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

Leon Torres,

Petitioner,

15IWCC0755

vs.

NO: 12 WC 18964

City of Chicago,

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 issue(s) of temporary total disability, medical expenses, penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 31, 2014 is hereby affirmed and adopted.

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

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

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

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

DATED: OCT - 1 2015
KWL/vf
O-8/10/15
42

Kevin W. Lamborn

Joshua D. Luskin

DISSENT

I respectfully dissent from the majority decision. I would find that there is plainly a causal relationship between Petitioner's accidental injury of April 4, 2012 and his current condition of ill-being with respect to his right shoulder, and I would award the respective medical bills of ($128,064.99) and temporary total disability benefits until November 6, 2013 for said injury.

The Petitioner was working as a watchman when the undisputed accident occurred. Petitioner fell from approximately 12 to18 feet after attempting to render assistance to an unresponsive individual that was located in an inaccessible area. The fall caused him to sustain numerous injuries, including multiple tears to his right shoulder.

First of all, the Petitioner testified that he reported shoulder pain to MercyWorks the day after his accident. The Petitioner specifically recalled discussing his right shoulder pain with the treating doctor there because the Petitioner has a noticeable scar from a previous surgery in 1998 due to a separate work accident with the same employer. The Petitioner further denied having any shoulder complaints prior to his new accident and subsequent to his previous surgery. Importantly, the medical record report dated April 5, 2012 - the day after Petitioner's accident – indicates, "There is slight tenderness in the right paracervical area...and right trapezius." Therefore, there is evidence that Petitioner contemporaneously complained of right shoulder pain after his work accident.

Further, there is other considerable evidence that Petitioner complained of shoulder pain. A scapular evaluation notation by his examining physical therapist on April 12, 2012 (8 days after Petitioner's fall) states, "The patient...was extremely tender around the medial border of the scapulae, into the rhomboids, and levator scapulare muscle," areas that are composed of or located near the shoulder. Again, on April 24, 2012, the scapular evaluation notation by his examining physical therapist stated, "The patient...was extremely tender around the medial border of the scapulae, into the rhomboids, and levator scapulare muscle left side greater than right." Similar notations were made by the physical therapist on May 15th and July 25th, 2012.

Moreover, in a MercyWorks medical report dated May 21, 2012, it was annotated that the Petitioner "couldn't move his shoulders." Although Petitioner did complain of pain and symptoms in his left shoulder as well, it was ultimately determined that it was his right shoulder that was injured. After treating with MercyWorks, Petitioner treated with Dr. Mark Lorenz. Petitioner further reported pain to Dr. Lorenz on June 18, 2012, although the Petitioner self-reported it as pain in his neck and back. However, it is plausible that the Petitioner did not realize that his pain was actually emanating from his shoulder area. Indeed, an MRI arthrogram of Petitioner's right shoulder was ordered to determine where Petitioner's pain complaints stemmed from after Petitioner specifically gave a history of right shoulder pain to Dr. Lorenz on October 17, 2012. The MRI arthrogram results from November 7, 2012 showed that Petitioner had significant pathology in the right shoulder: "Moderate to high grade partial thickness articular surface tear involving the posterior tendon fibers of the supraspinatus...SLAP tear and mid posterior labral tear...Widened acromioclavicular joint space without edema probably relating to a remote AC joint separation."

The Petitioner was subsequently referred to and treated by Dr. Steven Chudik for ongoing treatment of his right shoulder condition after treatment with Dr. Lorenz for his neck and arm pain symptoms did not alleviate his symptoms. Dr. Chudik notated that with a reasonable degree of medical certainty, the Petitioner's right shoulder condition was causally related to Petitioner's fall. Petitioner underwent surgery for his right shoulder on August 13, 2013 to treat his right labral tear, right rotator cuff tear, and impingement among other related right shoulder issues. Post surgery Petitioner was in physical therapy, and was not released back to work by Dr. Chudik as of the date of the 19(b) hearing on November 6, 2013.

At the Respondent's behest, the Petitioner was examined by Dr. Howard An on January 11, 2013. Dr. An noted in his report, "Because of his pain in the shoulder and low back as well as persistent neck and arm symptom(s), [sic] I did not believe that he is capable of returning to full duty work as a watchman." But after the Petitioner completed an FCE on April 24, 2013, Dr. An was of the opinion that Petitioner could return to work. Of note, Dr. An's report pre-dated Petitioner's treatment for his shoulder condition with Dr. Chudik. Also, Dr. Preston Wolin, who completed a records review for Respondent

on September 3, 2013, was of the same opinion, but he did not examine the Petitioner. In fact, Dr. Wolin's one page report erroneously noted that the Petitioner first complained of symptoms in his right shoulder more than one year after the work accident when he first saw Dr. Chudik. In reality, the Petitioner complained of symptoms in his right shoulder the day after his accident.

Furthermore, in order for a claimant to have a successful workers' compensation claim, he must show that his injury arose out of and in the course of his employment. Sisbro, Inc. v. Indus. Comm'n (Rodriguez), 207 Ill. 2d 193 (Ill. 2003). "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58, (1989). The claimant's injury will arise out his employment if his acts were those that he "might reasonably be expected to perform incident to his assigned duties." Id. In this case, Petitioner was working as a watchman who believed it was his duty to render assistance to an unresponsive individual. The Petitioner severely injured his shoulder during a fall while attempting to render assistance to the unresponsive individual. Therefore, Petitioner's injury arose out of his employment because he was injured while engaging in an act that he 'might reasonably be expected to perform' as a watchman.

In conclusion, Petitioner proved that there was a causal relationship between his work accident and his right shoulder condition. Thus, for the aforementioned reasons I dissent from the majority's opinion and would award Petitioner the related medical bills and TTD.

Thomas J. Tyrrell

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

15IWCC0755

TORRES, LEON
Employee/Petitioner

Case# **12WC018964**

CITY OF CHICAGO
Employer/Respondent

On 7/31/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% 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:

0365 BRIAN J McMANUS & ASSOC LTD
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
DANIEL S WELLNER
140 S DEARBORN SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

15IWCC0755

Leon Torres
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 12 WC 18964

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **November 16, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **April 4, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is*** causally related to the accident as it applies to his cervical spine.

Petitioner's current condition of ill-being is not causally related to the accident as it applies to his right shoulder.

In the year preceding the injury, Petitioner earned $**40,712.36**,; the average weekly wage was $**782.93**.

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

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

Respondent shall be given a credit of $**29,169.52** for TTD which has been previously paid.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $521.95/week for 52 weeks, commencing 6/28/12 through 6/28/13, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $29,169.52 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of ATI and Hinsdale Orthopedics, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid, 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.

Deborah L. Simpson

Signature of Arbitrator
ICArbDec19(b)

July 31, 2014
Date

JUL 31 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leon Torres,	)	**15IWCC0755**
Petitioner,	)	
vs.	)	**No. 12 WC 18964**
City of Chicago,	)	
Respondent.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on April 4, 2012, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that on that date the Petitioner sustained accidental injuries that arose out of and in the course of employment and that the Petitioner gave the Respondent notice of the accident which is the subject matter of the dispute within the time limits stated in the Act. They further agree that in the year preceding the injuries, the Petitioner earned $40,712.36, and that her average weekly wage was $782.93 and that the Respondent has paid $29,169.52 in TTD payments.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (2) Is the Respondent liable for the unpaid medical bills listed in Petitioner's Exhibit #11; (3) Is Petitioner entitled to TTD from June 28, 2012, through November 6, 2013 or June 28, 2012 through June 28, 2013; and (4) Is the Petitioner entitled to attorney's fees and penalties.

STATEMENT OF FACTS

Petitioner testified that on April 4, 2012 he was working for Respondent as a watchman pursuant to a light duty restriction from a prior injury. He had previously worked for the Respondent as an electrician/ lineman. He had a wage differential award from the prior claim. The restrictions which led to him working as a watchman included limits with respect to bending, lifting, kneeling and climbing. He began working as a watchman sometime in October of 2011.

On April 4, 2012, Petitioner was injured while working. He was working as a rover, driving around and doing odd security jobs for Respondent. He was notified that there was a nonresponsive individual in a car that was running and parked in a secured city lot near the Cook

County Jail. The individual was in the car parked in an area secured with a locked gate. The fence around the lot was a cyclone fence that had barbed wire on the top of it. The only way Petitioner could get to the person was to pull up a van along the fence and then using the van to climb the fence so that he could get onto a tree that was hanging over the inside of the fence. He climbed the fence, got in the tree and then fell from the tree, about 18 feet to the ground. He was hanging in the tree prior to falling. He stated that he could not go back up the tree and could not go down it any further so he had to drop from the tree. Petitioner fell into some sewer basins that he did not know were below the tree. A deputy sheriff stopped to see what they were doing and Petitioner's partner filled them in.

After the fall he responded to the person, and then the gate was opened. He reported the injury to his boss. The following day he returned to work and participated in a reconstruction of the accident. He was then taken to Mercy Works by Respondent. According to the Petitioner he told the doctor that his shoulder, back, elbows, ankle, knee and neck were hurting. He had a previous right shoulder injury in 1998.

The doctor ordered x-rays and prescribed pain medication for Petitioner. He was permitted to return to work. He also had physical therapy. Petitioner was seen at Mercy Works through June 25, 2012, and during that time they treated his right knee, right ankle, neck, thoracic spine, lumbosacral spine and both elbows.

Petitioner began seeing Dr. Mark Lorenz at Hinsdale Orthopedic Associates in June of 2012. He took him off of work on June 28, 2012. Dr. Lorenz treated symptoms in Petitioner's neck, which referred numbness and tingling through his shoulders to his hands. He referred Petitioner for a cervical spine MRI scan and pain management with Dr. Jain.

Dr. Jain performed epidural steroid injections in Petitioner's neck. A discogram was ordered by Dr. Lorenz, but not authorized by Respondent following a review by Coventry. Dr. Lorenz also recommended physical therapy. Petitioner had therapy for his ankle, knee, back, shoulders, and elbows. Dr. Lorenz also ordered an MRI arthogram of the right shoulder, which was performed in November 2012. Dr. Lorenz told Petitioner he had tears in the right shoulder, prescribed physical therapy and referred Petitioner to Dr. Steven Chudik.

Dr. Chudik is a shoulder specialist at Hinsdale Orthopedic Associates. Dr. Chudik took the Petitioner off of work and performed right shoulder surgery on August 16, 2013. The surgery was not authorized by Respondent.

Respondent stopped Petitioner's temporary compensation after June 28, 2013. Prior to that date, Respondent advised Petitioner that he had been released to return to work as a watchman by Dr. Howard An. He was told to return to work around June 5, 2013. He told Respondent that he was being kept off of work by Dr. Chudik and that Dr. Chudik was contemplating shoulder surgery.

Petitioner saw Dr. An on September 14, 2012, at the request of the Respondent. Petitioner testified that Dr. An indicated Petitioner might need surgery in the future because injections were not working for him. Petitioner has remained off of work since June 2013 per

Dr. Chudik's orders. Following surgery, Dr. Chudik has recommended physical therapy. The therapy has not been authorized and Petitioner is paying for it. He continues under the care of Dr. Chudik and Dr. Lorenz. According to the Petitioner, Dr. Lorenz was waiting for the shoulder to recover prior to providing additional neck treatment.

Petitioner had the FCE at ATI on April 24, 2013. He gave full effort but was in pain in his shoulders. Petitioner testified he is always in pain and is being treated for his shoulder and neck. He is taking Norco. He doesn't sleep well at night and gets numbness in his hands.

On cross examination, Petitioner testified that his restrictions when he obtained the watchman job were no lifting over 25 lbs., no pushing or pulling more than 45 pound and no kneeling or climbing. The job duties involved driving. He also monitored security cameras, receiving cases from other watchman in the field, and paperwork. The job duties did not involve lifting. He claimed that his right shoulder always hurt following the injury.

Petitioner testified that he climbed over the fence onto the tree to get to the unresponsive person. The fence was chain-link with barbed wire on it. The tree grew over the fence. It had no handrails on it. He could not grab onto the fence because of the barbed wire. He lost his footing and fell off the tree. He signed an accident report following the injury. The report indicated that as he climbed over the fence onto the tree he lost his footing and fell to the ground, hurting his ankle, knee, back and elbow.

The day after the injury he was seen at Mercy Works, he testified that he truthfully related his complaints to the doctor. He recalled being diagnosed with contusions and sprains of the right ankle, right knee, neck, thoracic spine and both elbows. He was allowed to return to work at that time. Mercy Works referred Petitioner to physical therapy, and his first visit was on April 5, 2012. He provided a history of injury and his complaints to the therapist.

Petitioner decided to see his own physician. He chose Dr. Lorenz, and saw him on June 18, 2012. Petitioner had a prior shoulder surgery in the 1990's. He previously saw Dr. Lorenz for neck back complaints related to prior workers compensation claims. Petitioner related his complaints to Dr. Lorenz and testified that he complained of pain in the shoulder. On June 18, he completed a pain drawing and filled out a patient assessment form. Dr. Lorenz took Petitioner off of work, and the Respondent began paying benefits beginning June 28, 2012.

He started treating with Dr. Jain in July 2012. According to the Petitioner he related his history of injury and symptoms to Dr. Jain. He followed up with Dr. Lorenz on August 6, 2012. At that time Dr. Lorenz was treating cervical symptoms and wanted to perform a repeat cervical MRI scan.

Petitioner returned to Dr. Lorenz on October 17, 2012, and reported that he was experiencing neck pain and numbness and tingling in his arm. He recalled giving a further history of having right shoulder pain from the work accident at that time.

Petitioner was seen by Dr. An on September 14, 2012. He testified that he truthfully related his history of injury to Dr. An at that time. He returned to Dr. An on January 11, 2013, and related his updated symptoms and histories.

Petitioner testified that he participated in the FCE on April 24, 2013.

Petitioner saw Dr. Chudik on June 26, 2013 and provided a history that he had a prior right shoulder injury in the 1990s. He agreed that he provided a truthful history of the incident to Dr. Chudik at that time. Dr. Chudik performed right shoulder surgery on August 13, 2013 and was keeping Petitioner off of work due to the shoulder injury. Dr. Lorenz was also keeping Petitioner off of work with kneeling and weight restrictions.

Petitioner testified that he has group insurance with Blue Cross Blue Shield which is the City's plan.

On re-direct examination Petitioner testified that he signed the accident report but did not prepare it. He indicated that he hurt both elbows. He testified that when he fell, he landed on "everything". The incident occurred when the City was hosting the G8 convention. He was asked to help move barricades. He believed that it was his duty to help the unresponsive person.

According to the Petitioner on May 21, 2012, he told Mercy Works that both of his shoulders were bothering him and that they went into spasm the day before while he was working. The doctor told Petitioner that he was somehow informed that Petitioner fell at home and it was not work related. Petitioner denied that he fell at home. He had informed Dr. Lorenz and Dr. Chudik that he had pain going from his neck down both of his arms. Petitioner testified that Dr. Lorenz recommended the MRI after Petitioner had continued complaints of right shoulder pain.

Petitioner signed a "Report of Occupational Injury" on April 5, 2012. The form indicates that as he climbed over a fence onto a tree he lost his footing and fell to the ground, hurting his ankle, knee back and elbow. (RX 5).

A description of the job requirements and physical job demands of the watchman position was offered as Respondent's Exhibit Two. The job requires Petitioner to stand and walk for extended periods of time and the ability to climb stair cases. (RX 2)

Petitioner was seen at Mercy Works on April 5, 2012. (PX 1). In a form completed by Petitioner, he indicated that he lost his footing to get into a yard from a van and injured his right ankle, knee, back and elbow. Petitioner complained of a tingling sensation in his left arm to small finger. Petitioner was diagnosed with contusions and sprains of the right ankle and right knee, a contusion of the neck, thoracic, and lumbosacral spine and both elbows. It was noted that Petitioner could work within the parameters of his previous work restrictions from his prior injury. This included no lifting more than 25 lbs., no pulling or pushing more than 45 lbs., no kneeling and no crawling. (PX 1)

A prescription form from Mercy Works which is dated April 9, 2012 indicates Petitioner was referred for physical therapy three times per week for two weeks. (PX 1). Petitioner was seen at Physical Therapy and Rehab Specialists for an initial evaluation on April 12, 2012. (PX 4). It was noted that Petitioner was a watchman for the Water Department and was attending to a person who was in a car that appeared to be in distress. He indicated that he had to lift himself out of a situation which caused him to fall approximately 13 feet. His current complaints were in the right knee and right ankle pain as well as swelling in the right ankle. He also had injuries to his cervical and thoracic spine and left scapula.

On April 26, 2012 Petitioner returned to Mercy Works. It was indicated that he would continue to work within his previous restrictions and that he should continue physical therapy. (PX 1).

Petitioner returned to Mercy Works on April 26, 2012. The work status report indicates that Petitioner could return to work within his previous restrictions, and it was indicated that a MRI scan of the neck and spine was also recommended to rule out disc herniation. (PX 1).

