slope to reach the driver's side of her car. *Id.* The claimant testified that she walked across the grass because it was the most direct route to her car. *Id.* While walking on the sloping grassy path, the claimant fell and sustained injuries. *Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275, 241 Ill.Dec.820 (1999).* In analyzing these facts, the Appellate Court found that the claimant's voluntary decision to transverse the grassy slope instead of the walkway, exposed her to an unnecessary danger entirely separate from her employment responsibilities. *Id.* In addition, the Court found that the claimant's decision not to use the walkway was for her own benefit and not that of the employer's. *Id.* Consequently, the Court held that the claimant's injuries did not arise out of her employment. *Id.*

In both *Hatfill and Dodson*, the claimants attempted to argue that other employees had used the alternative routes that they had used at the time of their injury, and hence, the employer had acquiesced in the use of the route in question. In both cases, the Appellate Court rejected this argument. In *Hatfill*, the Court stated that "the fact that some people may chose to leave the work place in an unsafe manner does not make such voluntary acts compensable, nor is the respondent required to police routes to prevent all unsafe voluntary acts." *Hatfill, 202 Ill.App.3d 553, 148 Ill.Dec.67, 560 N.E.2d 369.* The Court went on to state, that to accept the claimant's arguments would require the employer to make other routes safe. *Id.* Applying the analysis of the Appellate Court in *Hatfill* and *Dodson* to the facts of the present case, it is clear Petitioner's injuries, at the very least, did not arise out of his employment. While Petitioner was leaving the premises, just as in *Hatfill* and *Dodson*, Petitioner voluntarily choose to ignore a safe route for his own personal benefit, that being that it was the shortest route. Petitioner's actions in this regard did not, in any way, benefit Respondent. Accordingly, the Arbitrator finds Petitioner's injuries did not arise out of his employment.

Further, to be compensable, the injury must have resulted from some risk of the employment, and must be incidental to the anticipated normal use. *Archer Daniels Midland Co., 91 Ill.2d 210, 62 Ill.Dec. 921, 437 N.E.2d 609; Aaron v. Industrial Comm'n (1974), 59 Ill.2d 267, 319 N.E.2d 820.* Where the injury has resulted from a personal deviation by an employee or where the injury resulted from a risk

personal to the employee and not incidental to the employment the injury is not compensable. *Aaron, 59 Ill.2d 267, 319 N.E.2d 820; Fisher Body Division, General Motors Corp. v. Industrial Comm'n (1968), 40 Ill.2d 514, 240 N.E.2d 694.* Jumping from the loading dock off a freight only hydraulic lift and falling rather than taking stairs to the either side was not incidental to arising out of the employment or the anticipated normal use of egress. Petitioner's left foot claim did not arise out of employment.

Even one prong of the "arising out of" and in the course of" employment analysis that has not been met is sufficient to justify denial of compensation. *Orsini v. Industrial Comm'n (1987), 117 Ill.2d 38, 109 Ill.Dec. 166, 509 N.E.2d 1005.* However, Petitioner's injuries also did not occur at a reasonable time, place and circumstance. Not all injuries which occur on an employer's premises are compensable. *Archer Daniels Midland Co., 91 Ill.2d 210, 62 Ill.Dec. 921, 437 N.E.2d 609.*

At the time Petitioner jumped off the loading dock he was in place outside his "course of employment", in a circumstance exposing himself to a danger which was not one "arising out of" employee's employment but rather a personal deviation resulting in a personal risk. It is not as if Petitioner slipped off, or tripped over any defect on the loading dock, which would have been a risk to which Petitioner was exposed to in a greater degree than the general public by virtue of his employment and need to be on the loading dock. *Id.* Petitioner voluntarily exposed himself to an unnecessary personal danger solely for his own convenience. *Id.* Petitioner actions took him entirely out of the sphere of his employment. *Lunaghi Coal Co. v. Industrial Commission et al. 318 Ill. 151, No. 16627 (June 18, 1925).*

This Arbitrator confirmed the issues in dispute and had the opportunity to hear and carefully consider testimony along with examination of multiple exhibits. Consequently, Petitioner's request for compensation is hereby denied. Finding no employee/employer relationship nor causal connection, all other issues including accident, notice, liability for as well as reasonableness and necessity of medical services, liability for as well as amounts charged for medical bills, liability for TTD and periods of lost time, and nature and extent are moot. Accordingly, the Arbitrator finds Respondent is not liable for temporary total disability benefits claimed by Petitioner, nor medical expenses incurred by Petitioner introduced as Petitioner's Exhibit C, D, and E, nor entitled to any permanent partial disability.

CONCLUSION

In summary, the Arbitrator finds that when Petitioner ventures from a safe route provided by the employer for ingress/egress and instead, purposefully jumps from a loading dock onto a hydraulic lift thus falling off to the ground, he has exposed himself to an unnecessary personal risk for his own personal convenience. Therefore, any left foot claim sustained while performing this activity is not within the employee/employer relationship and does not arise out of or in the course of the employment with Respondent.

Accordingly, all Petitioner's claims for benefits under the Act are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Choose reason Accident, Causal Connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cheryl Innes, Widow of Thomas Innes,
Petitioner,

vs. No. 12 WC 38596

17IWCC0771

Hindsboro Community F.P.D.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, death and burial benefit rates and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FACTS:

At the arbitration hearing, Cheryl Innes testified she was married to the decedent, Thomas Innes, for 42 years before he died on October 2, 2010. At that time, he had been a volunteer for the Hindsboro Community Fire Department for ten years, and had attained the title of Assistant Fire Chief. Before he died, Thomas Innes had been on medications for diabetes, high blood pressure, high cholesterol; he had also recently finished taking a medication for blastomycosis, a fungal infection.

On the morning of October 2, 2010, Thomas went to Jeff Chambliss' farm and changed the oil in a tractor. He then visited his mother who was hospitalized at Carle, ate dinner and went shopping at Walmart before coming home. When he arrived home, his health, mood and demeanor were good. Cheryl and her husband both fell asleep in their recliners. Around 11:15 pm, his pager went off loudly, startling them awake. It was a call for first responders. Her husband jumped up, put on his shoes and left. He returned home from the call around 11:30 pm or 11:45 pm. He came to bed but immediately got back up saying, "Oh, this isn't going to work." After Thomas checked his blood pressure, reportedly 240/108, Cheryl began driving him to the hospital. They called 911 from their vehicle, and an ambulance met them at the parking lot of an IGA grocery store. By then, Thomas was in cardiac arrest. The paramedics were unable to revive him. Hospital records show he was pronounced dead there at 1:44 am.

Connie Hoel, the daughter of Cheryl and Thomas Innes, testified that prior to her current job as a registered nurse in the cardiac cath lab at Sarah Bush Hospital, she worked in the cardiovascular intensive care unit at Carle Hospital. She saw her father at 3:00 pm on October 2, 2010; then, his demeanor and health were fine and he was not in cardiac distress. Connie also worked as a volunteer firefighter for the Hindsboro Fire Department and had a pager which startles her and makes her adrenaline go up when it sounds.

Chris Biggs testified that he is a volunteer for the Village of Hindsboro's fire department. Thomas Innes was his uncle. When Chris' pager goes off it catches him off guard and he feels an adrenaline rush. At 11:15 pm on October 2, 2010, Chris responded to the same call that Thomas did. Chris observed his uncle moving quickly and carrying a medical bag with oxygen tanks and equipment weighing around 35 lbs. After an ambulance arrived and transported the patient, Chris and his uncle Thomas went back to the fire department around 11:35 pm. Thomas didn't act like himself and was in a hurry to go home that night, rather than hang out at the station as they sometimes did for up to an hour, after calls.

Dr. Randolph Martin, MD., Petitioner's Section 12 expert, testified via evidence deposition. He is a cardiologist and is board certified in internal medicine, cardiovascular disease and nuclear cardiology. At Petitioner's attorney's request, Dr. Martin reviewed copies of Thomas Innes' medical reports, death certificate, autopsy report, ambulance records, Dr. Daniel Fintel's IME report, and case law which was sent to him. He then authored a May 7, 2014 report in which he wrote: "The autopsy conclusion, in my opinion, is erroneous. The cause of death is listed as hypertensive cardiovascular disease… Mr. Innes died of SCD (sudden cardiac death) in the setting of ischemic heart disease and hypertensive cardio vascular disease exacerbated by stress related catecholamine release."