On May 21, 2012, Petitioner returned to MercyWorks. (PX 1). He complained of his back going into spasms while at work and that he couldn't move his shoulders. He also had neck pain and spasms in the shoulder. In an addendum, the examining physician indicated that Petitioner had reported to him that his shoulders went into spasms while working the day before. The doctor also indicated that he was "informed later that he fell at home causing the right shoulder injury". (PX 1). A follow-up work status report from Mercy Works indicated that Petitioner was unable to return to work. It appears that the MRI scan was still recommended.

On May 25, 2012 it was indicated that Petitioner could return to work within the previous restrictions. Petitioner complained of neck pain and spasms in the left shoulder. Petitioner was referred to Dr. Lorenz for a C6-C7 left foraminal disc protrusion and left cervical radiculopathy. (PX 1).

When Petitioner returned to Mercy Works on June 12, 2012, he reported a stabbing sensation in the left shoulder. It appears he had an appointment to see Dr. Lorenz on June 18, 2012. It was indicated he could continue to work within his previous restrictions. (PX 1).

Petitioner was seen by Dr. Lorenz at Hinsdale Orthopaedics on June 18, 2012. (PX 2). In a pain drawing, prepared by Petitioner, he marked that he had pain in the left upper back and neck. He had numbness down the bottom of his arms. (PX 2). His chief complaint was cervical pain and bilateral arm pain. He also had low back pain. Petitioner was last seen in June 2009, and known to have a C5-C6 and C6-C7 disc herniation at that time. Petitioner provided a history of climbing a fence and getting his foot caught while crossing barbed wire. He fell down trying to come off of a wall. He described an ankle injury, neck pain, bilateral arm pain and low-back pain. Dr. Lorenz noted that Petitioner had an MRI scan which showed some mild protrusions at C3-C4, a ridge at C5-C6 and spinal stenosis at C6-C7 with the left foraminal disc protrusion. He performed a physical examination and diagnosed Petitioner with C5-C6 spondylosis with stenosis, a left C6-C7 disc herniation and low-back pain. He found the Petitioner could continue

to work as tolerated. He recommended a cervical injection. Dr. Lorenz causally related Petitioner's condition with the April 4, 2012 incident. (PX 2).

On June 25, 2012 Mercy Works issued a work status report indicating that Petitioner could return to work within the confines of his prior injury. It was noted that he was referred for an epidural steroid injection. On that date Petitioner complained of neck pain with a stabbing sensation in the left shoulder. (PX 1). A work status report prepared by Hinsdale Orthopaedics indicated that Petitioner was taken off of work as of June 27, 2012. (PX 2). Petitioner had a cervical epidural steroid injection with Dr. Jain on July 18, 2012. (PX 3).

Dr. Jain, a pain care specialist, saw Petitioner on August 3, 2012. (PX 3). Petitioner reported to him that he developed low back and neck pain due to the fall. He reviewed a cervical MRI scan dated May 22, 2012 which reported a disc herniation at C6-C7, mild stenosis at C5-C6 and mild degenerative changes at multiple levels. Dr. Jain also performed a physical examination. He noted Petitioner complained of significant neck pain and numbness and tingling over both upper extremities in the ulnar nerve distribution. He recommended that Petitioner proceed with bilateral C5-C6 and C6-C7 facet injections. He deferred to Dr. Lorenz regarding Petitioner's work status.

Dr. Lorenz saw Petitioner on August 6, 2012. (PX 2). Petitioner was following up after an epidural steroid injection in his cervical spine. He stated the injection did not help his symptoms. He described more pressure in the neck. He described numbness down his arms. The diagnosis was C5-C6 spondylosis with stenosis, C6-C7 left-sided disc herniation and increasing bilateral arm radiculitis. Dr. Lorenz had him off of work and wanted a repeat cervical spine MRI scan.

The repeat MRI scan of the cervical spine occurred on August 13, 2012. At C5-C6 there was a disc osteophyte complex without resulting canal stenosis. There was no focal disc protrusion. There was mild bony neuroforaminal narrowing. There were similar findings at C3-C4 and C4-C5. (PX 2).

Dr. An saw Petitioner on September 14, 2012, for an independent medical examination at the request of the City. (RX 1). Petitioner provided a history of climbing onto a van near a fence by a tree to get into a yard when he lost his footing and hit the ground and injured his neck. Dr. An then took a history of Petitioner's treatment. He also performed a physical examination. Dr. An reviewed the MRI scan of the cervical spine from May 2012. He did not find any evidence of spinal cord compression at any level. Dr. An found that Petitioner's objective findings include a recent MRI scan, which correlated with cervical spondylosis neck pain and some left sided C7 and right sided C6 radicular pain. He noted low-back pain without significant radiculopathy. He noted the condition was pre-existing. Dr. An opined that the April 4, 2012, injury aggravated the condition beyond its normal progression and that Petitioner was having symptoms.

Dr. An found that the condition should improve with conservative treatment including anti-inflammatory medications. He found Petitioner was on sedentary to light-duty restrictions with no lifting greater than 15 lbs. and avoiding frequent bending and twisting of the neck and low back. He found that Petitioner's condition should plateau with maximum medical

improvement within four weeks and he should be able to go back to his regular duty work without restrictions at that time. He did not recommend any further injections as Petitioner did not have any improvement with the first injection. Dr. An noted that if Petitioner's condition became progressively worse with conservative care he should be reevaluated for possible cervical spine surgery.

On October 17, 2012, Petitioner returned to Dr. Lorenz. (PX 2). He complained of neck pain and bilateral arm numbness and tingling. He also provided a history of right shoulder pain due to grabbing a handrail or something to keep him from falling. Dr. Lorenz reviewed the MRI scan and noted it showed a central disk herniation at C3-4, spondylosis with a disk herniation at C5-6 and C6-7. He diagnosed Petitioner with C3-4, C5-6 and C6-7 disk herniation and right shoulder pain. He kept him off of work and referred him for a cervical discogram. He also referred him for a right shoulder MRI scan and follow-up with Dr. Chudik.

Petitioner had an MRI of the right shoulder on November 7, 2012. The scan was interpreted as showing a moderate to high grade partial thickness articular surface tear involving the posterior tendon fibers of the supraspinatus and the anterior tendon fibers of the infraspinatus, a SLAP tear and mid posterior labral tear and a widened acromioclavicular joint space without edema. (PX 2).

Dr. An performed a second independent medical examination on January 11, 2013. (RX 2). Petitioner reported that he had no significant improvement. He also reported right shoulder pain due to rotator cuff problems, which he was being treated for. Dr. An reviewed surveillance video, but he did not find it of much import. He noted that the video did not show any lifting, bending or twisting activities. He concluded that Petitioner had a cervical disc problem causing neck and bilateral radicular symptoms. He found that Petitioner's condition had plateaued. He also found Petitioner could return to work, but with the restrictions he noted before. A review of that prior report indicates restrictions of 15 lbs. lifting with limited bending and twisting. He found Petitioner was not capable of returning to work full duty as a watchman. He mentioned that with shoulder treatment and continuing improvement he could return to work in the future. Alternatively Petitioner could have a functional capacity evaluation to determine permanent restrictions and work capacity. He noted that if Petitioner's neck and arm symptoms worsened, he could consider a discectomy and fusion at C5-C6 and C6-C7. He reiterated his opinion that a discography was not indicated.

On March 25, 2013, Petitioner returned to Dr. Lorenz. He reiterated his recommendation for the cervical discogram. He also referred Petitioner for a functional capacity evaluation. (PX 2).

A functional capacity evaluation was performed on April 24, 2013, at ATI Physical Therapy at the request of Dr. Lorenz. (PX 5). It was found that Petitioner was at the light to medium physical demand level. It was specifically indicated that Petitioner is currently a watchman for the City of Chicago. This job was considered at the light physical demand level and Petitioner's capabilities appear to have met this level.

Petitioner saw Dr. Chudik on June 26, 2013. (PX 2). Petitioner provided Dr. Chudik with a history of his injury. He indicated that he was holding onto a high branch with his right hand and lowering himself down the tree. He did not describe a fall. He indicated that he had immediate right shoulder pain. It was noted that he had a pre-existing condition in the right shoulder from the 1990's. Based upon an MR arthogram from November, Dr. Chudik found that Petitioner had a traumatic rotator-cuff tear. He recommended the Petitioner have an arthroscopic procedure.

An addendum report from Dr. An regarding Petitioner was drafted on June 4, 2013. He indicated that Petitioner had a functional capacity evaluation on April 24, 2013 at ATI. He noted the findings. He found that Petitioner's work as a watchman at the City of Chicago is a light physical demand level. The results of the functional capacity evaluation and his previous physical examination, led him to the conclusion that Petitioner could return to work as a watchman without restrictions. (RX 3).

At Respondent's request, Dr. Wolin issued an opinion following his review of the medical records on September 3, 2013. (RX 4). Dr. Wolin opined that based upon his review of the records he did not find a causal connection between the right shoulder injury and the work injury. Dr. Wolin found no contemporaneous history of a right shoulder injury and that there was no mention of a right shoulder injury until Petitioner started seeing Dr. Chudik a year after the injury. He noted that the shoulder MRI scan findings could have been post-operative, but would not change his opinion that there was no causal connection based upon the records.

CONCLUSIONS OF LAW

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

Longstanding Illinois law mandates a claimant must show that the injury is due to a cause connected to the employment to establish it arose out of employment. *Elliot v. Industrial Commission*, 153 Ill. App. 3d 238, 242 (1987). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

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

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

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

The Arbitrator finds that the condition causally related to the April 4, 2012 accident is an aggravation of pre-existing cervical spine pathology symptoms of neck pain radiating into the upper extremities. This is based upon the consistent histories of complaints to those body parts since the injury and the opinions of Dr. Lorenz and Dr. An. Petitioner also had injuries to the lower extremities and back which from the medical records and testimony of the Petitioner appear to have resolved soon after the injury.

The Arbitrator finds that Petitioner's right shoulder condition is not causally related to the accident of April 4, 2012. The burden is upon a claimant to establish evidence of his workers compensation claim by a preponderance of credible evidence. *Board of Education of the City of Chicago v. Industrial Commission*, 83 Ill. 2d 475, 479 (1981). Although the testimony of the claimant standing alone is sufficient to sustain an award, that testimony must be considered with all the evidence in the record. *Id.* A petitioner's testimony, standing alone, may support an award where all of the facts and circumstances do not preponderate in favor of the opposite conclusion. *Seiber v. Industrial Commission*, 82 Ill. 2d 87, 97 (1980). However, when the claimant's testimony is virtually the only evidence favoring an award and that testimony is repeatedly contradicted, then the claim should not be allowed. *Caterpillar v. Industrial Commission* 73 Ill. 2d 311, 315 (1978).

A preponderance of the credible evidence demonstrates that Petitioner did not have an injury to the right shoulder caused by the accident. The accident report signed by Petitioner the day after the accident mentions injuries to numerous body parts but fails to mention a right shoulder injury. The Petitioner was seen by MercyWorks the day after the accident. Petitioner complained of injuries to several body parts but not the right shoulder. Petitioner went to physical therapy on April 12, 2012 and again did not complain of right shoulder pain. He continued the therapy without making any complaints of shoulder pain. The Arbitrator notes the reference at Mercy Works to both shoulders hurting after work on May 21, 2012, but does not find that it demonstrates Petitioner injured his right shoulder on April 4. There is no mention of the pain beginning on April 4. The reference is to both shoulders, not just the right shoulder. Moreover, there is a history of a fall at home. On May 25, 2012, the Petitioner began complaining about pain in the left shoulder. Six months after the accident there is a specific complaint of right shoulder pain.

The Arbitrator notes that in May and June of 2012, the Petitioner continued to be treated in both therapy and with Mercy Works and did not report any complaints of right shoulder pain. The Arbitrator notes that when Petitioner started treatment with Hinsdale Orthopedics in June 2012, he treated with Dr. Lorenz, a neck and back specialist. During the initial visit Petitioner did not provide any right shoulder complaints. He had complaints of radiating pain from the neck into the arms, and a pain drawing Petitioner completed shows the symptoms in the left upper back area, not the right. Petitioner followed up with Dr. Lorenz in August and again failed to mention right shoulder symptoms. During the same month, he reported to the pain specialist, Dr. Jain, that he hurt his neck and low back in a work accident. Petitioner did not have any right shoulder complaints during his September 2012, examination by Dr. An either. He informed Dr. An that he hurt his neck when he fell.

The Arbitrator finds that on October 17, 2012, over six months after the accident, Petitioner reported that he had right shoulder symptoms and that a physician, Dr. Lorenz, suspected that Petitioner might have right shoulder pathology. The Arbitrator notes that prior to October 17, 2012, Petitioner saw numerous physicians and therapists who performed physical examinations. Not one of the records contains findings consistent with the right shoulder pathology he had after October 17, 2012. In several of those examinations the medical records indicate Petitioner complained of pain in the left shoulder.

The Arbitrator finds that the October 17, 2012 record and Petitioner's subsequent reporting of an injury to his right shoulder to Dr. Chudik fail to prove that the shoulder condition is causally related to the injury. Not only is this the first reference of right shoulder symptoms as result of the fall, but Petitioner also supplied inconsistent histories of his injury to support a connection between the fall and right shoulder condition. Petitioner's initial history in the accident report, to Mercy Works, the therapist and in his testimony all describe a fall. The consistent theme was that Petitioner lost his footing and fell or he fell from the tree branch. However, in October 2012, he provides Dr. Lorenz with a history that he had to grab a handrail to prevent his fall. The Arbitrator notes that Petitioner testified that there was no handrail. Petitioner informed Dr. Chudik in June 2013, that he was lowering himself from the tree when he injured his shoulder. He did not mention a fall. Based upon the inconsistencies in these later histories, the Arbitrator finds that the initial histories provided by Petitioner in the days and weeks after the accident were more reliable. These earlier histories all fail to mention an injury to the right shoulder.

Based upon the over six month gap between the accident and the first mention of right shoulder pathology and the inconsistent histories provided after right shoulder pain developed, the Arbitrator cannot infer a causal connection between the shoulder injury and the accident. The Arbitrator notes Petitioner's testimony about Dr. Lorenz's opinion that the shoulder issue was somehow masked by the symptoms and treatment for the cervical spine. Petitioner did not offer any opinions from the treating physicians supporting Petitioner's testimony. There was no mention of this opinion in Dr. Lorenz's or Dr. Chudik's records. There was also no response offered to Dr. Wolin's finding that the lack of contemporaneous treatment or complaints to the shoulder demonstrated a lack of causal connection. Petitioner was examined by several doctors prior to October 17, 2012, none of whom found signs of rotator cuff pathology. Therefore, the Arbitrator concludes that a preponderance of the credible evidence fails to demonstrate a causal connection between the right shoulder condition and the accident.

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

Based upon the findings concerning causal connection, the Arbitrator finds that any treatment rendered to the right shoulder is not causally related to the accident. Therefore, the Arbitrator denies Petitioner's request for payment of medical bills from Hinsdale Orthopedic Associates

and Elmhurst Memorial Hospital for shoulder related treatment. These non-related bills total $120,684.04.

The Arbitrator finds the Respondent is liable for treatment to the cervical spine, including office visits for treatment from Dr. Lorenz and the FCE.

Respondent is responsible for payment of cervical spine related treatment bills per Petitioner's Exhibit 11, subject to fee schedule reductions.

Per the agreement of the parties, Respondent has credit pursuant to Section 8(j) and a credit for all bills paid.

What temporary benefits are in dispute?

The parties agree that Petitioner was paid temporary total disability benefits through June 28, 2013. At issue is whether Petitioner is entitled to benefits after that date. The Arbitrator finds that Petitioner participated in a functional capacity evaluation on April 24, 2013 at the request of Dr. Lorenz. The evaluation assumed that there were certain lifting requirements for the watchman position (up to 20 lbs.). However, the Arbitrator notes Petitioner's testimony that no lifting was required and the lack of lifting requirements in Job Description. (RX 10). The FCE found Petitioner could lift well above the 20 lbs. limit and that Petitioner was capable of working as a watchman. The only physicians who reviewed the FCE were Dr. An and Dr. Wolin. They both concluded that based upon the FCE, Petitioner could return to work as a watchman. The records do not show that Petitioner has seen Dr. Lorenz following the FCE.

Petitioner testified and Dr. Chudik's records show that he was off of work after June 28, 2013, due to his right shoulder condition. Based upon the Arbitrator's finding that the right shoulder condition is not causally related to the accident, the Arbitrator denies Petitioner's request for the payment of benefits after June 28, 2013.

Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that Petitioner is not entitled to penalties and fees. Respondent's denial of temporary total disability and medical benefits was neither vexatious nor unreasonable. Temporary total disability benefits were suspended based upon the opinion of Dr. An that Petitioner could return to work. Dr. An based his opinion on the FCE findings, which showed Petitioner able to lift well above the requirements of the job as seen in the job description and as described by Petitioner during his testimony. In additional, medical treatment and temporary total disability benefits were denied based upon the causation dispute involving the right shoulder. The Arbitrator finds that the Respondent's causation dispute was not unreasonable. The initial accident report and medical evidence failed to show complaints or treatment to the right shoulder.

Respondent also obtained a supporting medical opinion from Dr. Wolin based upon a review of the records. Dr. Wolin erred in finding that the first mention of a shoulder injury was when Petitioner saw Dr. Chudik a year after the injury however, his conclusions were not unreasonable, because they were based upon the lack of contemporaneous treatment and complaints concerning the shoulder.

ORDER OF THE ARBITRATOR

Respondent shall pay Petitioner temporary total disability benefits of $521.95/week for 52 weeks, commencing 6/28/12 through 6/28/13, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $29,169.52 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of ATI and Hinsdale Orthopedics, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid, 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.

Deborah L. Simpkin — July 31, 2014

Signature of Arbitrator — Date

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

Carmen Lampert,

Petitioner,

vs.

Ferrell Hospital,

Respondent,

NO: 12 WC 43965

15IWCC0756

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 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 October 16, 2015 is hereby affirmed and adopted.

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

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: OCT 2 - 2015

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:8/6/15
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LAMPERT, CARMEN
Employee/Petitioner

Case# **12WC043965**

15IWCC0756

FERRELL HOSPITAL
Employer/Respondent

On 10/16/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0693 FEIRICH MAGER GREEN & RYAN
KEVIN MECHLER
2001 W MAIN ST SUITE 101
CARBONDALE, IL 62903

15IWCC0756

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

Carmen Lampert
Employee/Petitioner

v.

Ferrell Hospital
Employer/Respondent

Case # 12 WC 43965

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **August 14, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11-26-12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$57,657.32**; the average weekly wage was **$1,140.93**.

On the date of accident, Petitioner was **59** 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 wages paid to Petitioner during her initial absence from work, **$0** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and **$49,617.92** for other (non-occupational indemnity disability) benefits.

Respondent is entitled to an additional credit of **$0** for any medical bills paid through its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on November 26, 2012 that arose out of her employment with Respondent. Petitioner's claim is denied and no benefits are awarded.

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

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

Nancy Lindsay
Signature of Arbitrator

October 11, 2014
Date

OCT 16 2014

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner has filed an Application for Adjustment of Claim for an alleged injury she sustained on November 26, 2012, while employed by Respondent as a floor nurse. (AX2). Petitioner alleges injury to her left ankle after slipping and falling on steps outside the hospital as she was exiting the building following the completion of her shift. (AX2). At the hearing, testimony was offered by Petitioner, Terri Debose, Kaylee Owen, and Caleigh Bruce. At the hearing the parties agreed that they would submit a written Stipulation as to an additional amount to be credited against any award of temporary total disability benefits. That Stipulation was received by the Arbitrator, marked as "Arbitrator's Exhibit 5" and has been included in the record.

The Arbitrator finds:

On November 26, 2012, Petitioner was employed as a floor nurse for Respondent. Petitioner's shift ended at approximately 8:00 p.m. At the end of her shift, Petitioner clocked out at a time clock located near the center of the hospital. She then proceeded down a hallway towards a door (the "Grant Street door") located on the south end of the hospital at the end of a hallway containing patient rooms. Petitioner was not required to use the Grant Street door. Petitioner chose the Grant Street door to exit the hospital because she had parked her car in a lot to the southwest of the hospital on this date (the "laundry parking lot"). (RX1).

Immediately outside the Grant Street door there are five (5) steps, as well as an immediately adjacent wheelchair ramp, either of which can be used to reach the street level. (PX6-2; 6-4; RX3-C; 3-D; 3-G). Petitioner chose to use the steps.

Petitioner testified that when she exited through the Grant Street door, but before she encountered the steps, she noticed that it was dark. She claimed the weather conditions were misty and a little sleety. Petitioner testified she grabbed handrails on either side of the steps with both hands, and then attempted to walk down the steps. Petitioner slipped at the very top of the steps and fell. She was still attempting to hold onto the handrail with her right hand when she slipped. She testified she swung around and landed with all of her weight on her left foot, injuring her left ankle.

Petitioner did not have anything in her hands at the time. She had only her personal shoulder bag with her, which was over her shoulder. She testified she was holding the handrails on both sides of the steps. She was not performing any job duties at the time of the occurrence. She was not hurrying.

After she fell, Petitioner located her shoulder bag, crawled to it, and retrieved her cell phone. She called the nurses' station inside the hospital. She was taken inside to the emergency room, where she was diagnosed with a trimalleolar fracture of her left ankle, and was transferred to Deaconess Hospital in Evansville, Indiana. (PX1 at 3-21).

The following day, November 27, 2012, Petitioner underwent an open reduction internal fixation of the lateral and medial malleolar components of the left ankle trimalleolar fracture. (PX3 at 3).

The Grant Street Door

The Grant Street door is available for use by both Respondent's employees and the general public. The Grant Street door is located on the south end of the hospital at the end of a hallway containing patient rooms. Down the hallway leading to the Grant Street door are two overhead exit signs, with no indication that the exit is restricted or otherwise limited to employees. (RX3-A). The radiology department is also located immediately to the right after entering the hospital through the Grant Street door.

Petitioner was not required to use the Grant Street door to enter and exit the hospital. Petitioner testified she was never told to use the Grant Street door, and confirmed that employees were free to use several different doors to enter and exit the hospital. These doors were also available to the general public. Employees were not required to use the Grant Street door, or any other door.

At hearing, Petitioner identified at least nine (9) doors located all over the hospital which she could have used on that night, including two (2) doors Petitioner admits were closer than the Grant Street door to the time clock where she punched out following her shift. (See RX1). These doors included the main entrance to the hospital (the "front doors"), a kitchen door, a door at the back of the hospital used by hospital administration, the emergency room door, and one or two additional doors. (*Id.*)

Petitioner testified she used the Grant Street door because she had parked in the laundry parking lot, which was near the Grant Street door. She testified she was not required to park in this lot. She testified the Grant Street door was the door she generally used to enter and exit the hospital because she usually parked in the laundry parking lot. Petitioner admitted it was possible she had used other doors to exit the hospital prior to the date of the occurrence.

Petitioner gave a recorded statement to Eileen Cox of Illinois Compensation Trust the same week of the incident in which Petitioner stated she had only been using the Grant Street door to enter and exit the hospital in the two to three years prior to the incident. (RX6 at 5). Petitioner had been employed by Respondent for more than five years prior to the incident.

Terri Debose, a former employee, testified that employees use the Grant Street door to enter and exit the hospital to and from the laundry parking lot because it is easier than entering through the door in the emergency room, which is also located on the south end of the hospital. (RX1). She testified Respondent employs around 500 employees, but does not know where all 500 park. Ms. Debose agreed that the doors indicated by Petitioner with yellow "X"s on a diagram of the hospital indicated additional doors that were available to both employees and the general public to enter and exit the hospital. Ms. Debose also testified that the "front door" of the hospital was the entrance and exit most visitors to the hospital used and that the area where Petitioner fell was mostly used by hospital employees. She further testified that for over four years she had used that same door to exit the hospital and access her own car. (RX1).

Kaylee Owen, also a former employee, estimated that she and 75 percent of Respondent's employees use the Grant Street door to enter and exit the hospital. She testified it was her choice to use the Grant Street door, which she chose because it was closest to where she generally chose to park. She also agreed that the doors indicated by Petitioner with yellow "X"s on a diagram of the hospital indicated doors that were available to both employees and the general public to enter and exit the hospital. (RX1).

Caleigh Bruce, the vice-president of human resources for Respondent, also agreed that the doors indicated by Petitioner with yellow "X"s on a diagram of the hospital indicated doors that were available to both employees

and the general public to enter and exit the hospital. (RX1). Ms. Bruce testified there were even more doors available to employees than indicated on the diagram. She testified that Respondent has no restrictions on employees using any of the doors identified by Petitioner. The Grant Street door is available to both employees and the general public. There are no prohibitions on the general public using the Grant Street door.

The Laundry Parking Lot

Petitioner had parked in the laundry parking lot located across the intersection of Grant and Maple Streets from the southwest corner of the hospital. Petitioner marked this lot on a diagram of the hospital and the surrounding parking lots with an orange "X." (RX1; See also RX3-E; 3-L; 3-M; 3-N). Petitioner testified this parking lot was available to both employees and the general public.

Petitioner also identified several parking areas around the hospital with green "X"s on a diagram of the hospital and the surrounding area. (RX1). Petitioner testified these parking areas were also available to both employees and the general public. These areas included a lot to the north of the hospital across Benton Street, a lot to the northwest of the hospital, a lot across Maple Street to the south and west of the front doors, a lot across Glenwood Avenue from the Maple Street lot, a lot south of the hospital's emergency room, and an area at the beginning of Second Street extending for one to two blocks, and street parking on any of the adjacent streets to the hospital with the exception of Maple Street. (*Id.*).

Petitioner testified that employees were not required to park in the laundry parking lot. Petitioner was free to park in any of the areas she identified with a green "X". (RX1). She testified there were additional areas employees were able to park in that were not indicated on the diagram.

Terri Debose and Kaylee Owen both agreed that the areas indicated by Petitioner were areas where both employees and the general public were free to park.

Caleigh Bruce testified that Respondent does not require employees to park in the laundry parking lot, and that employees are not told they must park there. Ms. Bruce affirmed that the parking areas identified by Petitioner were all available to both employees and the general public, and that there was no prohibition on employees parking in any of the indicated areas.

The Condition of the Steps

The steps outside the Grant Street door are concrete, and are covered with outdoor carpeting. (RX3-F; 3-G; 3-H). There are handrails on both sides of the steps. (RX3-G). Immediately to the right of the steps is a wheelchair ramp. (RX3-B; 3-C; 3-E).

Petitioner testified there was nothing wrong with the condition of the steps or the adjacent ramp. The steps were not deteriorating, but were in good condition. Petitioner testified there was nothing wrong with the condition of the carpet on the steps, stating the carpet was not ripped, unraveling, or even worn. She testified at hearing that she did not know if the carpeting on the steps was new or not. However, Petitioner's recorded statement with Eileen Cox of Illinois Compensation Trust, made the same week of the occurrence, documents Petitioner stating Respondent had just re-carpeted the steps prior to the date of the incident. (RX6 at 5).

Petitioner testified she had walked up the steps earlier that day when entering the hospital. She noticed no problems with the steps or the carpet on the steps. She testified that if she had known there was any problem with the steps, she would not have used them when she exited the hospital. She testified that when she exited

the hospital there was nothing preventing her from choosing to use the adjacent ramp instead of the steps if she had any concern about the weather conditions.

Petitioner testified that the steps were wet on the night of the occurrence. Petitioner's recorded statement with Eileen Cox, made the same week of the occurrence, documents Petitioner stating that the carpet on the steps was not wet at the time of the occurrence. (RX6 at 5). Petitioner testified she does not know what she said to Ms. Cox, and claimed at hearing she was on pain pills and in pain when she gave her statement.

Caleigh Bruce testified she took photographs of the steps within one month following the incident. (RX3-F; 3-G; 3-H). She testified that she was not aware of any changes that were made to the steps from the date of the incident to the date she took the photos.

Kaylee Owen claimed that the carpet had a hole in it at the top of the steps, and the maintenance department laid new carpet on the steps after the incident.

All of the witnesses, including Petitioner, testified anyone exiting the Grant Street door has the choice of whether to walk down the steps or down the adjacent ramp to the street level. Employees are not required to use the steps, and are not prohibited from using the adjacent ramp.

Petitioner testified it was misting outside and was a little sleety when she left the hospital. Petitioner presented records regarding the weather on the date of the incident printed from a website. (PX8). These readings were taken at an unknown location in Harrisburg, Illinois. (*Id.*). The Arbitrator notes that Harrisburg is generally 9 miles to the southwest from the site of the incident. The record documents "rain" at 7:55 p.m. and "light rain" at 8:15 p.m. (PX8 at 3). There is no rain documented in the hour between 6:55 p.m. and 7:55 p.m. (*Id.*). The temperature is noted to have been 41 degrees at 7:55 p.m. and 8:15 p.m. (*Id.*).

Respondent also submitted weather records for November 26, 2012. (RX4). These records are certified records from the National Climatic Data Center. (*Id.*). The readings contained in the report were collected from a reporting station at Harrisburg-Raleigh Airport, which the Arbitrator notes is approximately 7 miles due west of the location of the incident. These records indicate no precipitation at any time either one hour before or one hour after 7:55 p.m. on the night of the occurrence. (RX4 at 3). The records document 0.06 in. of precipitation at 6:15 p.m., 6:35 p.m., and 6:55 p.m., but no precipitation before or after those times. (*Id.*). These records also document a temperature of 41 degrees at 7:55 p.m. and 8:15 p.m. (*Id.*).

Petitioner testified she noticed it was dark when she exited the hospital. She testified she observed the lights located above the Grant Street door on the side of the hospital were not on. There is a streetlight located on a utility pole at the corner of Grant and Maple Streets, which Petitioner estimated is 10 yards from the Grant Street exit. (RX3-E). Petitioner testified she does not know whether the streetlight was on or not at the time of the occurrence. There is no evidence that the electricity was ever out at either the hospital or in the town of Eldorado on the night of the occurrence. Every witness testified the electricity was on in and around the hospital on the night of the occurrence.

Terri Debose testified that when she went outside to smoke at approximately one hour after the occurrence, neither the lights above the Grant Street door nor the streetlight were on. Caleigh Bruce testified that one of the employees who went outside to tend to Petitioner following the incident informed her that the streetlight was on while she administered aid to Petitioner.

During the arbitration hearing Ms. Bruce provided testimony concerning Terri Debose's departure from Respondent's employment. At the hearing Ms. Bruce testified that Ms. Debose left work in the middle of a shift during her two week notice period and never returned to work. After the arbitration hearing the attorneys for both parties provided the Arbitrator with a "Joint Stipulation RegardingTestimony of Caleigh Bruce." That "Joint Stipulation" has been marked as "Arbitrator's Exhibit 6" and has been made a part of the record as requested by the attorneys. According to the "Joint Stipulation" Ms. Bruce returned to her office after the hearing and reviewed Ms. Debose's personnel file only to discover she had incorrectly testified concerning the circumstances of Ms. Debose' cessation of employment with Respondent. According to the "Joint Stipulation" Ms. Debose did not leave in the middle of a shift. On June 16, 2014 Ms. Debose tendered a two week notice of intent to leave with Respondent. Two days later she was asked by her supervisor to sign a written warning regarding alleged excessive absenteeism. Ms. Debose refused and left the hospital, never to return. After returning home, Ms. Debose authored a facebook post indicating she was no longer employed with Respondent and made a derogatory comment regarding her former boss. (AX 6)

Petitioner has not worked in any capacity since her accident and has undergone multiple conservative and surgical medical treatments to her left ankle since her accident. (PX 1 - 5) Respondent does not dispute that Petitioner's current condition of ill-being in her ankle is related to the accident. Respondent's dispute is over liability for the accident.

The Arbitrator concludes:

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

An injury is compensable under the Act only if it "arises out of" and "in the course of" employment. *Caterpillar Tractor Co. v. Industrial Comm'n.*, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Id.* Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to be in the course of the employment. *Id.*

Whether an employee's injury "arose out of" her employment may be determined under two different approaches. *Dodson v. Industrial Comm'n.*, 308 Ill. App. 3d 572, 575, 720 N.E.2d 275, 241 Ill. Dec. 820 (5th Dist. 1999). First, an injury arises out of the employment where its origin stems from a risk connected with, or incidental to the employment. *Caterpillar*, 129 Ill. 2d at 58. Second, 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. *Dodson*, 308 Ill. App. 3d at 576. Under either approach, an injury does not arise out of the employment where an employee voluntarily exposes himself or herself to an unnecessary personal danger solely for his own convenience. *Orsini v.Industrial Comm'n.*, 117 Ill. 2d 38, 57, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987).

In this case, Petitioner has failed to prove that her injury "arose out of" her employment with Respondent because she has not shown she was exposed to any risk to a greater degree than the general public. Petitioner had clocked out and voluntarily chose to use the Grant Street door, the laundry parking lot, and the steps outside the door, all of which were available to and used by both Respondent's employees and the general public. Accordingly, her injury is not compensable, and her claim must be denied.

Petitioner admitted she was not required by Respondent to use the Grant Street door, but rather she chose to use the Grant Street door. The Grant Street door is fully available to the general public. There are two overhead signs down the hallway from the center of the hospital to the Grant Street door indicating it is an exit. This hallway contains patient rooms. Visitors and other non-employees are free to use the Grant Street doors.