Dr. Martin also provided opinions that: Thomas' job duties caused high stress; his increased adrenalin caused his underlying cardiac condition to cascade to a ventricular arrhythmia and sudden cardiac death, and an adrenalin release can cause ventricular arrhythmia for up to one hour or more after an event. Her further opined that although a few of Thomas' blood pressure readings were out of control, Thomas did not have malignant hypertension and in fact was not hypertensive at all. Dr. Martin disagreed with Dr. Fintel that Thomas' heart disease was so advanced that any stress or ordinary exertion would have killed him, and that his medications were

a causative factor in his death. Dr. Martin admitted that Thomas did have risk factors for coronary heart disease – high blood pressure, diabetes, and high cholesterol. He also had signs of progressing cardiac disease. Dr. Martin acknowledged that Thomas had caffeine and nicotine in his blood, both of which could have increased his heart rate.

Dr. Daniel Fintel, MD, Respondent's Section 12 expert, testified via evidence deposition. He is a cardiologist, board certified in internal medicine, cardiovascular diseases, critical care medicine and nuclear cardiology. He reviewed Thomas' records, which showed that in the last month of his life, he had persistently elevated blood pressures, documented as 160/78 on September 7, 2010 and 178/83 on September 28, 2010. Prior to his death, Thomas Innes complained to his doctor of having problems controlling his blood pressure. Thomas' records showed he had fluid overload, kidney swelling and congestive heart failure – signs that his condition was worsening. Dr. Fintel opined that Thomas' condition had progressed to the point that any ordinary event could have been equally likely to have precipitated the event.

Dr. Fintel also provided these opinions: Thomas Innes' cardiac arrest was precipitated by malignant hypertension, the most severe form, in which there is an abrupt increase in his blood pressure and evidence of end organ damage, along with the effects of his elevated blood pressure on his cardiovascular system. He most likely died from an unstable electrical rhythm, due to increased myocardial demand from his state of hypertensive emergency which caused myocardial ischemia leading to ventricular arrhythmia. Thomas had a 75% occlusion of his right coronary artery; that could have led to ventricular fibrillation in someone with left ventricular hypertrophy. Dr. Fintel believed that the autopsy report findings of prior pulmonary congestion and hepatic congestion, were indicative of chronic heart failure with acute exacerbation.

Dr. Fintel noted that when Thomas returned to the fire house after that call, he was not complaining of chest pain or shortness of breath. Dr. Fintel did not believe Thomas' assistance with that call exacerbated any pre-existing cardiac conditions and did not require a high degree of physical exertion or stress. Dr. Fintel absolutely disagreed with Dr. Martin's opinion that an adrenaline rush caused Thomas' death, because he did not experience a shock-like, sudden stressful state.

Dr. Fintel also testified that the itraconazole Thomas had been taking until three days before his death has been associated with side effects of hypertension, heart failure and unstable ventricular arrhythmia. The effects of that drug on blood pressure and heart failure are amplified in patients like Thomas who have cardiac risk factors, diabetes and were on three-drug treatment for hypertension. Even though Thomas discontinued that drug three days before his incident, the residual effects from taking it for six months were still present in his body.

Petitioner also offered into evidence a witness statement signed by Charles Guthridge and Colt Guthridge, a registered professional nurse. They responded the same emergency call which Thomas did. Their statement reported, "Tom Innes seemed to be fine as he helped with administering oxygen and taking vials. He helped with moving Nathan to the ambulance and seemed to be fine as the firemen talked at the station after returning from the call."

The written statement of Fire Department Chief Steve Beaty was introduced into evidence. Chief Beaty stated, "We had a call at 11:15 pm for a cancer patient that was having bad headaches. We arrived on the scene at 11:25 pm and Tom started to take vitals and the Oakland ambulance arrived around 11:30 pm... At 11:35 pm we went back to the fire house to put everything back in the trucks and went home. We went home around 11:45 pm."

Petitioner offered into evidence the records of Arrow Ambulance, which responded to Petitioner's 911 call, when Thomas was en route to the hospital. Those records show their dispatch received a call for a sick person at 12:49 am on October 3, 2010, and that an ambulance met Cheryl and Thomas at a grocery store parking lot three minutes later. The paramedics expressed difficulty removing Thomas from his vehicle due to his size, and they administered emergency care at the scene before transporting him to the hospital.

The Champaign County's Coroner's Report dated October 18, 2010 was also put in evidence. It was signed by Dr. Michael Humilier, MD, and stated in pertinent part, "In my opinion, the cause of death was as follows: Immediate Cause: (a) Hypertensive Cardiovascular Disease... My conclusions are based on the following observations and findings: (1) Autopsy findings, (2) Coroner's investigation reports, and (3) Toxicology testing results."

CONCLUSIONS:

The Commission acknowledges incongruities in the lay witnesses' accounts of Thomas' physical condition prior to his cardiac event. Chris Briggs, Thomas' nephew, testified that Thomas did not act like himself at the station following the call they had responded to. He appeared to be in a hurry to go home, unlike at other times when he would hang out with the others at the station for up to an hour after a call.

Aside from the vagueness of that testimony, the Commission finds it was contradicted by the statements of Charles Guthridge and Colt Guthridge. They both reported Thomas "seemed fine" not only when he was administering oxygen to the patient that evening, but also after the call, "as the firemen talked at the station." Colt Guthridge was a registered professional nurse ("RN"), and the Commission places more credence upon his opinion regarding Thomas' condition than upon Chris Briggs'. Further, Fire Chief Steve Beaty provided a statement that following this call, he and the other volunteers only stayed at the station for 10 minutes, to put equipment back into the trucks before going home, "around 11:45 pm." There is no evidence that Thomas left the fire station that night prior to any of the other firemen.

The Arbitrator found Dr. Martin's opinions more credible than Dr. Fintel's, and found that Respondent failed to rebut the statutory presumption that Thomas Innes' death arose out of and in the course of his employment by Respondent. The Commission views the evidence differently than the Arbitrator.
Section 6(f) of the Act provides, in pertinent part:

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition,

> heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. *** However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission." *820 ILCS 305/6(f) (West 2014).*

In *Johnston v. Workers Compensation Comm'n, 2017 IL App.2d 160010 WC (2nd Dist. 2017),* the Appellate Court considered the amount of proof necessary to overcome the rebuttable presumption of section 6(f). That Court held that to successfully rebut the presumption that a disease or condition arose out of a claimant's employment, an employer need not eliminate occupational exposure as a possible contributing cause; it need only present *some* contrary evidence. Here, Respondent presented contrary evidence in the form of Dr. Fintel's testimony that Thomas' cardiac arrest was precipitated by his malignant hypertension which had progressed to the point that any ordinary event could have been equally likely to have precipitated the event. The Commission finds that this evidence successfully rebuts the presumption in section 6(f) of the Act.

Once a party has successfully rebutted a presumption, the presumption vanishes and the parties proceed as if the presumption never existed. *(Id).* The burden of proving accident and causation by a preponderance of the credible evidence then returns to the Petitioner.

The Commission has considered the testimony of both parties' experts, and finds the Arbitrator's criticisms of Dr. Fintel's opinions unwarranted. The Arbitrator found Dr. Fintel's opinion that Thomas had significant preexisting heart conditions to be less credible than Dr. Martin's opinion that Thomas' heart was reasonably healthy and stable. The Commission, however, finds that the evidence more strongly supports Dr. Fintel's conclusion. Thomas' ongoing treating records show he suffered from congestive heart failure, cardiomegaly, coronary atherosclerosis with 75% occlusion of his right coronary artery, aortic atherosclerosis and concentric left ventricular hypertrophy. Given that evidence, the Commission finds Dr. Fintel's opinion on this issue more credible than Dr. Martin's.