Not only was Petitioner not limited to the Grant Street door, every witness confirmed there were multiple doors through which Petitioner or any other employee could have chosen to enter or exit the hospital. Two of the doors identified by Petitioner were closer to the time clock where she punched out following her shift than the Grant Street door was. Neither of these doors had steps.

This is not a case where Petitioner was required or even directed to use a specific door. This case is, therefore, distinguishable from the line of cases where the claimant was not allowed to freely choose which door to use, but instead was required by their employers to use specific doors. *See, e.g., Bommarito v. Industrial Comm'n.*, 82 Ill. 2d 191, 196, 412 N.E.2d 548, 45 Ill. Dec. 197 (1980). Unlike *Bommarito*, this is a case where Petitioner freely chose to use a certain route, a certain door, a certain parking lot, and a certain set of steps, none of which she was required to use. *See Northwestern Univ. v. Industrial Comm'n.*, 409 Ill. 216, 221, 99 N.E.2d 18 (1951). The testimony that Petitioner and other employees normally used the Grant Street door is not, by itself, compelling in terms of whether Petitioner's accident arose out of and in the course of her employment. *See, e.g., Caterpillar*, 129 Ill. 2d at 56.

Additionally, Petitioner testified that she chose to use the Grant Street door because she had parked at the laundry parking lot, as she frequently did. However, like the Grant Street door, Petitioner was not required by Respondent to park in the laundry parking lot. Petitioner identified multiple parking lots and areas around the hospital where she was free to park, all of which were verified by the witnesses at the hearing. These parking lots and areas were open and available to both employees and the general public.

The Arbitrator notes that the laundry parking lot is a very small parking lot, able to accommodate only a few vehicles at a time. (RX1; RX3-E; 3-L; 3-M; 3-N). The diagram of the hospital and the surrounding area introduced by Respondent shows the laundry parking lot contains only 13 parking spaces. (RX1). There is testimony that there are as many as 500 employees at Respondent's facility. There are also claims that 75 percent of Respondent's employees use the Grant Street door because they all park in the laundry parking lot. Based on the size of the laundry parking lot and the size of Respondent's work force, the Arbitrator finds the testimony regarding employee usage of both the Grant Street door and the laundry parking lot to be highly exaggerated, and therefore not credible. The Arbitrator notes that at least five other parking areas (one to the north, one to the northwest, one to the south, and two to the west of the hospital) appear larger than the laundry parking lot. (RX1; RX3-R; 3-U; 3-V).

Petitioner also testified she had a choice after exiting through the Grant Street door to either encounter the steps or the adjacent ramp. There is no defect alleged in either the steps or the adjacent ramp. It is Petitioner's contention that upon exiting through the door, she observed it was both dark and sleety. She testified that for this reason, she grasped both available handrails on either side of the steps prior to encountering the steps.

Petitioner was not required by the Respondent to use the steps at all. She readily admitted she chose to use the steps despite her allegations that it was dark and sleety. She admitted that she knew the condition of the steps and that she did not have any concern about the condition of the steps or she would not have used them. She further admitted she could have used the adjacent ramp, which was available to her, the general public, and anyone else exiting through the Grant Street door.

Based on the foregoing, Petitioner was not exposed to any risk to a greater degree than the general public by virtue of her employment. Petitioner chose to exit through the Grant Street door. Petitioner chose to park in the laundry parking lot. Petitioner chose to encounter the steps instead of the adjacent ramp.

This case is similar to the case of *Burke v. The People Gas Lights and Coke Co.*, 99 IIC 485 (May 26, 1999). In *Burke*, the petitioner was on her way home when she fell on an escalator in the Prudential Building. The petitioner admitted the area was an area open to the general public, not reserved just for the respondent's employees. There was evidence that the petitioner could have also used stairs or an elevator to leave the building, but chose to use the escalator. No one from the respondent told the petitioner to use the escalator. The Commission affirmed the arbitrator's decision that the petitioner suffered no injury arising out of her employment.

Furthermore, Petitioner's actions in voluntarily choosing where she parked, where she exited the hospital, and how she attempted to get to the street level constituted an increased personal risk. As such, her injury is not compensable.

In *Dodson, supra*, the claimant had just clocked out, had exited through the properly designated door, and was walking to her car. *Dodson*, 308 Ill. App. 3d at 574. She proceeded down several steps of concrete sidewalk leading to the employee parking area. Because it was raining hard, she left the sidewalk and walked across a grassy slope to reach her car. *Id.* While walking on the grass, claimant fell backwards and broke her ankle. *Id.* The appellate court found that her injury did not arise out of her employment because she voluntarily chose to expose herself to an increased personal risk by walking on the grass instead of the stairs. *Id.*, at 576. The court rejected the argument that the injury arose out of her employment because other employees often walked across the same grassy slope and the employer was aware of the practice and did not stop it. *Id.*, at 577.

A similar result was found in *Hatfield v. Industrial Comm'n.*, 202 Ill. App. 3d 547 (4th Dist. 1990). In *Hatfield*, the claimant jumped over an accumulation of water at the base of an incline on his way to his car at the end of the day, injuring his leg and his back. *Id.*, at 548. The claimant acknowledged there was a walkway to the parking lot approximately 50 feet north of where he jumped. *Id.*, at 550. In affirming the denial of the claim, the appellate court stated as follows:

> While the claimant's injuries were incurred upon the employer's premises and were incurred within a reasonable time after leaving his work duties, nevertheless, it is apparent that the claimant's injuries occurred while he was engaged in an activity which only benefitted himself and not his employer. Therefore, we find that the Commission's determination that the claimant's injuries did not arise out of and in the course of his employment was not against the manifest weight of the evidence.

Hatfield, 202 Ill. App. 3d at 554.

In this case, it is clear that Petitioner's choice to park in the laundry parking lot, her choice to exit through the Grant Street door, and her choice to use the steps instead of the adjacent ramp all constituted voluntary choices to expose herself to an increased personal risk benefitting only herself. Petitioner was not required by Respondent to park where she parked, exit where she exited, or traverse the steps instead of the adjacent ramp. Rather, she did all those things by her own choice and for her own benefit. This is especially true with respect to Petitioner's decision to encounter the steps despite her testimony that prior to doing so she observed it was

dark and sleety. Petitioner could have walked down the adjacent ramp if she truly believed it was dark and sleety outside. Instead, she chose to use the steps. This was an increased personal risk, and accordingly, her injury did not arise out of or in the course of her employment. In fact, witness Terri Debose testified when she exited through the Grant Street door approximately one hour after the incident to smoke, she chose to use the adjacent ramp rather than the stairs.

Based on the foregoing, the Arbitrator concludes that Petitioner has failed to prove an accident arising out of and in the course of her employment because whatever risk Petitioner was exposed to was by her own choice, and was no greater than any risk to which the general public was exposed.

Further, the Arbitrator is not persuaded that the steps encountered by Petitioner on the date in question constituted anything other than Petitioner voluntarily encountering a neutral risk. Risks to employees fall into three groups: (1) risks distinctly associated with the employment; (2) risks personal to the employee, such as idiopathic falls; and (3) neutral risks that have no particular employment or personal characteristics. *Caterpillar*, 129 Ill. 2d at 59. By itself, the act of walking on steps does not expose an employee to a risk greater than that faced by the general public. *Baldwin v. Industrial Workers' Compensation Comm'n.*, 409 Ill. App. 3d 472, 477-78, 949 N.E.2d 1151, 351 Ill. Dec. 56 (4th Dist. 2011).

The Arbitrator has given very little, if any, weight to Petitioner's recorded statement. Sections were inaudible and Petitioner testified she was on pain medication when it was given. The Statement was not taken on the day of the accident as one can tell from Petitioner's responses to certain questions that she was recovering from surgery when the Statement was provided. As such, Petitioner's recollection may have been, understandably, a little "foggy."

Nevertheless, while Petitioner contends it was dark outside when she exited the hospital she doesn't attribute her slip and fall to the darkness. Petitioner testified multiple times that she slipped on the top step and fell. She did not testify she missed the step or was unable to see the step due to darkness. She admitted she was very familiar with the steps, and had in fact used the steps earlier that day when she entered the hospital.

Petitioner could see well enough to grasp both handrails on either side of the steps with both hands prior to encountering the steps. Petitioner could also see well enough to locate her shoulder bag and retrieve her cell phone to call for help. And, as stated above, Petitioner observed the alleged darkness when she exited the door, but chose to encounter the risk on the basis that she was already out the Grant Street door despite numerous other exits to the hospital and the existence of a ramp right next to the steps.

Finally, though Petitioner testified there was no defect whatsoever with the steps or the carpet on the steps, Kaylee Owen, another former employee, testified with purported certainty that there was a defect in the carpet on the top step that had been fixed by Respondent's maintenance staff after the incident. This contradicts every other witness, including Petitioner herself, who testified the carpet was free of any defects. The Arbitrator gives more weight to the testimony of Petitioner and others who believed there was no defect whatsoever with the steps or the carpeting on the steps.

Petitioner voluntarily encountered a neutral risk to which she was exposed in no greater degree than was the general public. Petitioner voluntarily used the Grant Street door, voluntarily parked in the laundry parking lot, and voluntarily encountered the steps.

The Arbitrator has considered the recent appellate court decision of *Brais v. The Illinois Workers' Compensation Commission*, 2014 IL App. 3d 120820WC but finds it distinguishable from the case herein as the Court in *Brais*

found a "special hazard" in that the sidewalk was cracked and uneven and "The cracked sidewalk was a contributing cause of the claimant's injury as her heel caught on the defective sidewalk causing her to fall." *Id.* No such hazard or defect is present in this case.

For these reasons, Petitioner's claim is denied.

2. 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?

3. Issue "K"—What temporary benefits are in dispute?

Given her decision on Accident, the foregoing issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☒ 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

Rick Bailie,

Petitioner,

vs. NO. 14WC005466

GRP Mechanical Company,

15IWCC0757

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19b having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses, prospective medical, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 4, 2014 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.

15IWCC0757

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: OCT 5 - 2015
SJM/sj
o-8/6/2015
44

Stephen J. Mathis

Mario Basurto

DISSENT

I respectfully dissent from the majority decision and would reverse the Arbitrator's decision in regard to causal connection. Petitioner testified to having a right knee injury in 2012 which required treatment through May 11, 2012. Petitioner stated he has worked his normal duties as a laborer since that date. Petitioner testified to striking his right knee on the trailer hitch of his truck at home, but it did not break the skin and he did not seek medical treatment. Petitioner also testified to having a boil on his left leg. Petitioner stated that he saw a Dr. Klein on January 3, 2014 with complaints of the boil on his leg. Dr. Klein noted some cellulitis and prescribed an antibiotic. Petitioner testified that the boil dried up within a couple of days.

Petitioner testified that he had been recalled to work by Respondent on January 7, 2014 and sent to Oklahoma to begin work on January 8th digging around a 36 inch main pipe located in an open field. Petitioner testified that while he was in the trench a piece of sandstone the size of a table slid down and struck him on the right shin. Petitioner stated that although the stone didn't tear his pants it did break the skin, his leg was bleeding. A co-worker named Ty Reed testified on Petitioner's behalf. Mr. Reed testified that he roomed with Petitioner on January 9, 2014 and noticed a fresh scratch on Petitioners right leg after work. Reed further testified that he asked Petitioner what had happened and Petitioner told him that a rock slid off the ledge and hit him in the leg.

Petitioner was seen by Dr. Vest who opined that his condition of ill being was causally connected to the accident in question. Dr. Vest testified that MRSA can enter the body through a traumatic wound or an orifice like the mouth. Dr. Vest stated that based upon the examination he performed and the patient history, there were no other probable sources of entry for the MRSA other than the scrape on Petitioner's right shin. Dr. Vest stated that the fact that the MRSA attacked the nearest joint to the abrasion (the right knee) is consistent with the bacteria entering the body at the site of the abrasion.

The majority's decision relies upon alleged evidence of multiple other possible sources of the MRSA which were not included in the history given to Dr. Vest. The majority concurs with the Arbitrator's assessment that Dr. Vest's causal connection opinion is based upon incomplete and inaccurate information and therefore not valid. However, the evidence the Arbitrator relies upon amounts to nothing more than speculation. Dr. Vest was unaware of the incident wherein Petitioner struck his right knee on a trailer hitch or the resolved boil on Petitioner's left thigh. However, Dr. Vest's records, including the date of treatment when he aspirated Petitioner's knee 114 cc of fluid, make no mention of any abrasions or open wounds on Petitioner's right knee which could have been the entry point for the MRSA. Furthermore, blood cultures performed at the same times as the knee aspirant were negative for MRSA. So although the knee aspirant tested positive for MRSA, there was no MRSA found in Petitioner's blood, or any other part of his body, making any inference that the infection was spread through the bloodstream to Petitioner's right knee purely speculative.

After considering all of the evidence, it is clear that Petitioner's MRSA infection is causally related his January 8, 2014 accident. Petitioner is under no obligation to disprove every other possible cause of his condition of ill-being. Sisbro, Inc. v Industrial Commission, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003). However, any other possible causes of Petitioner's infection are speculative at best and not supported by the evidence in the record. Accordingly, I would reverse the decision of the Arbitrator in regard to causal connection and remand the matter for a determination of benefits.

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF 19(b) ARBITRATOR DECISION

BAILIE, RICK
Employee/Petitioner

Case# **14WC005466**

GRP MECHANICAL COMPANY
Employer/Respondent

15IWCC0757

On 12/4/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4620 ARMBRUSTER DRIPP WINTERSCHEIDT
JOHN WINTERSCHEIDT
219 PIASA ST
ALTON, IL 62002

0000 WIEDNER & McAULIFFE LTD
MATTHEW J ROKUSEK
8000 MARYLAND AVE SUITE 500
ST LOUIS, MO 63105

15IWCC0757

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

☐ 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)

Rick Bailie
Employee/Petitioner

v.

GRP Mechanical Company
Employer/Respondent

Case # **14** WC **05466**

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 **Brandon Zanotti**, Arbitrator of the Commission, in the city of **Belleville**, on **May 30, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0757

FINDINGS

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

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

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

In the year preceding the injury, Petitioner earned $**18,734.00 over 8 weeks**; the average weekly wage was $**2,341.75**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**2,678.88** for other benefits, for a total credit of $**2,678.88**.

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

ORDER

BECAUSE PETITIONER FAILED TO PROVE THAT HIS CONDITION OF ILL BEING WAS CAUSALLY CONNECTED TO THE ACCIDENTAL INJURIES SUSTAINED ON JANUARY 8, 2014, CLAIM FOR COMPENSATION IS HEREBY DENIED.

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

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

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

Signature of Arbitrator

December 4, 2014
Date

ICArbDec19(b)

DEC 4 - 2014

Statement of Facts

On January 8, 2014, Petitioner Rick Bailie was employed by Respondent GRP Mechanical Company as a laborer.

Prior to January, 2014, Petitioner had prior treatment to his right knee by Dr. Vest. Petitioner testified that he injured his right knee in 2012 while changing an engine at home. Dr. Vest testified that an MRI taken March 22, 2012 revealed a torn medial and lateral meniscus (Px 5, pg 8). Petitioner was treated through May 11, 2012. (Px 5, pg 9). Petitioner testified that he worked his normal duties as a laborer after that. He had stiffness and his knee just hurt every once in a while. Petitioner testified that he struck his right knee on the trailer hitch of his pickup truck at home. Petitioner testified that it did not break the skin. He did not seek medical treatment

Petitioner testified that he had a boil on his left leg. Dr. Klein gave him an antibiotic.. Petitioner testified that it dried up in a couple of days. In his statement (Rx 9) Steve Huch states that on January 3, 2014 Petitioner told him he had a sore on his leg. He showed him a two inch pus filled sore on his thigh. Dr. Klein saw Petitioner on January 3, 2014 with complaints of the boil on his left leg as well as congestion, cough and sinus drainage with fever. The record states that Petitioner's wife was messing around with the boil and it had become bigger. The examination notes some cellulitis. The doctor prescribed Bactrim (Rx 13).

Petitioner testified that he had been laid off and was called back to work for Respondent on January 7, 2014. He was sent to Skiatook, Oklahoma. Petitioner testified that he began work on January 8, 2014 in an open field digging around a 36 inch main pipe. Petitioner testified that he was working with Steve Huch. Petitioner testified that while he was in the trench a piece of sandstone about the size of a table slid down into the hole and hit him on the right shin. Petitioner testified that the stone did not tear his pants but it did break the skin. He rolled up his pant leg and saw it was bleeding, but just rolled his pant leg back down and went back to work. He continued working. Petitioner initially testified that he was wearing jeans, but on redirect admitted he was not sure if he was wearing the required protective clothing.

Petitioner testified that he did not immediately report the injury to his supervisor. Petitioner signed the Job Safety Analysis stating he was not injured on January 8, 2014 (Rx 7). Petitioner testified that the injury was just a scrape and he did not think anything of it.