The Arbitrator also found Dr. Fintel's "credibility and the value of his opinions," were diminished because Dr. Fintel did not review Thomas' "full and accurate history." The record

proves otherwise. Although the Arbitrator did not identify which documents Dr. Fintel purportedly failed to review. Dr. Fintel identified all the records and evidence he reviewed prior to rendering his written opinions. Those included: the records from Carle Hospital, Dr. Whalen's records, Thomas' autopsy report, his death certificate, the coroner's report, four pages relating to the call which Thomas responded to on the night of the occurrence, the ambulance run sheet, Cheryl Innes' written timeline statement, and witness statements of Fire Chief Steve Beatty, Charles Guthridge and Colt Guthridge. Prior to giving opinions at his deposition, Dr. Fintel also read Dr. Martin's

IME report and pertinent parts of Dr. Martin's deposition; contrary to the Arbitrator's finding that he had not.

The only documents reviewed by Dr. Martin but not Dr. Fintel, were: (1) unidentified "case law" which Petitioner's attorney sent to Dr. Martin, and (2) a three-sentence statement of farmer Jeff Chambliss. That statement noted that on the morning Thomas' incident, Thomas drove a tractor back to a shed, changed its oil, and then left without making any complaints. The Commission disagrees with the Arbitrator's finding that Dr. Fintel's credibility and opinions were diminished because he did not review the Chambliss statement and case law.

The Arbitrator's finding that Dr. Fintel "clearly ignored" Thomas' normal blood pressure readings in July and August 2010 is also unsupported by the evidence. Dr. Fintel did acknowledge that Thomas' blood pressure was well-controlled with medications throughout that period, as well as during much of 2010. Dr. Fintel opined Thomas' blood pressure became persistently elevated and uncontrolled during the month before his death, turning into "malignant hypertension." Treating records show that on September 7, 2010, Thomas' his blood pressure rose to 160/78, requiring his primary doctor had to change his medication to a "more potent" anti-hypertensive drug. Dr. Fintel noted that despite this change in medications, Thomas' blood pressure remained elevated. On September 28, 2010, his blood pressure increased to 178/83, and he complained to his doctor that he had problems controlling it. Given this evidence, the Commission finds Dr. Fintel's opinion persuasive, and Dr. Martin's opinion that Mr. Innes "was not hypertensive at all," to be lacking credibility.

The Arbitrator's reliance on *Norma Toler, Widow of Frances Toler, Deceased, v. Clifford Jacobs Forging, 5 IWCC 490; 2005 Ill. Wrk. Comp. LEXIS 490*, is misplaced. In that claim, also involving a sudden cardiac death, Dr. Martin testified in favor of the claimant and Dr. Fintel testified in favor of the employer. The Arbitrator herein implies that because the Commission found Dr. Martin's conclusions more credible than Dr. Fintel's in *Toler*, the relative credibility of these two physicians is now res judicata. Aside from that untenable conclusion, the Arbitrator herein failed to note that in *Toler,* the case outcome was based not upon Dr. Martin's and Dr. Fintel's opinions only, but also upon the testimony and opinions of four additional doctors.

The Commission finds the timeline of events in this case to be important. While there is evidence of the times at which some events in this claim occurred,[1] the times of other significant events, crucial to the outcome of this case, were left to speculation. In particular, there is no evidence of the time when Thomas went to bed and got up stating, this isn't going to work." The Commission finds that moment to be the first credible evidence of Thomas not being well. The time of this could have been within minutes of his returning home at 11:45 pm, or up to an hour later. Similarly, no evidence was presented of the time when Thomas took his blood pressure, or when Cheryl began driving him to the hospital. Without knowing how long this occurred after he was awakened by his pager at 11:15 pm, Dr. Martin's testimony that an adrenaline surge could cause a ventricular arrhythmia "up to an hour or more" after an event, is meaningless.

[1] Thomas' emergency page came in at 11:15 pm; the volunteer firemen returned to the fire station after that call at 11:35 pm; Thomas arrived home at 11:45 pm; the ambulance responding to Thomas' emergency was dispatched at 12:49 am and it arrived at the hospital at 1:29 am.

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The Commission finds credible Dr. Fintel's opinion that, in addition to Thomas' high blood pressure, high cholesterol and diabetes, his heart disease was so advanced that any everyday activity could have increased his blood pressure enough to be fatal. The coroner's Report, showing Thomas' immediate cause of death to be hypertensive cardiovascular disease, supports Dr. Fintel's opinion.

Finally, the Commission notes that Petitioner presented no evidence tending to show that any hazards or exposures from Thomas' employment caused or contributed to his underlying cardiac condition. Petitioner presented no evidence at any time of Thomas' inhaling smoke or other toxins which could have caused or contributed to his condition. Instead, the evidence supports a conclusion that Thomas' non-occupational risk factors – his uncontrolled hypertension, diabetes, obesity, lipid abnormality and smoking history – were the cause of his underlying cardiac condition. The Commission finds that Petitioner did not prove that Thomas Innes sustained an accident arising out of or in the course of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 5, 2016, is hereby vacated and all benefits to Petitioner are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for 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: NOV 3 0 2017

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jdl/mcp
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Joshua D. Luskin

L. Elizabeth Coppoletti

DISSENTING OPINION

I must respectfully dissent and would find Claimant, Cheryl Innes, proved that the death of her husband, Thomas Innes, arose out of and in the course of his employment.

The Majority found Dr. Fintel's opinion credible that any everyday activity could have increased his blood pressure enough to be fatal. I would first point out that Dr. Fintel testified that Dr. Martin's explanation was theoretically possible and that there are well-documented examples of people dying from the mechanism that Dr. Martin described. Dr. Fintel testified:

Q: Do you agree with Dr. Martin's opinion?
A: I absolutely do not.
Q: Okay. And why is that?
A: There are well-documented cases in which people die suddenly at work under highly stressful situations for exactly the mechanisms that Dr. Martin eloquently described in his deposition of a sudden surge of adrenaline in a [predisposed] individual, but that's not the facts of this case.

This is not a fireman who died while fighting a fire, running up a ladder, carrying heavy equipment. And I've dealt with those cases and I've opined that death at work was clearly related to the effects of the shocklike, sudden stressful state, and the patient's underlying cardiovascular condition.

But the facts of this call, as I understand it, is a beeper goes off in the evening, not for cardiac arrest or a fire or a motor vehicle accident, but a cancer patient who is having a headache who needed to be followed up. And as would occur in a clinic situation, the patient was examined, blood pressure, vital signs were obtained, I believe, by Mr. Innes as part of a team, and they placed the patient in an ambulance and then the fire team returned to the firehouse and the ambulance transported the cancer patient.

This is far from the kind of life-threatening stressful situation accompanied by a volley of adrenalin [sic] in the blood stream, or another term for that is catecholamines, which are small chemical messengers that stimulate the adrenergic nervous system in the body.

In fact, what we're told is that Mr. Innes returned to the firehouse, interacted with his colleagues, was not complaining of chest pain or shortness of breath or feeling like he was going to pass out. All symptoms he was entitled to develop if he was exposed to sudden adrenalin [sic] release in a threatening or very stressful situation. But after interacting or socializing with his colleagues, the volunteers all returned home and so did he. And then he went to bed with his wife.

So although Dr. Martin's explanation is theoretically possible, the facts of the case don't lead – the facts of the case lead me to strenuously disagree with Dr. Martin on that aspect of the case. *Rx2 at 22-23.*

To paraphrase Dr. Fintel's arguments against a finding of causation: 1) a beeper going off is not a sudden stressful event; 2) the emergency call was not for a serious event like cardiac arrest, fire, or motor vehicle accident, but merely a cancer patient who had a headache; and 3) Thomas did not show any symptoms of sudden adrenaline release when he returned to the firehouse. On cross-examination, Dr. Fintel testified:

Q: Wouldn't you agree that if somebody is called to an emergency call out of a sleep that that can cause an increase in your adrenaline?

A: It could. But in someone who's accustomed to being on call with a pager who's been a volunteer fireman for quite a period of time, that's not a very stressful experience.
Q: You don't know, in fact, how that affected Mr. Innes on that night though, do you?
A: I know that there was no description of him feeling poorly when he went to the call. His coworkers did not notice any change. He clearly got sick later. That's not questioned. So I don't have objective data that he was perturbed, upset, in pain or more short of breath as he tended to the business of the call. *Rx2 at 59-60.*

So, Dr. Fintel admitted that being awakened from sleep for an emergency call could cause an increase in adrenaline but he believed that this is not very stressful for a volunteer fireman. However, the evidence does not support Dr. Fintel's premise.

Cheryl Innes testified that the pager went off at approximately 11:15pm on October 2, 2010. It was very loud and attention grabbing, and both she and Thomas jumped up from their sleep. She testified that Thomas was startled, got his shoes, and left. She testified that Thomas moved quickly and that she too felt an adrenaline rush. She testified that when the emergency call came, they had no idea what type of emergency it was, other than someone in physical distress. *T.18-21.* Connie Hoel, a Registered Nurse and also a Hindsboro volunteer First Responder, testified that when her pager goes off, she too notices her adrenaline going up, and the pager startles her. She testified that the sound of the pager puts her in an urgent life-saving mode. *T.47.* Chris Biggs, also a volunteer firefighter who responded to the same emergency call that Thomas did, testified that he feels an adrenaline rush when his emergency pager goes off and that he has to move quickly in response. *T.58-59.* These are three witnesses who contradict one of Dr. Fintel's assumptions. Mrs. Innes testified to how the emergency page actually affected her husband, which was that he was startled, he moved and left quickly, and did not know the nature of the emergency. Two other volunteer emergency responders testified that they experience heightened adrenaline responses when their pagers go off. I believe that the evidence does not support Dr. Fintel's opinion that an emergency page would not cause a stressful situation for a volunteer firefighter such as Thomas.

Similarly, Dr. Fintel's opinion seems to be based on the premise that the emergency call was not a "real" emergency and merely someone with a headache. However, at the time of the sudden adrenaline rush due to receiving the emergency page, the evidence shows that Thomas did not know the nature of the emergency. In his mind, it very well could have been for a cardiac arrest, fire, or motor vehicle accident. I believe Dr. Fintel's distinction, in hindsight, regarding what the emergency actually was is not supported by the testimony of the other witnesses.

Finally, although Thomas may not have complained to anybody about shortness of breath, chest pain, or other symptoms, there are certain facts which tend to show that he was not behaving normally after this emergency call. Mr. Biggs testified that Thomas' usual custom after emergency calls was to come back to the firehouse, fill out paperwork, re-stock supplies, and sit and visit with other firefighters for up to an hour. *T.67.* However, Mr. Biggs testified that after this emergency call Thomas was in a hurry to go home, and didn't act like himself which was very unusual. *Id.* He testified that when he learned that Thomas had died from sudden cardiac death, it made sense that Thomas wasn't acting right and didn't feel right after the call. *Id. at 68.* Mrs. Innes testified

that Thomas came home directly after the emergency call "about 11:30 – 11:45" and "I was surprised when I heard his truck driving up because usually he stands around up at the fire department, the guys do after they come back and, you know, just talk and talk about the call or talk about whatever." *Id. at 22.* She testified that she heard Thomas come in, "he came into the bedroom and he laid down in bed but immediately he just got right back up and he is like oh, this isn't going to work." *Id. at 23.*

The Majority found the timeline of events to be important and stated:

> In particular, there is no evidence of the time when Thomas went to bed and got up stating, ["]this isn't going to work." The Commission finds that moment to be the first credible evidence of Thomas not being well. The time of this could have been within minutes of his returning home at 11:45 pm, or up to an hour later. Similarly, no evidence was presented of the time when Thomas took his blood pressure, or when Cheryl began driving him to the hospital. Without knowing how long this occurred after he was awakened by his pager at 11:15 pm, Dr. Martin's testimony that an adrenaline surge could cause a ventricular arrhythmia 'up to an hour or more' after an event, is meaningless. *Comm.Dec. at 6.*

However, there *is* credible evidence of when Thomas complained of not being well. Mrs. Innes testified:

Q: How many minutes after your husband entered the home after returning from the ambulance call as a first responder was it before he told you this isn't going to work?
A: Oh, not many. Maybe 20 minutes.
Q: Well –
A: 30. Before he laid down you mean when he first got home?
Q: When he first got home?
A: Sorry. When he first came home he just came to bed and that's when he laid down and he jumped right back up, so maybe 5 or 10 minutes.
Q: Okay, so it was soon after he got home?
A: Yes. *T.30-31.*

The Majority's speculation that this could have been "up to an hour later" when Thomas complained is inconsistent with the testimony of Mrs. Innes that it was "maybe 5 or 10 minutes." This would be well within the "up to an hour or more" that Dr. Martin testified an adrenaline surge could cause a ventricular arrhythmia. I find that the timeline of the events do not render Dr. Martin's opinion "meaningless" and, in fact, are consistent with and support his opinion as being more likely true than not.

I'm also troubled by Dr. Fintel's inconsistent opinions in this case. On one hand, he testified, "Sudden cardiac death is a very chance phenomenon. We can't definitively state when someone is going to expire due to an arrhythmia or worsening of a medical condition." *Rx2 at 72.* On the other hand, he testified:

> A severe stress, not ordinary stress, in a susceptible individual can increase the chance of sudden cardiac death; and those stressors may include the threatening of death – like him being in a very dangerous situation, earthquake-related sudden death has been well documented, or emotional loss of a loved one, being told that a loved has passed away, or being fired from a job. These are all sudden stressors with no prediction that have been associated with sudden death. However, that did not occur here. *Rx2 at 81.*

So, sudden cardiac death is a matter of chance but severe stress in a susceptible individual can increase the chances? Dr. Fintel's opinion is apparently based on his belief that Thomas was not exposed to a severe enough stressor, with which I would disagree. Regardless, Dr. Fintel testified:

> As I've opined, his condition had progressed to the point where any ordinary event, including going to bed with his wife and trying to get rest, could have been equally likely in precipitating this. So I'm also aware of the case law that if a patient's condition is advanced to the point where any ordinary activity can be associated with a life-ending event, that it's not related to work. So what my opinion will be for the arbitrator is he had such a significant condition of a hypertensive heart disease with coronary disease, diabetes, left ventricular hypertrophy, that any activity, whether he was at work, answering a beeper, on the toilet, having a meal, is equally as likely to have led to this event. *Rx2 at 74-75.*

But, how can Dr. Fintel claim that any activity was equally as likely to have led to Thomas' death when he already admitted that severe stress can increase the chances? How can Dr. Fintel equate being on the toilet, performing a job, eating, and "going to bed" as all examples of "activities" that could have killed Thomas? Is simply "breathing" a sufficient activity in his mind? To paraphrase this *non sequitur*, it sounds to me like Dr. Fintel is claiming that Thomas is "dead because he had been alive" or that "living killed him."

I find the opinion of Dr. Martin to be much more persuasive than Dr. Fintel. Claimant need not prove that the sudden adrenaline release that was caused by the sound of a pager going off was the sole cause of Thomas' sudden cardiac death. Nor must she prove that no other event or life activity could have caused his death at some point. Rather, she must only prove by a preponderance of the evidence that this work-related event was *a* contributing factor in his death at that precise moment in time on October 3, 2010.

Although Thomas had other comorbidities such as high blood pressure, high cholesterol, etc., even if this work-related adrenaline event only hastened Thomas' death by a few hours or a few days, it is still a contributing factor. I point out that Mrs. Innes did not testify that Thomas came home, sat in the living room, relaxingly watched television for a while, went to the bathroom[2], made himself a meal[3], and then came to bed. Instead, she testified:

---

[2] Dr. Fintel testified that these are examples of "any activity," which could have caused Thomas' sudden cardiac death. Rx2 at 75.

[3] Id.

> He came in, I heard him come in, and he came into the bedroom and he laid down in bed but immediately he just got right back up and he is like oh, this isn't going to work; and I am kind of troubled, but then I heard him in the kitchen. So I went in there and he was trying to take his blood pressure and it was coming up error, and he was getting more and more agitated as this was going on, too which he was already a little distressed. So, I said well, let me take mine and I took mine and it was normal. So we took his again and it was 240 over 108, I believe, which was very high. But he was so worked up that it was, I thought oh my goodness. *T.23.*

It is apparent to me that Thomas experienced a sudden adrenaline rush when he received the emergency page and quickly left home. He also was behaving unusually after the call by returning home immediately instead of spending time at the firehouse. And he was clearly in significant distress within five or ten minutes of returning home, according to Mrs. Innes' testimony. It seems more likely than not that Thomas would not have died on that particular night if his pager had not awakened him abruptly from sleeping in his recliner, alerted him to an emergency situation, and required him to leave home quickly at 11:15pm. Therefore, I would find that Thomas' death was hastened by the work-related emergency response call.