Ty Reed testified for Petitioner. He testified that he roomed with Petitioner on January 9, 2014. He noticed a fresh scratch on Petitioner's right shin after work on January 9, 2014 when Petitioner exited the shower. He testified he asked Petitioner what happened and was told that a rock slid off the ledge and hit him in the leg

Petitioner testified that as he continued working, his right leg was starting to swell up and was getting stiff. Petitioner spoke with John Schultz, the project manager on January 14, 2014 and asked if he knew where he could get a cortisone injection for his right knee. Mr. Schultz testified that he asked Petitioner if he got hurt and was told by Petitioner that he did not. On January 21, Petitioner requested to be seen by a doctor and Mr. Schultz arranged for him to be seen at One Source.

Petitioner was seen at One Source on January 21, 2014 (Px 1; Rx 12). He gave a history of his prior 2012 problem in the knee and also of hitting his knee on his trailer hitch two weeks ago. He stated it did not seem to bother him, but now two weeks later he is having right knee discomfort. The record notes swelling. A diagnosis of degenerative joint disease was made and he was advised to follow up with his personal physician.

Petitioner returned home and was seek by Dr. Vest on January 23, 2014. The record of that visit (Px 2) notes the prior May, 2012 treatment and denies any history of injury. Petitioner claimed increased pain over the last two weeks. The impression was right knee pain and effusion. The knee was injected and the doctor aspirated 114 cc of fluid which was sent for culture. The cultures were positive for MRSA. On January 27, 2014, Petitioner was seen and scheduled for hospital admission and surgery. He provided Dr. Vest with a history of an abrasion to the right shin on the January 8, 2014. The January 27, 2014 notes reflect a finding of a 2 cm by 5 mm abrasion on the upper right shin (Px 2).

Petitioner contacted John Schultz and Tom DeClue. At that time he told them he hurt his leg while working on the jobsite the week of January 6 when a rock fell on his leg and caused a cut (Rx 8).

Petitioner underwent an initial surgery to his right knee on January 27, 2014 at St. Anthony's Health Center (Px 2). The operative report notes a diagnosis of septic arthritis, chronic tears of the medial and lateral menisci, degenerative arthritis, synovitis, and chondromalacia. Dr. Vest testified that all of the conditions except for the meniscal tears were related to the diagnosis of MRSA (Px 5, pg 36-38). An MRI performed February 3, 2014 found osteomyelitis of the proximal tibia. Petitioner underwent a second surgery on February 4, 2014 for incision and drainage of a deep abscess of the right proximal leg with opening of bone cortex of the right proximal tibia and excision and debridement of the right proximal tibia for osteomyelitis (Px 2).

Petitioner has been under Dr. Vest's care through a visit on April 21, 2014. He was on a PICC line for intravenous antibiotics. Petitioner has been disabled by Dr. Vest through the date of the hearing. He is scheduled to see him next on June 2, 2014. The Petitioner demonstrated a scar on the right shin to the Arbitrator. Petitioner testified that his right knee is still stiff and sore.

Dr. Vest testified by deposition as to causal connection (Px 5). He testified that the abrasion on the right shin may have caused or resulted in the staph infection diagnosed. He testified that based on Petitioner's history; there was no other obvious source for the infection (pg 15). The finding of the abrasion is consistent with his opinion. MRSA is present in the environment and on people's skin (pg 33). It can enter the body through a break in the skin (pg 34). When it breaks the skin, it enters the blood stream. It can travel the blood stream or penetrate the tissues adjacent to the site of infection (pg 19). If the bacteria was in the blood stream, it could spread anywhere throughout the body. If it entered through another source, such as the mouth, it is possible it could travel to the leg (pg 35-36).He testified that MRSA can enter the body through a traumatic wound or an orifice like the mouth (pg 12). MRSA can infect the skin. It can manifest as cellulitis where the skin becomes red and warm (pg 45). It can cause boils and sores. In some people you can eradicate it; in others, it comes right back (pg 46). Symptoms can include pain, swelling, and sometimes fever. These symptoms would begin to manifest within a few days to a few weeks (pg12).

Conclusions of Law

In support of the Arbitrators decision with respect to C (Accident), the Arbitrator finds as follows:

Petitioner testified to an accident on January 8, 2014 when a piece of sandstone fell into the ditch in which he was working, striking his right shin, causing an abrasion. His testimony is corroborated by the testimony of Ty Reed and the findings of Dr. Vest of the abrasion during the January 27, 2014 examination.

Respondent's defense focuses on the failure of Petitioner to report the accident as required by the company policies, including the signing of the January 8, 2014 Job Safety Analysis form, stating he had not been injured, and the failure to present the history of accident in the initial medical visits to One Source and to Dr. Vest on January 23, 2014. The Arbitrator notes that Petitioner testified that he was working with Steve Huch when he was injured. Respondent submitted a statement from Mr. Huch concerning Mr. Huch's observations of the Petitioner's left leg boil, but no testimony concerning whether a piece of sandstone fell into the ditch on January 8, 2014. Respondent's Exhibit 7 listed all of the employees who were working on January 8, 2014, but no testimony concerning the lack of the stone falling into the ditch was presented by Respondent.

The Arbitrator finds that Petitioner's explanation for not reporting the minor abrasion is reasonable and persuasive. Given the prior knee injury in 2012 and the symptoms that Petitioner testified to developing in his right knee during the initial period following January 8, 2014, it is also consistent that he would not present the doctors with the January 8, 2014 incident as related to his complaints.

The Arbitrator finds that Petitioner as proved by a preponderance of the credible evidence that on January 8, 2014, he suffered an abrasion to the right shin as a result of an accident arising out of and in the course of his employment.

In support of the Arbitrators decision with respect to F (Causal Connection), the Arbitrator finds as follows:

The evidence that Petitioner's MRSA infection and subsequent related treatment is causally connected to the accident on January 8, 2014 is based entirely on Dr. Vest's opinion in his deposition that "the abrasion on the right leg may have caused or resulted in the staph infection that we diagnosed." He testified that the infection can be secondary from a scrape on the right shin. He testified that abrasion he observed was consistent with the history.

Dr. Vest's opinion is specifically based upon the history he received containing no other source of the infection. He testified that "based on his history, there were no other obvious sources for the infection that we diagnosed." Dr. Vest agreed that there are multiple possible sources for contracting MRSA including through an orifice such as the mouth. MRSA can infect the skin. It can manifest as cellulitis where the skin becomes red and warm. It can cause boils and sores. When it enters the body in can travel through the bloodstream and spread anywhere through the body.

Dr. Vest was initially provided with no history of injury on January 23, 2014. On January 27, 2014, after the diagnosis of MRSA, he recorded the history of the January 8, 2014 accident only. He did not have any information about the injury when Petitioner struck his leg on the trailer hitch of his car. This was noted to have occurred two weeks before he saw One Source which would place it within days of the January 8, 2014 accident. He was not provided information about the boil on the left leg, or the

additional symptoms of congestion, cough and sinus drainage with fever. Dr. Klein diagnosed Petitioner with a cellulitis and prescribed antibiotics. Dr. Vest testified cellulitis can be the manifestation of a MRSA infection.

An expert's opinion is only as valid as the bases and reasons for the opinion. *Gyllen v. College Craft Enterprises, 260 Ill App 3d 707; 633 N.E.2d 111 (2nd Dist. 1994).* Dr. Vest based his causation opinion that the abrasion may have caused the infection based upon a history providing no other obvious source. But the evidence presents multiple other possible sources not included in this history. The basis of the causation opinion is an incomplete and inaccurate statement of the evidence presented concerning the potential source of the infection.

The Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that the accidental injury sustained on January 8, 2014, caused the MRSA infection and therefore the subsequent treatment and lost time.

In support of the Arbitrators decision with respect to J (Temporary Compensation), L (Medical) and K (Prospective Medical), the Arbitrator finds as follows:

In light of the Arbitrator's finding with respect to causal connection, claims for Temporary Compensation, and Medical, past and prospective are 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 Employment Affirm no accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cynthia Muench,

Petitioner,

vs. NO: 10 WC 39602

Lee Erickson D/B/A Wrigleyville North ,
Illinois State Treasurer Ex-Officio of the
Injured Workers' Benefit Fund

15IWCC0758

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 employment relationship, accident, causal connection, medical expenses, notice, temporary total disability and permanent disability and being advised of the facts and law, reverses the Decision of the Arbitrator as it pertains to the employment relationship but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Petitioner testified that she was hired by Lee Erickson to be a bartender at Wrigleyville North. She further testified that Lee Erickson took taxes out of her check and that she was given a W-2 form. (Transcript Pgs. 24-25) This testimony went unrebutted. Therefore, Petitioner successfully proved that she and Lee Erickson were in an employer-employee relationship. The Arbitrator is reversed in that regard.

The Commission affirms and adopts the rest of the Arbitrator's findings in regard to the Petitioner's failure to prove she sustained accidental injuries arising out of the scope and course of her employment on September 30, 2010. Petitioner saw Dr. Ghodsizadeh on October 1, 2010 and gave him a history of abdominal pain for 1 month and vomiting. Nothing in the history mentions anything about her alleged accident the day before. (Petitioner Exhibit 8)

15IWCC0758

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on September 30, 2010.

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: OCT 7 - 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 8/12/15
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MUENCH, CYNTHIA
Employee/Petitioner

Case# **10WC039602**

LEE ERICKSON D/B/A WRIGLEYVILLE NORTH AND ILLINOIS STATE TREASURER AS EX-OFFICIO OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

15IWCC0758

On 10/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% 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:

0014 ARNOLD & KADJAN
PAUL M EGAN
203 N LASALLE ST SUITE 1650
CHICAGO, IL 60601

2214 FLADER AND HACES
YOLANDA HACES FLADER
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

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

15IWCC0758

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

Cynthia Muench
Employee/Petitioner

v.

Case # **10** WC **39602**

Consolidated cases:

Lee Erickson d/b/a Wrigleyville North and IL State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **August 11, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS & ORDER

On **September 30, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent.

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

No benefits are awarded 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

10/30/14
Date

OCT 30 2014

ILLINOIS WORKERS' COMPENSATION COMMISSION

CYNTHIA MUENCH,	)	
	)	
Petitioner,	)	
	)	
VS	)	NO: 10 WC 39602
	)	
LEE ERICKSON d/b/a WRIGLEYVILL NORTH and STATE TREASURER as ex-officio Custodian of the ILLINOIS WORKERS' BENEFIT FUND	)	**15IWCC0758**
	)	
Respondent,	)	
	)	

ADDENDUM TO ARBITRATION DECISION

FINDINGS OF FACT

This action was pursued under the Illinois Workers' Compensation Act by Petitioner. Petitioner seeks relief from Respondent-Employer, Lee Erickson d/b/a Wrigleyville North. This action also sought relief from the Illinois Injured Workers' Benefit Fund because the employer allegedly did not maintain workers' compensation insurance. A hearing was held before Arbitrator Jessica Hegarty on August 11, 2014. Petitioner notified the employer of the hearing by mailing notice to the employer's counsel of record. The employer did not appear for any of the arbitration proceedings and employer's counsel of record also did not appear. Employer's counsel of record did send a letter to counsel for Petitioner acknowledging the hearing date. (PX 2). The Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund, and participated in the arbitration proceedings.

Petitioner testified she was 41 years old, unmarried, with three dependent children on the alleged date of accident. Petitioner testified her daughter Mary was born on September 18, 1992, which would make Mary 18 years old on the alleged date of accident. Petitioner testified a second daughter Amber was born on December 20, 1995, which would make Amber 14 years old on the alleged date of accident. Petitioner testified her son Joseph was born on September 7, 2002, which would make Joseph 8 years old on the alleged date of accident.

Petitioner testified that she began working at Wrigleyville North a few years prior to the alleged date of accident. Petitioner testified that Wrigleyville North is a bar located at 3900 North Sheridan Road in Chicago and is owned and operated by Lee Erickson. Petitioner interviewed with and was hired by Lee Erickson's husband on a Friday night. Petitioner testified that Lee Erickson usually just came into the bar to collect the money. Petitioner testified that she was a bartender whose duties included closing the bar at night, and stocking and cleaning the bar. Petitioner testified she worked five nights a week and her usual shift was from 6 p.m. until 2 a.m.

Petitioner testified she made approximately $500 or $550 per week including tips while working for Wrigleyville North. Petitioner testified she was paid a salary of $5.00 per hour and was paid by check. Petitioner testified Wrigleyville North withheld taxes from each paycheck.

Petitioner did not submit evidence of receiving any payment from either Wrigleyville North or Lee Erickson.

Petitioner testified that on September 30, 2010, she was closing up the bar that night when she grabbed a case of beer and turned and heard a "pop" in her left knee. Petitioner testified there were no witnesses to the alleged accident; however, she told the doorman and a customer about her knee pain immediately after the alleged accident occurred. Petitioner identified the doorman as "Detroit" and the customer as Annie. Petitioner testified "Detroit" cut Petitioner's jeans due to the swelling in her knee. Petitioner also testified she called Lee Erickson that night as was her usual custom and told Lee during the call that Petitioner injured her knee.

Petitioner worked the night following her alleged accident. Petitioner testified she was off Friday through Sunday. Petitioner testified she called Lee Erickson on the Monday following her alleged accident and Lee told her she was not on the schedule. Petitioner testified Lee Erickson fired her the next week.

Petitioner testified she called her primary care physician, Dr. Ghodsizadeh, the day after the alleged accident. According to Petitioner, Dr. Ghodsizadeh told her that she needed to see a specialist for her knee.

On October 1, 2010, Dr. Ghodsizadeh notes indicate Petitioner's complaints of ongoing abdominal pain. The doctor did not note any complaints with respect to Petitioner's left knee or Petitioner having suffered a work accident the previous day. (PX 8).

On October 5, 2010, Dr. Ghodsizadeh's records reveal Petitioner's complaints of left knee pain and occasional popping. Petitioner reported that she twisted her left knee but made no mention of the injury occurring at her place of employment. The doctor ordered an x-ray of the left knee.

On October 26, 2010, Petitioner consulted with Dr. Elias on October 26, 2010. (PX 6). On that date Petitioner did report suffering an injury at work on September 26, 2010. Dr. Elias had previously treated Petitioner for an injury to her left knee. Petitioner reported difficulty with climbing, yard work, running, and lifting. Dr. Elias noted x-rays of the left knee showed no acute bony findings but did note some mild changes along the medial tibifemoral compartment which the doctor opined might be related to her prior knee condition. Dr. Elias diagnosed Petitioner with a medial meniscal tear that may be overlapped with a traumatic chondromalacia. Dr. Elias ordered an MRI of the left knee and gave Petitioner a work status note restricting her from working. *Id.* An October 30, 2010 MRI of the left knee revealed an ACL tear and a subchondral cyst of the tibial plateau. *Id.* Dr. Elias noted Petitioner had all the signs of an ACL tear such as instability, swelling, and buckling and recommended surgery to repair the ACL tear.

On December 17, 2010, Dr. Elias performed a left knee arthroscopy with included a left patella tendon quad graft ACL reconstruction, arthroscopic assist, pain pump, left femoral nerve block, and a left knee arthroscopy on December 17, 2010. (PX 5). The post-operative diagnosis was left knee ACL and meniscal tears. *Id.*

On December 28, 2010, Dr. Elias noted Petitioner had a left knee hemarthrosis or effusion and aspirated Petitioner's knee. (PX 6). Dr. Elias prescribed physical therapy and continued to restrict Petitioner from work. Petitioner continued to develop effusions and Dr. Elias continued to aspirate fluid from Petitioner's left knee in the first few weeks following the surgery. *Id.* By January 18, 2011, Petitioner was able to walk without support.

On February 1, 2011, Dr. Elias noted Petitioner was improving but had very significant atrophy grossly visible in her left quadriceps. *Id.* Dr. Elias reinforced the importance of Petitioner performing her home exercises as well as attending physical therapy. *Id.*

On March 9, 2011, Dr. Elias completed disability paperwork at Petitioner's request for submission to the Western and Southern Life Insurance Company. *Id.*

On March 17, 2011 Dr. Elias examined Petitioner and determined he would begin Orthovisc injections in April due to Petitioner's continued pain and swelling. *Id.* Dr. Elias gave Petitioner a knee brace and noted Petitioner was doing well. He also recommended that she slow down until she started the prescribed physical therapy.

On March 31, 2011 Dr. Elias again aspirated Petitioner's knee and also performed an injection of Orthovisc. Dr. Elias again advised Petitioner she should start physical therapy. *Id.* Dr. Elias performed three more injections from April 2011 through the middle of May 2011. *Id.* Petitioner showed improvement in May 2011 and Dr. Elias gave Petitioner a stabilizing knee brace to help ease Petitioner's pain with exertion.