To believe Dr. Fintel, one would have to accept the premise that Thomas would have passed away at that exact time on that exact day even if he had been merely sleeping comfortably in his recliner. I find this completely unbelievable and I don't see how Dr. Fintel could give such an opinion to a reasonable degree of medical certainty. This assertion is much more speculative than the reasoned explanation by Dr. Martin that the adrenaline surge from responding to an emergency call was a contributing factor in the timing of Thomas' death.

Dr. Martin reviewed Thomas' clinical records from Carle Hospital, the records from his primary care physicians Dr. Whalen and Dr. Ahmad, his Arrow ambulance record, death certificate, autopsy report and Dr. Fintel's Section 12 examination report. He also reviewed witness statements form Fire Chief Steve Beatty, Cheryl Innes, Charles Guthridge, Colt Guthridge, Jeff Chamblis, and the Supreme Court decision in *Bagget v. IC*, 201 Ill.2d 187 (2002). Dr. Martin gave an opinion, to a reasonable degree of medical certainty, that Thomas suffered from sudden cardiac death on October 3, 2010, which was directly related to his actions as a volunteer fire fighter/first responder on October 2, 2010. Dr. Martin opined that Thomas would not have died at the time that he did had he not been called to duty as a first responder on October 2, 2010. *Px5 at 15, 27-29, 38.*

I believe the facts of this case overwhelmingly support the opinion of Dr. Martin. However, I also find the opinion of Respondent's Dr. Fintel to be less persuasive due to his history of opining in favor of insurance companies more than 90% of the time in cases involving the question of whether physical stress was a causative factor in a heart-related death. *Rx2 at 49-50.* Dr. Fintel performs 20 to 30 independent medical examinations per year and derives a significant portion of his income, up to one third, from providing medical-legal opinions mostly for defendants and respondents. *Id. at 45-47.* In contrast, Dr. Martin testified he only does medical-legal work once or twice a year, and some years does none. *Px5 at 11.*

Although I would not necessarily adopt all aspects of the Arbitrator's reasoning, I would find that Claimant has sustained her burden of proof in this case and affirm the result.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

INNES, CHERYL WIDOW OF INNES, THOMAS Case# **12WC038596**
Employee/Petitioner

HINDSBORO COMMUNITY F P D
Employer/Respondent

17IWCC0771

On 7/5/2016, 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:

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JEFFREY D FREDERICK
129 W MAIN ST
URBANA, IL 61801

0000 RUSIN & MACIOROWSKI LTD
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CHAMPAIGN, IL 61821-7047

17IWCC0771

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

☐ Injured Workers' Benefit Fund (§4(d))
☒ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
FATAL

CHERYL INNES, Widow of THOMAS INNES
Employee/Petitioner

v.

HINDSBORO COMMUNITY F.P.D.
Employer/Respondent

Case # 12 WC 38596

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 **Urbana**, on **April 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 Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

F. ☒ Is Decedent's current condition of ill-being causally related to the injury?

G. ☐ What were Decedent's earnings?

H. ☐ What was Decedent's age at the time of the accident?

I. ☐ What was Decedent's marital status at the time of the accident?

J. ☐ Who was dependent on Decedent at the time of death?

K. ☒ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☐ What compensation for permanent disability, if any, is due?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

17IWCC0771

FINDINGS

On the date of accident, **10/2/10**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Decedent and Respondent.

On this date, Decedent *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Decedent's death *is* causally related to the accident.

In the year preceding the injury, Decedent earned below the statutory minimum, and as such it has been stipulated to that the rate applicable here is the statutory minimum of $466.13/week.

On the date of accident, Decedent was **61** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

The Arbitrator finds that Decedent died on **10/3/10**, leaving **1** survivor(s), as provided in Section 7(a) of the Act, including **CHERYL INNES**.

ORDER

Respondent shall pay death benefits, commencing October 3, 2010, until the trial date of April 13, 2016, or $134,245.44, as well as $466.13 per week, each week thereafter until a total of $605,969.00 has been paid out by Respondent or 25 years, whichever is greater, because the injury caused the employee's death, as provided in Section 7 of the Act.

If the surviving spouse dies before the maximum benefit level has been reached, payments shall cease.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall pay $8,000.00 for burial expenses to the surviving spouse, as provided in Section 7(f) of the Act.

Respondent shall pay $1,376.65 for reasonable and necessary medical services to the surviving spouse as provided in Sections 8(a) and 8.2 of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund,*** **as provided in Section 8(g) of the Act.**

Based upon the foregoing, the Arbitrator finds that on October 2, 2010, Petitioner/Decedent Thomas Innes suffered sudden cardiac death directly after completing his work for Hindsboro Community F.P.D. That said sudden cardiac death arose out and in the course of his employment with Hindsboro Community F.P.D. That in the early morning hours of October 3, 2010, Thomas Innes died as a result of said sudden cardiac death. That Hindsboro Community F.P.D. had actual notice on the day of his death that he died as a result of a sudden cardiac death which he suffered shortly after he was in the course of his employment. There is a causal

connection between the Petitioner/Decedent, Thomas Innes's death and his employment activities at Hindsboro Community F.P.D. The Arbitrator hereby orders that the Respondent, Hindsboro Community F.P.D. pay to Cheryl Innes, the widow of Thomas Innes, pursuant to Section 7(a) of the Illinois Workers' Compensation Act Death Benefits in accordance with Subparagraph (2) of Paragraph (b) of Section 8. The Petitioner's widow, Cheryl Innes, is entitled to receive the accrued sum of $466.13 per week, from October 3, 2010 until the trial date of April 13, 2016, or $134,245.44, as well as $466.13 per week, each week thereafter until a total of $605,969.00 has been paid out by Respondent or 25 years worth of payments have been issued, whichever is greater.

In support of Arbitrator's Decision relating to (A) Whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent; (B) whether Petitioner's death is causally related to his injury or exposure the Arbitrator first cites the applicable case law:

The Arbitrator first cites the Illinois Workers' Compensation Act, Section 6 (f): Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician, …or paramedic which results directly or indirectly from any …condition, heart or vascular disease or condition, …resulting in any disability to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment.

The Arbitrator further cites the Illinois Supreme Court case law from *Freeman United Coal Min. Co. v. Industrial Com'n,* 188 Ill.2d 243 (1999) where it was held that in cases where there is a statutory rebuttable presumption, it is the duty of the employer to rebut the statutory presumption, and similarly to *Freeman,* in the case at bar, finds that the Respondent has not successfully rebutted the statutory presumption.

This Arbitrator also cites the Illinois Supreme Court Decision in *Sisbro, Inc. v. Industrial Com'n,* 207 Ill.2d 193 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *A* causative factor in the resulting condition of ill-being." Also, the claimant is not required to negate every other possible cause of death to establish death by reason of a heart attack as a legitimate inference from the evidence. *Field Enterprise v. Industrial Commission,* 37 Ill.2d 335 at 338 (1967).

This Arbitrator further cites *Twice Over Clean, Inc. v. Indus. Com'n,* 337 Ill.App.3d 805 (2003), in support of his findings: "It is well established that pre-existing heart disease will not preclude a workers compensation award for a heart attack where work-related stress contributed to the heart attack." The Arbitrator also cites *Baggett v. Industrial Com'n,* 201 Ill.2d 187 (2002) which further explains that a claimant need not prove increased or unusual stress at the time of the injury, nor must a claimant demonstrate a sole, strict, scientific correlation between stress and a physical injury. *Baggett* also confirmed that in order to receive benefits, the Petitioner is not required to provide "conclusive" proof that stress was a causative factor, but that it is more probably true than not true.