On May 31, 2011, Dr. Elias advised Petitioner that she needed to attend the prescribed physical therapy and noted that her quadriceps muscles were atrophic and that Dr. Elias could see a divot in the muscle. (PX 7). Dr. Elias performed another injection in June of 2011 and also requested an arthritis panel work up for Petitioner. Dr. Elias prescribed additional physical therapy and continued Petitioner's pain medication. *Id.*

On July 18, 2011, Petitioner fell directly on her left knee developed an effusion. *Id.*

On July 19, 2011, Dr. Elias aspirated Petitioner's left knee and administered an injection.

On August 11, 2011, Dr. Elias again aspirated Petitioner's left knee and administered an injection. *Id.*

On September 1, 2011, Dr. Elias noted Petitioner was doing remarkably well. He noted again that Petitioner would benefit from additional physical therapy.

On September 15, 2011, Dr. Elias noted Petitioner's left knee looked "great." *Id.* at 93. The doctor also noted Petitioner reported feeling better and that Petitioner no longer had the recurring effusion. *Id.*

On September 29, 2011, Dr. Elias noted increased pain in Petitioner's right knee. *Id.* Dr. Elias noted Petitioner had developed a baker cyst in the right knee. Petitioner also for the first time complained of pain in her lower back. Dr. Elias noted Petitioner had back surgery a decade ago and recommended proceeding with a medial branch block in the future to treat her low back.

On October 20, 2011, Dr. Elias aspirated the left knee and performed an additional injection. Dr. Elias noted that Petitioner had a motor vehicle accident and required treatment related to that accident. *Id.*

On November 3, 2011, Dr. Elias cleared Petitioner to work light duty with lifting restrictions as well as limits regarding bending, climbing, sitting, and standing. Dr. Elias also mentioned again that Petitioner required treatment for the motor vehicle accident. *Id.*

On November 15, 2011, Dr. Elias noted Petitioner needed to schedule injections for her lumbar spine.

On December 6, 2011, Dr. Elias examined Petitioner and noted she had not proceeded with the recommended lumbar epidural injection and medial branch block on the left side. *Id.* at 81. Dr. Elias stated, "...in my opinion this issue with respect to her knee is definitely affected and is causally connected to her back..." *Id.* Petitioner reported increased pain in her left knee and Dr. Elias further noted that Petitioner had been able to go a prolonged period of time without needing her left knee aspirated. *Id.* Dr. Elias again indicated Petitioner needs to schedule the recommended lumbar injections and medial branch block.

Petitioner continued to treat for respiratory issues as well as knee and back pain relating to the September 2011 motor vehicle accident from January 2012 through June 2012. *Id.* Dr. Elias performed additional injections into the left knee and also aspirated the knee on a few occasions during that time period. Dr. Elias also noted on various occasions that Petitioner's knee pain was related to her ongoing back injury. Dr. Elias also continued to strongly urge Petitioner to continue to wear her knee brace and attend physical therapy so she could strengthen her muscles. *Id.*

On May 29, 2012, Dr. Elias noted Petitioner's knee was doing much better and exhibited full range of motion and no effusion. *Id.* Dr. Elias noted weakness in the left quads and believed Petitioner was likely ready to be discharged from care.

On June 19, 2012, Dr. Elias again aspirated the left knee and performed an injection. Dr. Elias noted his belief that the effusion was inflammatory in nature. *Id.*

Petitioner did not return to Dr. Elias until November 2012. Dr. Elias apparently completed additional paperwork for Petitioner's disability claim with Western and Southern Life Insurance Company in June of 2012.

Petitioner returned to Dr. Elias for a final time on November 15, 2012. At that time Dr. Elias indicated an Oswentry score of 60% and a VAS of 5 due to her left knee with an effusion and Petitioner's low back. Dr. Elias noted Petitioner had treated with another doctor who ordered MRIs of Petitioner's left knee and spine. *Id.* According to Dr. Elias, the MRI of the left knee revealed a lateral meniscal tear, effusion, and also some changes in the possible loose bodies. *Id.* Dr. Elias aspirated the left knee and performed a final injection.

Petitioner testified she did not return to Dr. Elias after the November 2012 visit because the doctor did not accept her insurance. Petitioner testified that she began treating with Dr. Souza at some point after that and continued to treat with Dr. Souza for her shoulder, back, knee, and high blood pressure at the time of the hearing.

The Arbitrator notes Petitioner submitted no medical records supporting this testimony and there is no mention of Dr. Souza in any of medical records submitted.

The medical records in evidence show Petitioner ceased treatment after November 15, 2012.

Petitioner testified she currently takes pain medication for her back, shoulder, and knee. Petitioner testified that she continues to experience severe pain and swelling in her left knee. Petitioner testified that she can carry a baby but is unable to pick up her four year old grandson. Petitioner also testified that her left knee occasionally locks up. On a scale of 1 to 10 with 10 being the worst pain, Petitioner testified her left knee pain was a 6 at the hearing. Petitioner testified that occasionally her pain in her left knee is as high as 12 out of 10 on a scale of 1 to 10. Petitioner testified that she occasionally uses heating pads and takes hot baths. Petitioner testified she still performs some of her stretches at home.

Petitioner testified she suffered a previous injury to her left knee in either 1998 or 1999. The records show Dr. Elias treated Petitioner for this prior injury and performed a left knee scope at that time. Petitioner testified she had suffered no other injuries to her left knee neither prior to the alleged injury nor after the alleged work injury. Petitioner testified she experienced no problems with her left knee during the ten or eleven years that had passed since her prior surgery.

Petitioner testified she remained off work from October 1, 2010, until November 3, 2011. A review of the medical records reveals no doctor restricted Petitioner from working until Dr. Elias did so on October 26, 2010. The records do reflect that Dr. Elias restricted Petitioner from working from October 26, 2010 through November 3, 2011. Dr. Elias released Petitioner to light duty work on November 3, 2011. Petitioner testified she received no compensation from Respondent during the time she remained off work. Petitioner testified that although Dr. Elias completed disability insurance paperwork at Petitioner's request, Petitioner's claim was denied and she never received any payments. Petitioner also testified that the policy with Western and Southern Life Insurance was her personal insurance her mother obtained when she was younger. Petitioner testified she did return to Wrigleyville North on or around November 4, 2011 and continued to work there for some time before she was let go again. Petitioner testified that she initially kept Lee Erickson's husband updated regarding her treatment, but that she stopped communicating with him soon after the accident.

Petitioner testified she is currently working in a bar but is not a bartender. Petitioner testified she works behind the bar and primarily cleans up the bar. Petitioner testified she does not have to do a lot of lifting in this position. She is no longer employed by Wrigleyville North.

Petitioner submitted bills from Six Corners Same Day Surgery, LLC and the Bone and Joint Center PC. (PX 4). The Arbitrator notes that these two companies appear to be the same medical provider operating under multiple names. The billing statements show charges for dates of service from October 26, 2010, through November 15, 2012. Petitioner testified that Dr. Elias did not accept the insurance she had through the State of Illinois insurance program for her children. Petitioner also testified that Respondent never paid any of her medical bills. The billing statement shows an outstanding balance of $92,001.00.

CONCLUSIONS OF LAW

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

Petitioner testified that at the time of the alleged accident she was employed by Wrigleyville North and Lee Erickson was the owner of the business. Petitioner testified that Wrigleyville North is a bar that serves both alcohol to the public. The Arbitrator finds that the employer Wrigleyville North is subject to the automatic coverage provision of Section 3.12 of the Act.

B. Was there an employee-employer relationship?

Petitioner testified she learned of an open bartender position at Wrigleyville North through a friend a few years prior to the alleged accident. Petitioner testified she met with Lee Erickson's husband on a Friday night and was hired as a bartender. Petitioner testified she worked at Wrigleyville North a few years prior to the alleged accident, but could not remember the month or the actual year she began her alleged employment. Petitioner presented no evidence of her alleged employment. Petitioner testified she was paid by check by Wrigleyville North and the company deducted taxes from each check. However, despite testifying she worked for the bar for several years, Petitioner presented no evidence of ever having received any wages or salary from either Wrigleyville North or Lee Erickson.

Based on the foregoing, the Arbitrator finds Petitioner failed to prove the existence of an employee – employer relationship.

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

D. What was the date of the accident?

The Arbitrator has already found no employee-employer relationship existed between Petitioner and Respondent Lee Erickson d/b/a Wrigleyville North on the alleged date of accident. Thus, no benefits are awarded.

Assuming Petitioner had provided sufficient evidence to prove the existence of an employer-employee relationship on the date of her alleged accident, the Arbitrator finds that Petitioner failed to prove that an accident arose out of and in the course of employment with Respondent Lee Erickson d/b/a Wrigleyville North.

Petitioner testified her usual duties as a bartender included closing the bar at night, cleaning, and stocking the bar. Petitioner testified that she began closing the bar between 1:30 a.m. and 2:00 a.m. on September 30, 2010 and suffered an injury to her left knee during that time. Petitioner testified she grabbed a case of beer, and felt and heard a "pop" in her left knee when she turned while holding the case of beer.

A review of the record does not establish that an accident occurred on September 30, 2010, as Petitioner claims. Petitioner testified she felt immediate excruciating pain and her knee immediately

began to swell. Petitioner testified she was alone when the actual injury occurred, but two other people were present in the bar and saw her immediately following her injury. Petitioner testified the doorman known as "Detroit" was present and actually cut Petitioner's pants as a result of the swelling in her knee. Petitioner also testified a customer named "Annie" was present and saw Petitioner immediately following the alleged injury. The Arbitrator notes Petitioner did not produce either of the alleged witnesses to testify at the hearing.

Furthermore, Petitioner failed to report a work related accident the day after her alleged work injury to treating MD Dr. Ghodsizadeh. The doctor saw Petitioner on October 1, 2010 and noted Petitioner's complaints of ongoing abdominal issues. (PX 8).

Petitioner returned to Dr. Ghodsizadeh on October 5, 2010 reporting decreased abdominal pain and left knee pain. Petitioner did not tell Dr. Ghodsizadeh that her left knee pain was caused by a work related injury on September 30, 2010.

The records of Dr. Elias cast further doubt on Petitioner's testimony that a work accident resulting in her left knee injury occurred on September 30, 2010. Petitioner first visited Dr. Elias on October 26, 2010. At that time Petitioner told Dr. Elias that she injured her left knee on September 26, 2010. (PX 6 at 135). Dr. Elias completed disability paperwork from Western & Southern Life Insurance Company at the request of Petitioner on multiple occasions. (PX 6 at 194-197; PX 7 at 9.) Dr. Elias certified to the life insurance company that Petitioner's injury occurred on September 26, 2010. The only reference to a September 30, 2010 accident date is found in correspondence from Petitioner's attorney to Dr. Elias. (PX 6 at 6).

Petitioner bears the burden of proving all aspects of her claim, including that an accident occurred that arose out of or in the course of her employment with Respondent. That burden includes proving the date of the alleged accident. The medical records conflict with Petitioner's testimony regarding when the alleged accident occurred.

The Arbitrator notes the November 15, 2012, medical record in which Dr. Elias noted Petitioner had a *new* lateral meniscal tear which was not present following the work accident. (PX 7). Dr. Elias' records also note that Petitioner was involved in a motor vehicle accident in September of 2011 which negatively affected the condition of her left knee. *Id.*

Based on the foregoing, the Arbitrator finds Petitioner failed to meet her burden of proof. Thus, the Arbitrator finds no accident arising out of or in the course of Petitioner's employment occurred on September 30, 2010.

With respect to the remaining issues in dispute:

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? And,
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?

L. What is the nature and extent of the injury?
O. Other: Insurance.

The Arbitrator has already found no employee-employer relationship existed between Petitioner and Respondent Lee Erickson d/b/a Wrigleyville North on the alleged date of accident. The Arbitrator has also found that no accident arose out of or in the course of Petitioner's employment on September 30, 2010. Thus, no benefits are awarded and the Arbitrator makes no findings in regards to the remaining issues in dispute.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARL HANSERD,

Petitioner,

vs. NO: 12 WC 35267

TAYLOR FREEZER,

Respondent.

15IWCC0759

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, maintenance, vocational rehabilitation and permanency, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that Petitioner is not entitled to temporary total disability after July 23, 2013, the date Dr. Marc Soriano issued his Section 12 examination report. The Commission vacates the Arbitrator's award of TTD after July 23, 2013, and also vacates the award of maintenance benefits from September 12, 2013 through May 21, 2014. The Commission finds that the parties indicated that the nature and extent of the injury was at issue per the Request for Hearing, and based on the Petitioner having reached maximum medical improvement prior to the hearing, we also vacate the Arbitrator's award of vocational rehabilitation benefits.

Dr. Soriano opined that Petitioner's current subjective condition was not related to the March 15, 2012 accident. While Petitioner had positive EMG findings, he indicated that, in and of themselves, they are not conclusive of the existence of cubital or carpal tunnel syndrome. Noting many people of his age will have similar EMG findings as the Petitioner, Dr. Soriano stated that such diagnoses should not be made where there is a lack of clinical findings, and a

lack of findings suggesting acute traumatic or repetitive injury. While Petitioner subjectively reported an inability to move his hand due to pain and difficulty moving his arm and forearm, there was no evidence of atrophy in these anatomical locations, which "raises interesting questions" about the level of disuse the Petitioner claimed. Dr. Soriano opined that Petitioner was capable of returning to work based on a lack of clinical correlation for cubital or carpal tunnel syndrome. (Rx2).

Dr. Soriano's opinion regarding a lack of causation of any cubital or carpal tunnel syndrome to the accident is supported by the September 11, 2013 opinion of Dr. Korcek. (Px1). Dr. Korcek opined that Petitioner had: "superimposed thumb CMC and MPC joint pain and cubital and carpal tunnel not work related but all contributing to inability to return to work." However, on October 15, 2012, Dr. Korcek opined that the right thumb arthritis was exacerbated by the work injury, with persistent to progressive right thumb MPC joint stiffness and pain. (Px1). Dr. Korcek referred Petitioner to Dr. Borchard for evaluation of DeQuervain's tenosynovitis and the ability to return to work. There is no evidence in the record indicating that Petitioner was evaluated by Dr. Borchard, or any other occupational medicine specialist. The Petitioner testified that he did not want to have a thumb fusion surgery, and Dr. Korcek indicated he thus had nothing more to offer Petitioner from a surgical standpoint, but continued his work restrictions. (Tr. 17-20).

Petitioner was subsequently examined by Dr. Atluri at the request of the Respondent on March 4, 2014. He reported that Petitioner had significant ongoing complaints of the right hand and wrist despite having undergone extensive treatment, including surgery and prolonged formal physical therapy. Following examination, Dr. Atluri believed that Petitioner's clinical findings were dramatically out of proportion to his subjective complaints, noting Petitioner's inability to tolerate even gentle passive thumb examination. He agreed with Dr. Soriano that Petitioner's subjective complaints and examination findings were not consistent with a diagnosis of cubital tunnel syndrome. He noted that while Petitioner might have carpal tunnel syndrome, his physical exam was not consistent with this diagnosis. Finally, he opined that the clinical notes did not document significant examination findings consistent with DeQuervain's tenosynovitis, and that this condition had resolved. He was "highly suspicious" of a significant component of symptom magnification. It was Dr. Atluri's opinion that no specific work restrictions were indicated. (Rx3).

Overall, based on these medical opinions, the Commission finds that Petitioner developed a right DeQuervain's tenosynovitis as a result of his work activities on March 15, 2010, but that all other claimed injuries and conditions are not causally related to his employment. Additionally, we rely on the opinions of Dr. Soriano, Dr. Atluri and Dr. Korcek that the Petitioner either did not have carpal or cubital tunnel syndrome, or if he did, that these conditions were not related to his employment. We do believe, based on the opinions of these physicians, and in agreement with the Arbitrator, that Petitioner's CMC and MCP joint arthritis was chronic and degenerative, but we rely on the opinion of Dr. Korcek to find that the arthritis was exacerbated by the work injury. While we question whether any condition of carpal or cubital tunnel existed clinically, we agree with Dr. Korcek with regard to the thumb arthritis, as there is no evidence that Petitioner had symptoms or was limited in thumb motion prior to the accident.

The Commission finds that the Petitioner sustained the loss of use of 35% of the right hand, pursuant to Section 8(e) of the Act. While the Petitioner initially requested a 19(b) hearing in this matter, the request for hearing form (Arbitrator's Exhibit 1, No. 10) indicates that the nature and extent of the Petitioner's injury was at issue. As such, the issue is properly before the Commission. Given the finding that Petitioner had reached maximum medical improvement with regard to his work related conditions prior to the hearing date, a permanency award is proper in this case.

The only physician who instituted work restrictions in this case was Dr. Korcek. He indicated on September 11, 2013 that Petitioner's thumb CMC and MCP joint pain and cubital and carpal tunnel all contributed to Petitioner's inability to return to work. Based on this, the Commission finds that the work restrictions instituted by Dr. Korcek are not completely due to work related conditions, as we find that Petitioner did not have work related carpal or cubital tunnel syndromes. However, the need for the restrictions may be in part due to ongoing sequelae from the work related DeQuervain's tenosynovitis, as well as the thumb joint arthritis. We believe that the work related conditions have resulted in the restrictions instituted by Dr. Korcek. That being said, the Petitioner also has chosen not to have any surgery for the thumb arthritis, and, as noted, we have no evidence that he attempted to seek further evaluation of his DeQuervain's tenosynovitis with Dr. Borchard, as recommended by Dr. Korcek.

The permanency award in this case is based on Section 8.1(b) of the Act.

With regard to subsection (i), neither party submitted evidence indicating a permanent partial disability impairment pursuant to the AMA guides.

As to subsection (ii), Petitioner worked for Respondent as a forklift driver. The evidence supports the fact that his condition of right DeQuervain's tenosynovitis did not restrict him from continuing to work as a forklift driver.

As to subsection (iii), the Petitioner was 61 years old at the time of his injury. He is therefore at an age close to the typical retirement age, and this could impact his ability to find similar employment in a negative fashion versus a younger worker.

As to subsection (iv), there is no evidence to indicate that the Petitioner's future earning capacity was impacted by his injury, as we have indicated above that the evidence does not support any causally related permanent work restrictions.

As to subsection (v), the evidence of the Petitioner's ongoing disability is not truly corroborated by the medical records, as the work related DeQuervain's condition is intertwined with non work related conditions of thumb joint arthritis, cubital tunnel syndrome and carpal tunnel syndrome. As such, the ongoing disability solely related to DeQuervain's tenosynovitis is difficult to discern.

As noted, since no AMA impairment rating was submitted by the parties, that factor does not come into play in our permanency analysis. The Petitioner underwent surgery for DeQuervain's tenosynovitis, and appears to have had a reasonably good result. He also had

15IWCC0759

degenerative joint conditions in the right thumb that were aggravated by the Petitioner's employment. Based on the totality of the evidence, we find that Petitioner has sustained the loss of use of 35% of the right hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's awards of TTD and/or maintenance after July 23, 2013, as well as the Arbitrator's award of vocational rehabilitation, are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $435.76 per week for a period of 68-3/7 weeks, from March 26, 2012 through October 17, 2012 and October 24, 2012 through July 23, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $392.22 per week for a period of 71.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 35% of the right hand

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $124.00 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit of $31,128.57 for temporary total disability previously paid.

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 $27,100.00. 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: OCT 8 - 2015
TJT: pvc
O 08/10/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

HANSERD, CARL
Employee/Petitioner

Case# **12WC035267**

15IWCC0759

TAYLOR FREEZER
Employer/Respondent

On 6/5/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% 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:

1131 GESMER LAW OFFICES PC
BRAD REYNOLDS
630 N CHURCH ST SUITE 201
ROCKFORD, IL 61103

2027 WIEDNER & McAULIFFE LTD
JEFFREY L SALISBURY
1639 N ALPINE RD SUITE 300
ROCKFORD, IL 61107

15IWCC0759

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

- [ ] 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)

Carl Hanserd
Employee/Petitioner

v.

Taylor Freezer
Employer/Respondent

Case # **12** WC **35267**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Rockford**, on **May 21, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 15, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$33,992.40**; the average weekly wage was **$653.70**.

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

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

Respondent shall be given a credit of **$31,128.57** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$31,128.57**.

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

ORDER

Respondent is ordered to pay TTD at the rate of $435.76 from 3-26-12 through 10-17-12 and then from 10-24-12 through 9-11-13 less a credit for all TTD previously paid.

Respondent is ordered to pay maintenance benefits from 9-12-13 through 5-21-14 at the rate of $435.76 per week.

Respondent is ordered to provide vocational rehabilitation pursuant to Section 8(a).

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.

Richard E Mc — Signature of Arbitrator

May 30, 2014 — Date

ICArbDec19(b)

JUN 5 - 2014

MEMORANDUM OF DECISION OF ARBITRATOR

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner Carl Hanserd worked for Respondent Taylor Freezer as a forklift operator for more than 6 years. Taylor Freezer manufactures ice cream machines. On March 15, 2012 while working, petitioner lifted a pan off a lop-sided skid and felt a pop his right wrist. Petitioner dropped the pan and felt pain in the area of his right wrist and right thumb. Petitioner reported the incident to his lead person. Respondent instructed petitioner to be seen at Physicians Immediate Care for medical treatment. Accident and notice are not in dispute. See Arbitrator's Exhibit 1.

Petitioner was initially seen by Dr. Gander at PIC on 3-19-12. There petitioner complained of right wrist pain over the thumb extensor tendons after lifting a pan at work on 3-15-12. Petitioner complained it hurt to move his right wrist and to flex his thumb across the palm. PX 1. Physical exam findings revealed tenderness to palpation over the right wrist. X-rays taken were normal. Preliminary diagnosis was right DeQuervain's tendonitis. PX 1. When seen for recheck on 3-26-12 petitioner reported pain 7 out of 10 with difficulty gripping- not even a pencil. PX 1. Physical exam revealed positive Finkelstein's on the right. Diagnosis remained the same. PX 1. MRI was ordered on 4-4-12 and physical therapy ensued. In the initial physical therapy evaluation dated 4-6-12, right wrist and right thumb ROM were substantially diminished along with grip strength when compared to the left upper extremity. PX 1. Gripping continued to make his pain worse. PX 1. On 4-14-12, petitioner continued to complain of right wrist pain and difficulty gripping. Physical exam that day revealed tenderness of the CMP joint of the right thumb with decreased strength on the right at 3/5 with flexion, extension, pronation, and supination. Petitioner was examined by Dr. Buzzard on 4-20-12. Dr. Buzzard noted petitioner's MRI revealed moderately severe DeQuervain's tendonitis. PX 1. Petitioner declined an injection at that time. On 4-26-12 Physical Therapy notes revealed limited ROM of the right wrist and thumb. Petitioner's thumb could only be extended to neutral. Grip strength was 5 pounds on the right compared to 80 pounds on the left. Pinch strength was 7 pounds on the right compared to 18.5 pounds on the left. PX 1.

Petitioner sought a second opinion with his family doctor Sheldon Weiss on 4-27-12. PX 1. There it was noted petitioner experienced swelling in his right wrist extensor surface and thumb following work injury with no improvement with conservative care. PX 1. Dr. Weiss referred petitioner to ROA for an orthopedic consultation. PX 1.

Petitioner was seen initially by Dr. Ken Korcek on May 5, 2012. PX 1. Dr. Korcek noted petitioner's injury while lifting a pan and hearing a pop at work on 3-15-12. PX 1. Pain was identified in the palmar side of the right wrist and thumb. Pain was rated 6 out of 10. PX 1. Physical exam revealed limited active ROM of the right wrist and thumb. There was a positive Finkelstein's test. MRI dated 4-11-12 was reviewed. Preliminary diagnosis was right DeQuervain's tenosynovitis due to work related injury. PX 1. A cortisone injection was performed. Work restrictions were issued. Occupational Therapy was ordered on 6-6-12. Slow improvement is noted in the records. PX 1. On 9-17-12 petitioner

discussed a progressive return to work with understanding petitioner would pursue surgery if his symptoms grew worse after an attempt to return to work. PX 1. On 10-15-12 physical exam continued to reveal limited ROM of the right wrist and thumb. There was increased tenderness over the right thumb joint. X-rays of the right thumb showed CMC arthritis. PX 1. Diagnosis at that time was DeQuervain's disease of the right hand and osteoarthritis of the right CMC joint. PX 1. On 10-24-12 petitioner's pain was noted at 7 out of 10 with pain in the radial aspect of his right wrist and thumb. Petitioner was elected to proceed with right wrist surgery in the form of first dorsal compartment release. Regarding petitioner's right thumb, surgical treatment of the CMC joint (fusion) was discussed but declined at that time by petitioner. PX 1. Dr. Korcek performed a right first dorsal compartment (DeQuervain's) release and right wrist mass excisional biopsy on 12-6-12. According to the operative report, the mass was consistent with a retinacular cyst. PX 1.

Following surgery, Petitioner participated in post-operative physical therapy. PX 1. When seen on 12-19-12, petitioner complained of radial right wrist and right thumb pain. Dr. Korcek noted some scar tenderness following surgery with a separate component of thumb CMC/MCP joint arthritis. Sutures were removed and petitioner was fitted with a thumb spica splint. PX 1. Occasional numbness and tingling was noted in the right long, ring, and small fingers. PX 1. On 1-23-13 petitioner rated pain 8 out of 10 with activity. Once again right wrist and thumb ROM was limited. Diagnosis remained DeQuervains and right thumb CMC and MCP arthritis. Meloxicam was refilled and PT was continued. PX 1. On 2-20-13 an EMG was ordered. A home exercise program for right thumb arthritis was commenced. EMG done 4-16-13 showed right CTS and right cubital tunnel syndrome. PX 1. When seen on 4-24-13 physical exam showed limited ROM in the right wrist and thumb. Tinel's sign at the right wrist and elbow were negative. Petitioner opted for splinting concerning his right CTS and right elbow symptoms. PX 1. Conservative treatment was continued following the 6-24-13 and 8-7-13 visits. Physical therapy was completed at the time of the visit on 8-7-12. Eight months post surgery, petitioner continued to complain of right wrist and right thumb pain. Work restrictions were continued. PX 1 and 2. Petitioner's final visit with Dr. Korcek was on 9-11-13. Dr. Korcek diagnosed some residual right wrist and right thumb pain with stiffness. PX 1. Petitioner declined to consider thumb surgery and was told he could follow up as needed with the surgeon for his symptoms. Permanent work restrictions were issued. PX 1 and 2.

Respondent disputes causal connection to any condition of ill-being other than right wrist DeQuervain's syndrome. See Arbitrator's Exhibit 1. Dr. Daniel Nagle, who performed IME on 6-12-12 pursuant to Section 12 of the Act, opined that petitioner irritated his right first dorsal compartment tendons when he lifted the pan on 3-15-12. RX 1.

Respondent denies that petitioner's EMG findings of carpal tunnel syndrome and cubital tunnel syndrome are work related. Respondent further denies that petitioner's arthritis of his right thumb are work related. In support of their denial Respondent offered the opinions of Dr. Soriano and Dr. Atluri.

Dr. Soriano performed an IME at the request of the Respondent on 7-23-13. Dr. Soriano reviewed the medical records and performed a physical exam. RX 2. Tinel's signs on that date at the

wrists and elbows bilaterally were negative. No atrophy was found at the wrists or elbows. Petitioner reported no night time awakening due to wrist or elbow symptoms on the date of the exam. Dr. Soriano opined that while petitioner had a positive EMG for carpal tunnel and cubital tunnel syndrome, that these conditions (which were non-clinical) were not related to the 3-15-12 work injury. RX 2. Dr. Soriano opined that petitioner's job as a fork lift operator did not involve highly repetitive motions to the hand or high impact to the wrist or elbow. Dr. Soriano felt the EMG findings were incidental and age related. RX 2. Dr. Soriano offered no opinions concerning petitioner's DeQuervain's and/or arthritis of his right thumb.

Dr. Atluri performed IME exam at the request of the Respondent on 2-25-14. See RX 3. Dr. Atluri noted petitioner's history of injury to his right wrist and hand on 3-15-12 while lifting pan at work. Dr. Atluri, like Dr. Soriano, noted petitioner developed elbow and hand pain with numbness/tingling after his surgery in December 2012. RX 3. Dr. Atluri's physical exam revealed no tenderness at the ulnar aspect of the elbow. There was no tenderness over the cubital tunnel. The ulnar nerve was stable at the cubital tunnel with a negative's Tinel's. No atrophy was identified in the right hand. There was a negative Tinel's over the carpal tunnel.

Dr. Atluri diagnosed petitioner with right wrist DeQuervain's tenosynovitis status post first extensor compartment release, possible CTS, and mild arthritis of the right thumb. RX 3. Dr. Atluri's diagnosis did not include cubital tunnel syndrome of the right upper extremity. RX 3. Dr. Atluri opined it was possible that petitioner had right CTS but stated his clinical exam was inconsistent with that diagnosis. RX 3. Regarding petitioner's right thumb, Dr. Atluri did document positive physical exam findings and diagnosed mild arthritis, basilar joint of the right thumb. RX 3. Dr. Atluri opined these findings regarding the right thumb were chronic and degenerative in nature and not related to the 3-15-12 work injury. RX 3.

In support of causation, Petitioner relies on the opinions of the treating hand surgeon Dr. Ken Korcek. Dr. Korcek opined petitioner's DeQuervain's disease was causally related to his 3-15-12 work injury in the office note dated 5-5-12. PX 1. Concerning petitioner's right thumb Dr. Korcek opined in his office note of 10-15-12 that petitioner's right thumb CMC arthritis was not directly caused by the 3-15-12 work injury but that the work injury exacerbated it causing persistent to progressive worsening of the underlying right condition. PX 1. Dr. Korcek opined that petitioner's positive EMG findings of right CTS and right cubital tunnel were NOT causally related to the 3-15-12 work injury in his office note dated 9-11-13. PX 1.

After reviewing the records and considering the opinions of the treating and various examining doctors, the Arbitrator finds petitioner sustained his burden of proving his right DeQuervains tenosynovitis and his right thumb CMC/MCP arthritis are causally related to his 3-15-12 work injury. The Arbitrator notes the following in support of this finding. First, all doctors who offered opinions in this matter conclude petitioner's right DeQuervain's tenosynovitis is work related. Furthermore, Respondent stipulated that petitioner's right DeQuervain's was causally related to the 3-15-12 work injury. See Arbitrator's Exhibit 1. Second, no doctor opined that petitioner's right CTS or right cubital tunnel syndrome (if indeed petitioner has such conditions) are causally related to the 3-15-12 work injury.

Regarding petitioner's right thumb, the Arbitrator does not find persuasive Dr. Atluri's opinion that petitioner's right thumb arthritis is strictly degenerative in nature and not causally related to the 3-15-12 injury. It is settled law that an injured worker need only prove a work injury aggravated, exacerbated or made symptomatic a pre-existing condition and need not be the direct cause of an injury in order to be compensable. Petitioner testified he had no previous medical treatment concerning his right thumb before the 3-15-12 injury. Petitioner's testimony on this point was not refuted by Respondent. None of petitioner's medical records revealed any past medical history concerning petitioner's right thumb prior to 3-15-12. Petitioner was symptom free and working without limitations for Respondent until he felt a pop and pain in his right wrist and thumb on 3-15-12 while lifting a pan at work. It is significant to the Arbitrator's finding concerning causation to the right thumb that the initial treating records show petitioner complained about his right wrist and thumb from the outset of his injury. At no time after the 3-15-12 injury did petitioner report to a treating physician that his right thumb symptoms resolved.

While it is true that Dr. Korcek opines the 3-15-12 work injury did not directly cause petitioner's right thumb CMC/MCP arthritis, Dr. Korcek clearly opines the work injury exacerbated the previously asymptomatic arthritis in petitioner's right thumb which caused his right thumb arthritis to progressively persist and worsen. Dr. Korcek placed work restrictions on petitioner in part due to the injury to his right thumb. Those work restrictions, which were not present prior to 3-15-12, were made permanent by the treating doctor on 9-11-13.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found petitioner proved causal connection between his right wrist Dequervain's and right thumb conditions and the 3-15-12 work injury, the Arbitrator further finds all medical treatment rendered on account of the 3-15-12 work injury was reasonable and necessary to treat petitioner's condition of ill being. All bills are to be paid for treatment rendered as contained within Petitioner's Exhibit 1pursuant to the Illinois fee schedule with credit given to Respondent for all bills previously paid.

Respondent paid the medical bills to the various medical providers with the exception of the last visit with Dr. Korcek on 9-11-13 in the amount of $124.00. See PX 1 and PX 4. On that date, petitioner was seen by Dr. Korcek for right wrist and right thumb complaints. The Arbitrator finds this date of service to be related to the 3-15-12 injury. Respondent is ordered to pay this bill pursuant to the Illinois fee schedule.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

During the pendency of medical treatment following the 3-15-12 work injury, Respondent laid petitioner off pursuant to its written policy effective 9-26-12. See RX 4.

Arbitrator's Exhibit 1 shows Respondent stipulated to two periods of TTD from 3-26-12 through 10-17-12 and from 10-24-12- through 8-13-13. Respondent is ordered to pay TTD during this time period with a credit in the amount of $31,128.57 for all TTD paid previously.

Respondent disputes it owes any TTD beyond 8-13-13 on the basis of the opinions of Dr. Soriano and Dr. Atluri.

Respondent further disputes petitioner's claim for maintenance benefits from 9-12-13 through 5-21-14 on the basis of the opinions of their examining doctors.