In further support of this Arbitrator's decision, the Arbitrator offers the following facts:

Petitioner's widow, Cheryl Innes, testified in the above matter on April 13, 2016. Cheryl Innes testified that she had been married to Thomas Innes from 1968 until his death on October 3, 2010. She testified that she is still widowed and has not remarried and has no children who were dependent or under the age of eighteen. (Trial Transcript P7-8). Cheryl Innes testified that Thomas Innes had retired from his full time employment as an IDOT worker and had been a volunteer firefighter with the Hindsboro Community Fire Department for at least ten years prior to his death. *Id* at 10. Cheryl Innes testified that Thomas Innes's job duties included acting as Assistant Chief, working on trucks, responding to fire and first responder calls, as well as acting as the safety training coordinator. *Id.* She testified that Thomas Innes was an active individual that went up to the fire hall

every day, volunteered for Pheasants Forever, and worked with a farmer as side work. *Id* at 11. Cheryl Innes testified that her husband had no physical limitations imposed on him before the date of his death. *Id* at 22.

Mrs. Innes testified that on the morning of October 2, 2010, Thomas Innes arose at 7:30 a.m. and went to his part time job that morning for farmer Jeff Chambliss, whom Mr. Innes frequently worked for. She testified that because of the rain, Thomas Innes did not work long that day. *Id* at 15. Cheryl Innes further testified that Thomas Innes's health and mood that day were fine and there was no medical problem. *Id.* She further testified that she spoke to her husband on the phone that day and there was nothing unusual with Thomas's conditions.

Connie Hoel, Thomas and Cheryl Innes's daughter, also testified on April 13, 2016. Connie testified to her education and vast experience as a Registered Nurse, including 13 years as a nurse in the Carle Hospital cardiovascular Intensive Care Unit. *Id* at 43-44.
Connie testified that she was trained in recognizing physical symptoms that someone would present while having cardiac arrest problems. *Id* at 44.

Mrs. Hoel testified that she picked up her father, Thomas Innes around 3pm on October 2, 2010. *Id.* Connie testified that she picked her father up and they went to the Carle hospital to visit Thomas Innes's mother, who was in the hospital, and stayed at least three hours visiting. *Id* at 48. She testified that Thomas Innes's mood, demeanor and health were all normal and that he was interacting with his mother, and his grandchildren. *Id.* She testified that they then left Carle and had dinner at the Cracker Barrel in Urbana, IL. Connie testified that his health and demeanor during dinner were unremarkably normal. *Id* at 49. She testified that she then went with her father to Walmart and his mood, health and demeanor were unremarkably normal. *Id.* She further testified that she drove her father home at 8:30pm and that his mood, health, and demeanor were all still normal. In fact during the five and half hours Connie was with Thomas Innes, his mood health and demeanor were all normal.

Connie also testified that she too is a member of the Hindsboro volunteer First Responders. She further testified that when her pager goes off, she too notices her adrenaline going up, and the pager startles her. She testified that the sound of the pager puts her in an urgent life-saving mode. *Id* at 47.

Cheryl Innes testified that she again saw her husband at 8:30pm on October 2, 2010. *Id* at 17. She testified that she noticed nothing unusual about her husband's health and testified that he was in a good mood, and had had a good day. *Id* at 18. Cheryl Innes testified that both she and her husband fell asleep in their recliners that night before his pager went off.

Cheryl Innes testified that the pager went off at approximately 11:15 pm. *Id* at 20. She testified it was very loud and attention grabbing, and that they actually both jumped up from their sleep. *Id* at 18. She testified that Thomas Innes was sound asleep, but that when the pager went off, he was startled and he jumped out of his chair and got his shoes and left. *Id* at 19. She testified that Thomas Innes moved quickly and she too felt an adrenaline rush. *Id* at 20. Cheryl Innes further testified that when the emergency call came in to her husband, they had no idea what type of emergency it was, other than someone in physical distress. *Id* at 21. Cheryl Innes testified that Thomas responded to the emergency call, and during said call, the first responders loaded the patient into the only close ambulance which was six miles away. *Id.*

Chris Biggs, a fellow volunteer firefighter, nephew, and close friend of Thomas Innes also testified on April 13, 2016. Mr. Biggs also testified that Thomas. Innes was active and came up to Chris Bigg's automotive shop daily. *Id* at 56. Mr. Biggs stated that Thomas Innes came to his shop either right before or right after noon that day and helped him with diagnosing a truck. Mr. Biggs testified that Thomas Innes stayed at his shop helping for approximately 3-4 hours. *Id.* Mr. Biggs testified that Thomas Innes's health was fine that day, and he had no physical complaints. *Id.*

Mr. Biggs testified that he too went to the same emergency call that Thomas Innes did. *Id* at 58. He further testified that he still feels an adrenaline rush when his emergency pager goes off, and that it comes with every page. *Id* at 59. He testified that he has to move quickly after emergency pages, especially with medical pages, as was the case on October 2, 2010. *Id.* Chris Biggs also testified that during these emergency calls, legally the firefighters are required to run the emergency lights on the way to the scene. *Id* at 61.

Mr. Biggs testified that he arrived to the scene after Thomas Innes did, and that he saw Thomas go into the home with the first responders, and he was carrying a medical bag with oxygen bottles and other medical equipment. He testified that the bag weighed 35 pounds and that Thomas Innes was moving quickly to get into the home. *Id* at 63. He also testified that 90% of the time the man responsible for bringing the medical bag in, was responsible for carrying the bag out. *Id* at 72. Mr. Biggs testified that the nearest ambulance was 10-15 minutes away, and that they put the patient, whose call they had responded to, in the ambulance for transport. *Id* at 65.

Mr. Biggs also testified that Thomas Innes's usual custom after emergency calls was to come back to the firehouse, fill out paperwork, re-stock supplies, and sit and visit with the other firefighters. Mr. Biggs testified it was Thomas Innes's custom to do this for up to an hour or so before he left. *Id* at 67. Mr. Biggs testified that on the evening of October 2, 2010, however, Thomas Innes was in a hurry to go home and didn't act like himself, which was very unusual behavior for Thomas Innnes. *Id.* Mr. Biggs testified that when he was told the next morning Thomas Innes had died from sudden cardiac death directly after the call, he thought it made sense that he wasn't acting right and didn't feel right after the call. *Id* at 68.

Cheryl Innes further testified that Thomas Innes came home directly after the emergency call at approximately 11:30pm. *Id* at 22. She elaborated that this was unusual and surprising as Thomas usually stayed at the fire department and talked with the other first responders. Cheryl Innes testified that she had actually gone to bed as she did not expect Thomas to come home for a while. *Id* at 23.

Cheryl Innes further testified that Thomas came in and laid down in bed, and immediately got right back up and said "this isn't going to work". *Id.* Cheryl Innes testified that she heard him go to the kitchen and attempt to take his blood pressure. She testified that he was distressed and agitated, pacing, tense, and worried *Id* at 23, 33. She testified that Thomas Innes attempted twice to take his blood pressure but the first two times, the machine read error and that when he was successful in getting a reading, on the third attempt, his blood pressure reading was 240 over 108. Cheryl Innes testified that Thomas Innes decided that since the only nearby ambulance was already transporting the patient from the prior emergency call, his wife should drive him to Carle Hospital, which is a level one trauma center. *Id* at 25, 29. Cheryl testified that during the drive, her husband began struggling and squirming in the seat and rubbing his left arm, and at that point he called 9-1-1 and asked that the ambulance meet them in the IGA grocery store parking lot in between where they were, and where the ambulance was coming from. *Id.*

Cheryl Innes testified that they arrived in the parking lot she could not feel a pulse from her husband, and her attempts at CPR were unsuccessful. *Id* at 28. Cheryl Innes testified that the ambulance personnel were also unsuccessful in getting Thomas Innes's heart started. *Id.* Cheryl Innes testified that the ambulance took Thomas Innes to Carle Level One Trauma Center, where the medical personnel too, were not able to resuscitate Thomas Innes. *Id* at 29. Thomas Innes was pronounced dead at Carle hospital on October 3, 2010.

Cheryl Innes further testified to Exhibit 6 which was admitted into evidence at the trial, and was a true and accurate copy of the Arrow Ambulance bill in the amount of $1,376.65, which Cheryl paid. Similarly, she testified to a $10,907.68 bill from Bill Crable Funeral Home that she paid. Both were admitted into evidence as Petitioner's Exhibits 6 and 9 respectively.

Petitioner introduced into evidence the deposition of medical expert. Dr. Randolph Martin, who is board certified in internal medicine and board certified in cardiovascular disease with advanced training in nuclear cardiology, for which he is also board certified. Dr. Martin is an experienced professor in clinical medicine at the Department of Cardiology at the SIU School of Medicine in Springfield. (Martin Deposition P. 6). Dr. Martin's practice is limited to cardiac diseases and he performs heart related surgical procedures on a regular basis. *Id* at 7-9.

Dr. Martin reviewed Thomas Innes's clinical records from Carle Hospital, the records from his primary care physicians Dr. Whalen, and Dr. Ahmad, his arrow ambulance record, death certificate, autopsy report and Dr. Fintel's (Respondent's IME Doctor) Section 12 examination report. He also reviewed witness statement from Fire Chief Steve Beatty, Cheryl Innes, Charles Guthridge, Colt Guthridge, Jeff Chamblis, and the Supreme Court decision in *Bagget v. Industrial,* 201 Ill.2d 187 (2002).

After reviewing all of the aforementioned documents, Dr. Martin gave an opinion, to a reasonable degree of medical certainty that the actions of Thomas Innes as a volunteer fire fighter/first responder on October 2, 2010 were a causative factor in his death that occurred in the early morning hours of October 3, 2010. *Id* at15.

It is Dr. Martin's opinion to a reasonable degree of medical certainty, that Thomas Innes suffered from sudden cardiac death and it is his opinion to a reasonable degree of medical certainty, there is a direct causal relation to his work activities on October 2, 2010 as a volunteer firefighter and his death of October 3, 2010. (Martin P. 27-29).

Dr. Martin testified that the stress of being a first responder can cause an adrenalin release, and that the adrenalin release can cause ventricular arrhythmia, which is associated with sudden cardiac death. Dr. Martin testified that the effect of this adrenalin release can be seen either immediately **OR** up to an hour or more after the event. Emphasis added. (Martin P. 34). Dr. Martin's testimony, and opinion to a reasonable degree of medical certainty, clearly explain the timeline of Thomas Innes's death as a result of responding to the first responders call.

It is Dr. Martin's opinion that first responders, immediately after receiving a call, do not necessarily know what they are going to find when they respond to the call. Dr. Martin further testified that when you are suddenly awakened from your sleep by a loud pager and have to go on a call, there is a sudden increase in production of adrenalin. The increased adrenalin causes a stressor, and this stressor, in Thomas Innes's case set off the underlying cardiac conditions such that it began the cascade of events of arrhythmia and sudden cardiac death. (Martin P 24). In fact, Dr. Fintel too testified that if someone is called to an emergency call out of their sleep, that this can cause an increase in adrenalin (Fintel P. 59).

Dr. Martin testified that it is his opinion, to a reasonable degree of medical certainty, that Thomas Innes's job duties as a first responder, on October 2, 2010, required him to experience high stress and adrenalin on the job. (Martin P. 26). Dr. Martin gave an opinion that there was a direct relationship between the stress of the response, and in this situation, a medical emergency, that resulted in an increase in adrenalin, which lead to well accepted phenomenon of adrenalin and other neuropeptide changes in the blood circulation to Thomas Innes's heart, rendering it susceptible to arrhythmias. He gave his opinion that the arrhythmia, which was ventricular in nature, deteriorated over the next 15 to 30 minutes until full cardiac arrest, after which Thomas Innes died. (Martin P. 26, 27).

The Respondent has entered into evidence the report and deposition of Dr. Daniel Fintel as Respondent's Exhibits 1 and 2 respectively. In both his report and his deposition Dr. Fintel testified to several other possibly causative factors that he states may have caused the death of Thomas Innes. Dr. Fintel also disagreed with the

findings of Petitioner's Medical Expert Dr. Martin. However, this Arbitrator finds that Respondent's witness, Dr. Fintel, did not review a full and accurate history and that his credibility and the value of his opinions are thus diminished.

For instance, Dr. Fintel testified that Thomas Innes's cardiovascular system may have been provoked during his farming activities. From Dr. Fintel's testimony, it was clear that he had no knowledge of what Thomas Innes's farming activities consisted of. Dr. Fintel testified that he did not know how often Thomas Innes farmed, if he owned a farm, how long he had been farming, or how many hours a week he farmed.

In fact, Dr. Fintel conceded that he had no definitive evidence of whether Mr. Innes had ever been exposed to any chemicals whatsoever while farming. Moreover, he admitted that his assertation was pure speculation and not based on a reasonable degree of medical certainty. *Id* at 65.

Dr. Fintel also disagreed with Petitioner's Expert Witness Dr. Martin's opinion that a release of adrenalin contributed to Thomas Innes's death and continued to testify to other speculative causes. *Id* at 22. However, Dr. Fintel admitted that not only had he never read Dr. Martin's evidence deposition, but that Respondent's counsel requested Dr. Fintel write an addendum in response to Dr. Martin's initial report, and Dr. Fintel choose not to do so. *Id* at 42-43. From Dr. Fintel's own testimony, it is clear that he disagreed with an opinion that he had not read, and as such, his opinions that run contrary to Dr. Martin's opinions lack credibility.

Dr. Fintel testified that one of the factors of Mr. Innes's death could have been persistently elevated blood pressure, or malignant hypertension. Dr. Fintel, clearly ignores Thomas Innes's medical history and cites only the examples of September 7, and September 28 of 2010 as being high (Fintel 55-56). When questioned during his deposition, Dr. Fintel conceded that Thomas Innes's blood pressure readings from July 8, 2010, through August 30, 2010 were normal. (Fintel P. 55-56).

Dr. Fintel also conceded during his testimony that Thomas Innes's blood pressure on September 7th was not alarmingly high at 160/78. (Fintel P. 20). He further conceded that the two readings from September of 2010 could be attributed to "white coat syndrome" which is a medical condition where blood pressure is elevated due to the stress of being in a doctor's office. *Id* at 54-56. Dr. Fintel testified that he has had previous patients that have had "white coat syndrome". *Id* at 55. Moreover, Fintel conceded that the blood pressure in a doctor's office does not necessarily represent a person's normal blood pressure and that repeated measurement at home give the physician a better notion of what the patient's blood pressure runs at all times. *Id.*

Dr. Fintel further conceded that in September Thomas Innes had a checkup with his primary care physician Dr. Ahmad, and Dr. Ahmad noted nothing regarding concern for Mr. Innes's blood pressure readings and that between February of 2009 and August of 2010, Mr. Innes's Blood pressure was under excellent control. *Id* at 63.

Conversely, Dr. Martin disagrees with Dr. Fintel that malignant blood pressure could have been a cause of death or that such a condition was present. Dr. Martin points out that malignant hypertension is a run away blood pressure condition which he says Mr. Innes did not have at all. (Martin P. 40, 41). As proof, he referred to Exhibit 8 during his deposition, which were home blood pressure read-outs showing that Thomas Innes's blood pressure from July 8 to August 30, 2010, was under excellent control according to his readings. (Martin P. 19, 20).

Dr. Martin testified that although Thomas Innes was diabetic, had high cholesterol and was hypertensive, his test results for all conditions were all within acceptable findings. He further elaborated that Thomas Innes's cholesterol was at a good level due to the medication he was on, his diabetes was within an acceptable range and

his hypertension was under good control. (Martin P. 18). Chery Innes also testified at trial that her husband took his medication regularly and had regular checkups. (Trial Transcript 12, 14).

Respondent's Expert Dr. Fintel also testified that Mr. Innes's death may have been a result of exposure to potentially cardio toxic medications. (Fintel Report P. 4-5). He discussed that Thomas Innes had previously been taking litraconazole for a fungal infection and as such the medication he was taking could have been a causative factor. However, Dr. Fintel conceded that only a small percentage of people suffer congestive heart failure from taking litraconazole therapy, and that heart problems are rarely reported with its use. (Fintel P. 62, 70). Moreover, Dr. Fintel inappropriately testified to a prescribing information document during his deposition that lacked foundation and relevance as there was no mention that he relied upon said document while doing his initial report. (See Fintel Deposition P. 25).

Dr. Martin testified that Mr. Innes was not on any medication associated with sudden cardiac death. (Martin P. 32). Nor was Thomas Innes on drugs like calcium channel blockers that would concentrate with the use of litraconazole.

Moreover, Dr. Martin testified that it had been over 100 hours since Mr. Innes had taken litraconazole as he had finished his course of treatment. Dr. Martin testified that he looked up the half-life of this drug, and the half-life is 18 to 36 hours. Accordingly, he would have had a very small percentage of the drug, less than 10% of the therapeutic concentration of this medication, in his body at the time of his death. (Martin P. 33). During Dr. Martin's testimony, he consistently stated that the consumption of litraconazole had nothing to do with Thomas Innes's sudden cardiac death. (Martin P. 30).

Respondent's Expert Dr. Fintel also testified generally that Thomas Innes's death could have been caused by pre-existing coronary artery disease, yet conceded that there are millions of living Americans with congestive heart failure. (Fintel P. 33). Moreover, Dr. Fintel agreed that the coroner's report does not cite definitive pathologic evidence of what caused Thomas Innes's death (Fintel P. 62).

On the other hand, Dr. Martin noted that Mr. Innes's pre-existing coronary artery diseases was not critical. (Martin P. 52). Dr. Martin reviewed the autopsy report and it was his opinion that although Thomas Innes's heart did have some signs of progressive heart disease, Thomas Innes's heart was reasonably healthy, and was not unstable. Dr. Martin states that in his opinion, after the EMT first responder call, Thomas Innes knew something serious was going on in his body. He tried to lay down and said "this is not going to work", he promptly went to take his blood pressure, and that he was frightened by the results and was feeling fluttering and pounding and an irregular heartbeat. This results in a high blood pressure reading. (Martin P. 52).

During his deposition, Dr. Martin was asked whether or not Mr. Innes's heart disease was so advanced so that any stress, even the most ordinary exertion could have brought upon his demise. Dr. Martin responded no, that is not his opinion, and that there is nothing in his medical records that he reviewed that would indicate that he was at high risk of sudden cardiac arrest. (Martin P. 27, 28). Dr. Martin notes that the autopsy report, which stated that the patient had moderate atherosclerosis, but no evidence of valvular heart disease and left ventricular hypertrophy, was an incidental finding of the autopsy report and not a causative factor to his death. (Martin Page 36).

Dr. Martin points out that the autopsy conclusion was misleading. Dr. Martin explained that the immediate cause of Thomas Innes's death was sudden cardiac death syndrome. (Martin P. 38, 39). Dr. Martin testified that Thomas Innes's arteries were in good condition according to the autopsy report and that the one finding of 75% occlusion was not a significant finding. (Martin P 49). Dr. Martin states that after reviewing the autopsy report Mr. Innes' heart was reasonably healthy, and his heart was not unstable. Dr. Martin testified that at the time of

the ambulance call on 10/2/10, Thomas Innes's heart function was adequate and stable immediately before the call. (Martin P. 64, 65). In addition, Mr. Innes had no prior history of heart failure ever. (Martin P 32).

Dr. Fintel also suggests that Thomas Innes's swollen ankles suggest a different cause of death than sudden cardiac death, but conceded that after a person dies, their body fluid shifts, and that a lot of people have swollen ankles and that does not mean they are having heart failure. (Fintel P. 75, 80). He also conceded that prior to Thomas Innes's death, he recently underwent a change in medication and elimination of a dietetic, and that those changes could account for retention of water in Thomas Innes's legs. (Fintel P. 13).

Dr. Fintel conceded that severe stress in a susceptible individual can increase the chance of sudden cardiac death, and those stressors may include the threatening of death. (Fintel P. 82). In fact, Dr. Fintel also admitted that when he is in the hospital and gets a beeper code for an emergency call he too, has experienced an increase in his heart rate, and admitted that he feels stress when he is responding to a code. (Fintel P. 71). He further admitted that even after 35 years of practicing medicine, he still feels stress and has a rapid heartbeat when he gets a code call. *Id.* As further examples of stressors, Dr. Fintel cited stressors such as an earthquake related sudden death, the emotional loss of a loved one, being told that a loved one has passed away, or being fired from a job. Fintel testified that these are all stressors with no prediction that have been associated with sudden death. *Id* at 82. He also testified that ventricular arrhythmia can happen because of catecholamine release (Fintel P. 80).

In contrast, Dr. Martin testified that he noted and relied on the fact that Mr. Innes carried equipment that weighed as much as 35 pounds into the patient's residence to work on the patient. He further cited as evidence that once Thomas Innes got home, he got in bed, and he immediately got out of bed saying "this isn't going to work" and went to go take his blood pressure. (Martin P 29). Dr. Martin testified that Thomas Innes's blood pressure at that point was 230/108, which is strikingly high. (Martin P 17).

Dr. Martin was asked by defense counsel how he responds to emergency calls as a doctor. He indicated that every time he is responding to a code blue and he has to run up to the code blue, his heart rate is up and his adrenalin is pumping. (Martin P 59).

Dr. Martin is of the opinion, to a reasonable degree of medical certainty that Mr. Innes would not have died at the time that he did had he not been called to duty as a first responder. (Martin P 38).

Dr. Fintel testified that up to 1/3 third of his annual income is derived from doing expert witness work in legal cases. *Id* at 47. He also testified that he conducts 20-30 IMEs per year. *Id* at 45. He testified that 2/3rds of his independent consulting in medical malpractice cases is for defendants and 3/4ths of his consulting in workers' compensation cases is for the Respondent or their insurance company. *Id* at 46. He testified that in the last 30 years he had given at least fifty opinions on whether physical stress was a causative factor in a heart related death, and that of those fifty times, 90% of the time he gave an opinion in favor of the insurance company, that there was not a causal relationship. *Id* at 49-50. He further testified that he makes more per hour doing medical/legal independent medical examination work than actually treating patients. *Id* at 52.

In contrast, Dr. Martin is a practicing physician and testified he only does medical/legal work once or twice a year, and some years does none. (Martin P. 11).

After having carefully reviewed all of the testimony in this case and the exhibits introduced into evidence, this Arbitrator finds that per the aforementioned case law and facts, the Petitioner has in her favor, a rebuttable presumption that the death of Thomas Innes arose out of, and in the course of Thomas Innes's employment with Respondent Hindsboro Community F.P.D., and that Respondent has failed to sufficiently rebut said

presumption. Although Respondent offered testimony as to other possible causes of Thomas Innes's cardiac arrest, Respondent failed to prove that the mental and physical stress from the work activities he engaged in on October 2, 2010 were not a causative factor in his resulting ill-being and death.

Given the totality of the evidence and testimony, the Arbitrator finds Petitioner's expert witness more credible and in support of his position cites the Workers' Compensation decision in *Norma Toler, Widow of Frances Toler, Deceased, v. Clifford Jacobs Forging,* which was also a sudden cardiac death case regarding cardiac arrest and also involved testimony from the exact same two doctors. In that case, as is the case here, both Doctors Martin and Dr. Fintel came to opposite conclusions regarding causation of death and whether the injury was then compensable. the Illinois Workers' Compensation Commission found Dr. Martin's testimony and opinions to be more credible than Dr. Fintel's. This Arbitrator finds the same here, and rules in favor of the Petitioner.

Accordingly, this Arbitrator has reviewed the medical and funeral bills as well as all evidence in this matter, and determines that Petitioner's Exhibits 6, the ambulance bill, and 9, the Crable Funeral Home bill, were bills casually related to Petitioner/Decedent accident and death on October 3, 2010, and the Respondent is hereby ordered to pay Petitioner $8,000.00 for funeral expenses, $1,376.65 for medical expenses, a lump sum of $134,245.44 constituting payment of $466.13 per week from the date of October 3, 2010 until the trial date, and $466.13 per week, each week thereafter until a total of $605,969.00 has been paid out by Respondent or 25 years worth of payments have been issued, whichever is greater.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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

6/27/16
Date

JUL 5 - 2016