Dr. Soriano opined that petitioner could return to work without restrictions as of 7-23-13. RX 2. Dr. Atluri's physical exam on 2-25-14 noted no instability at the first extensor compartment. Dr. Atluri's physical exam did not reveal any persistent DeQuervain's extensor tenosynovitis. Dr. Atluri opined petitioner's right wrist DeQuervain's had resolved and that no specific work restrictions were indicated on account of the 3-15-12 work injury. RX 3. Dr. Atluri opined petitioner's right thumb arthritis and possible carpal tunnel syndrome are not work related. RX 3.

Dr. Korcek opined that petitioner's right DeQuervain's tenosynovitis and the exacerbation of his right thumb arthritis were causally related to the injury of 3-15-12. On 9-11-13 Dr. Korcek noted significant pain in petitioner's right wrist and thumb status post DeQuervain's release. Right hand and right thumb ROM were limited due to pain. PX 1. Dr. Korcek specifically opined that petitioner continued to suffer residual pain from DeQuervain's tenosynovitis despite surgical release. PX 1. Dr. Korcek further found petitioner also was experiencing ongoing residual thumb pain and stiffness. Dr Korcek opined that the Dequervain's, superimposed CMC and MCP thumb joint pain, carpal tunnel, and cubital tunnel were all contributing to petitioner's inability to return to full work. PX 1. On 9-11-13 Dr. Korcek placed permanent work restrictions on petitioner of no lifting of any kind > 10 pounds with the right hand and no pinch or grip whatsoever. See PX 2.

The Arbitrator is persuaded by the opinions of Dr. Korcek and adopts those opinions over those offered by Dr. Soriano and Dr. Atluri concerning whether petitioner's condition of ill being from the 3-15-12 injury had resolved as of 8-13-13. The Arbitrator is not persuaded that petitioner's deQuervain's fully resolved as of 8-13-13 thus permitting petitioner to return to work full duty and without restrictions. The Arbitrator notes the following in support of this finding. First, when seen by Dr. Atluri on 2-25-14, petitioner reported inability to fully extend his right thumb. He also reported pain with pinching activities. RX 3. Difficulty with gripping/grasping were noted throughout petitioner's treatment at PIC and later at ROA. Dr. Atluri also noted swelling of the right thumb when compared to his left on physical exam. RX 3. These complaints (whose genesis was the 3-15-12 work injury) and positive physical exam findings show petitioner's DeQuervain's had not fully resolved. Such is the opinion of Dr. Korcek who found permanent residuals post first dorsal compartmental release and need for permanent work restrictions. Second, Dr. Atluri opined he was in agreement with petitioner's treating physician that petitioner had some mild arthritic changes at the carpometacarpal joint of his right thumb. RX 3. Dr. Atluri however did not find the thumb arthritis to be caused or aggravated by the work injury- a finding that has not been adopted by the Arbitrator for the reasons stated above.

The Arbitrator finds petitioner is entitled to TTD from 3-26-12- 10-17-12, and then from 10-24-12-through 9-11-13 less a credit for TTD already paid in the amount of $31,128.57.

The Arbitrator also finds petitioner is entitled to an award of maintenance benefits. Respondent terminated petitioner effective 9-26-12. See RX 4. When petitioner was last seen by Dr. Korcek on 9-11-13 he was released to return to work with permanent restrictions of no lifting > 10 pounds and no pinch or grip. Respondent's job description (offered as RX 5) lists simple grasp, lateral pinch, palmer pinch, and power grasp as specific job functions of a forklift operator. Petitioner cannot perform these tasks within

his work restrictions set by Dr. Korcek. PX 2. Dr. Atluri opined that "this patient's usual work activities do include some exposure to gripping and pinching". RX 3.

Since 9-26-12, Respondent has NOT offered petitioner a light duty job within the restrictions set by Dr. Korcek. Respondent has NOT offered petitioner assistance with job searching nor has Respondent offered vocational rehabilitation. Petitioner testified without contradiction that he has been searching for work on his own since being terminated by Respondent.

The Arbitrator finds petitioner is entitled to an award of maintenance benefits from 9-12-13 through 5-21-14 or 35 and 6/7th's weeks at the rate of $435.76 per week.

O. OTHER: IS PETITIONER ENTITLED TO VOCATIONAL REHABILITATION?

The Arbitrator incorporates by reference thereto the findings set forth above and further finds petitioner is entitled to an award of vocation rehabilitation pursuant to 8(a) of the Act. Ongoing maintenance benefits to be paid by Respondent during the pendency of vocational rehabilitation.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVE PITAK,

Petitioner,

vs.

NO: 09 WC 36785

15IWCC0760

COOK COUNTY SHERIFF'S DEPT.,

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

We affirm and adopt the Arbitrator's determination that the Petitioner sustained accidental injury arising out of and in the course of his employment on August 5, 2009, and that his rhabdomyolysis condition and lumbar pain and radiculopathy are causally related to this accident. However, we find that the Petitioner failed to prove that his complaints of psychological problems are related to the accident at issue.

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It appears that the Petitioner had some problems with his mental acuity during the time he was suffering from acute rhabdomyolysis, as evidenced by his testimony regarding confusion while attempting to drive home from his August 5, 2009 training session. (See Tr. pp. 111-115). However, we do not believe the evidence supports a causal relationship of any ongoing subjective complaints regarding his mental state.

Dr. Kelly testified that he believed that periodic limb movement disorder resulted in sleep deprivation, which then led to Petitioner's subjective complaints regarding such things as his memory, judgment, depth perception, mood swings and irritability. (Px16, pp. 6-7). A sleep study was performed in October, 2011 (Px15), and the report from this study indicated no abnormal leg movements. While Dr. Kelly agreed the study was unremarkable, he believed that there were deficiencies in the sleep study. He found it unusual for someone to have zero leg movements during a sleep study, and that this likely indicated the monitor was not picking up movements, as well as his belief that the medication Petitioner was taking for it resulted in improvement, which was reflected in the sleep study findings. He therefore continued to diagnose a periodic movement disorder. (Px16, pp. 13-15, 35-36).

The Commission finds that the opinion of Section 12 examining neurologist Dr. Rechitsky is more persuasive than that of Dr. Kelly in this regard. (See Rx2). Dr. Kelly testified that his opinion was based, at least in part, on Petitioner having no similar preexisting problems. (Px16, pp. 23-25). Dr. Rechitsky noted Petitioner had previously been diagnosed with restless leg syndrome and symptoms of anxiety depressive ideation, and that these could be the cause of Petitioner's subjective mental complaints. (Rx2, pp. 16-18). The records of Dr. Wilkerson (Px11) indicate diagnoses of insomnia in both 2007 and 2009. His March 18, 2009 report, approximately five months prior to the accident at issue here, indicates Petitioner complained of insomnia, and increased stress in his life with gradual onset of anxiety.

Based on the above, we find that the Petitioner has failed to prove that any periodic limb movement disorder, insomnia and/or mental deficiencies were due to the accident at issue. We also question why a second sleep study was not requested by Dr. Kelly if he felt there were deficiencies in the one performed in October, 2011, in order to verify the existence of a periodic limb movement condition.

While Petitioner sought an award under Section 8(d)(1) of the Act, and Respondent argued that Petitioner was entitled to a percentage of loss of the man as a whole, the Commission finds that a determination of permanency in this case is premature. We find that the Petitioner is instead entitled to vocational rehabilitation, and as such we vacate the permanency awarded by the Arbitrator under Section 8(d)(2) of the Act, and remand this matter back to the Arbitrator for further proceedings consistent with this decision.

Dr. Kelly testified on March 20, 2013 (Px16), and opined that Petitioner would need to maintain treatment via medications and epidurals, and required permanent restrictions: he must stay below moderate to heavy physical activity, and he must avoid working around inmates or in

other situations where that could be dangerous, and where he would need full cognition and physical function. On cross examination, Dr. Kelly added that the Petitioner would also need to be able to change positions as needed due to low back pain, and that he might be able to tolerate light duty, but that such light duty would need to be evaluated to see how it impacted Petitioner's chronic pain. (Px16, pp. 24-26, 36-37).

According to the medical records in evidence, the Petitioner most recently treated with Dr. Mehta at Premier Pain Specialists, on referral from Dr. Kelly. While the Arbitrator notes that Dr. Mehta, Petitioner's most recent physician and a pain specialist, instituted work restrictions, the Commission could not find any evidence of work restrictions in his records (Px17). The only reference we find to work in Dr. Mehta's records is his reference to the fact that Petitioner was not working during the time he treated with Dr. Mehta.

Dr. Rechitsky evaluated the Petitioner on June 22, 2011. (Rx2). He testified on February 24, 2014, that, barring further evaluation with regard to whether Petitioner had an underlying condition that predisposed him to rhabdomyolysis, and the determination of the level of risk of reoccurrence, he was limited to sedentary duty based on the life threatening nature of the condition. He recommended an evaluation with neuromuscular physician Dr. Meriggioli. (Rx2, pp. 53-56).

The Petitioner has proven a partial incapacity which prevents him from returning to his job with Respondent. The parties stipulated that at the time of his accident, Petitioner was earning $1,123.96 per week at the time of his injury. While there was no guarantee that Petitioner would have completed training and obtained a permanent job with the Respondent, his accidental injury resulted in an inability to complete the training. We agree with the Arbitrator's findings that all of the doctors in this case generally agree that Petitioner is unable to return to work in law enforcement or any other physically strenuous job.

Petitioner was evaluated by rehabilitation counselor Steven Blumenthal, who issued his report on December 26, 2012. Petitioner was a high school graduate, and Petitioner reported completing 59 college credit hours. Petitioner also reported receiving "A" and "B" grades at both levels. Petitioner also reported the ability to type, and that he had completed basic training in Microsoft Office and Excel. Mr. Blumenthal reports that Petitioner has worked as an unarmed security guard earning $12.00 per hour, worked in inventory control for a welding company ($18.00 per hour) and at an assisted living facility ($14.00 per hour). He also has worked as a server/bartender and as a construction laborer. Petitioner had completed almost 60 semester credit hours of college work. Relying on the opinions of Dr. Kelly (Petitioner cannot return to work as a correctional officer), Dr. Rechitsky (Petitioner is limited to sedentary duty) and Dr. Konowitz (restrictions should be based on the December 14, 2010 functional capacity evaluation), Mr. Blumenthal's opinion was that Petitioner should initially undergo vocational testing to determine his interests, aptitudes and skills in order to determine if he needs any formal retraining, or if he was ready for direct job placement assistance. (Px18).

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Petitioner testified that he was working for AMC Theaters earning $8.25 per hour on a part time basis. The Commission believes that vocational assistance could increase his earning capacity. He is still at a very early point in his work life at age 26, and we do not believe that a minimum wage, part time job is the best he is capable of at this point. Petitioner's Exhibit 7 contains Petitioner's job search records. While the records reflect a relatively extensive attempt to find employment, we find that his self-directed job search was not directed and targeted as well as it could have been with professional assistance.

Mr. Blumenthal's records include January and February, 2013, letters from Petitioner's attorney to Respondent requesting vocational rehabilitation pursuant to Mr. Blumenthal's recommendations. (Px18). We find that Mr. Blumenthal, pursuant to Section 7110.10 of the Commission rules, has provided an initial recommendation in determining a plan or program regarding the rehabilitation required to return the Petitioner to suitable employment. We do not believe that the job he held at the time of the arbitration hearing with AMC Theaters has been proven to be suitable employment given his age, education and experience. At the same time, it should be noted that it appears that Mr. Blumenthal's opinion may have been, in part, based on Petitioner's subjective complaints. Any vocational rehabilitation plan, in order to be objectively valid, should only consider physical restrictions that are outlined by a valid medical provider. It appears to the Commission that any physical work restrictions that would be applicable within the context of vocational rehabilitation should be determined on an updated basis. Work restrictions based solely on a claimant's subjective complaints without medical support are not appropriate.

Whether it is determined that Petitioner requires formal retraining or direct job placement assistance, either way, we believe that vocational assistance is likely to increase his earning capacity significantly above the wage he was earning at the time of arbitration. As a result of this finding, we further find that the Petitioner is entitled to an additional period of maintenance that was not awarded by the Arbitrator, from October 25, 2013 through the March 6, 2014 arbitration hearing date. During this additional maintenance period, for the times that Petitioner was employed by AMC Theaters, the monetary maintenance awarded should be determined in the same fashion that a wage differential would have been determined in that period.

The Commission notes that the Petitioner's Petition for Review indicates an issue regarding "evidentiary rulings". As Petitioner's statement of exceptions does not describe the evidentiary rulings he takes issue with, we have no way of addressing this issue. The Commission also specifically affirms and adopts the Arbitrator's denial of penalties and attorney fees, as Respondent had a reasonable basis, based on the totality of the evidence, to defend itself on the basis of accident and causation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the permanency award made by the Arbitrator is vacated, and that Petitioner is entitled to vocational rehabilitation and a further award of maintenance and/or temporary partial disability, as described above.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $749.30 per week for a period of 189 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $749.30 per week for a period of 31-1/7 weeks, that being the period of maintenance for work under §8(a) of the Act, and this award in no instance shall be a bar to a further hearing and determination of a further amount of maintenance, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner either maintenance for work under §8(a) of the Act, or temporary partial disability under §8(a) of the Act, from October 25, 2013 to March 14, 2014, a period of 20-1/7 weeks; Petitioner is entitled to maintenance in this period for any dates he was not working, and is entitled to temporary partial disability for any dates he was working.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable, necessary and causally related medical expenses incurred by Petitioner, pursuant to §§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.

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.

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

DATED: OCT - 8 2015
TJT: pvc
O 08/11/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PITAK, STEVE
Employee/Petitioner

Case# **09WC036785**

COOK COUNTY SHERIFF'S DEPARTMENT
Employer/Respondent

15IWCC0760

On 5/5/2014, an arbitration decision on this case 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:

0293 KATZ FRIEDMAN EAGLE ET AL
FRANK J BERTUCA
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0132 ASSISTANT STATE'S ATTORNEY OF COOK COUNTY

CYNTHIA M ASHFORD-HOLLIS ASA
500 RICHARD J DALEY CENTER
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

15IWCC0760

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Steve Pitak
Employee/Petitioner

v.

Case # **09** WC **36785**

Consolidated cases: _____

Cook County Sheriff's Department
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the City of **Chicago**, on **March 6, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 5, 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 **$58,445.92**; the average weekly wage was **$1,123.96**.

On the date of accident, Petitioner was **26** years of age, ***single*** with **1** dependent child.

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $749.30/week for 189 weeks from August 6, 2009 through March 20, 2013 pursuant to Section 8(b) of the Act.

Respondent shall pay Petitioner $749.30/week for 31 1/7 weeks from March 21, 2013 through October 24, 2013 for maintenance during this period pursuant to Section 8(a) of the Act.

Respondent shall pay Petitioner the reasonable, necessary and causally related medical expenses incurred pursuant to Sections 8 and 8.2 of the Act.

Respondent shall pay Petitioner $664.72 per week for 50 weeks in that Petitioner sustained 10% loss of use of a person as a whole pursuant to Section 8(d)(2) of the Act.

Petitioner's request for penalties and fees under the Act 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.

Carolyn Doherty

Signature of Arbitrator

5/5/14

Date

MAY - 5 2014

FINDINGS OF FACT

At trial, the 26 year old Petitioner alleges he sustained accidental injuries resulting from his attendance at Respondent's sheriff's training academy from 8/3/09 through 8/5/09. Specifically, Petitioner alleges that he was required to perform heavy physical exercise and activity, both scheduled and punitively imposed, with little to no breaks for hydration. As a result, Petitioner alleges he that developed rhabdomyolysis and that he continues to suffer from its sequelae. Respondent disputes that Petitioner sustained a work related accident. ARB EX 1.

As his first witness, Petitioner called Officer Rodriguez to testify pursuant to subpoena in Petitioner's case. Officer Rodriguez testified that he was hired by Respondent on 8/3/09 pursuant to previously started paper work. He was hired at a starting gross salary of $45,000 based on the pay scale contained in the collective bargaining agreement at PX 19. The witness testified that he is paid per the grade levels in the agreement and does not know his current pay level. However, he also testified that he is at the C1 pay grade level. Each year on his hiring anniversary he moves up a step on the pay scale.

Officer Rodriguez testified that as a cadet he attended a sheriff's training institute which he likened to military boot camp. The recruits at the training institute are to follow the orders of ranking officers. The witness further testified that he attended army basic training in 2005 and that he participated in physical fitness activities at basic training. He further testified that if the orders at basic training were not followed discipline would follow. The witness was in good physical shape when he went to sheriff's training as a cadet in 2009. Officer Rodriguez testified that if a cadet failed to follow orders at training, all of the cadets in the program would share in the punishment and perform additionally ordered training exercises.

Officer Rodriguez testified that his first day at the training camp was 8/3/09. He testified that he completed paper work on that day and does not recall any physical activities performed on the first day of camp. He does not recall any physical or verbal reprimands from the supervisors on that day. He testified that the recruits performed only classroom activities on that day including orientation and paperwork. Finally, he testified that on 8/3/09, he recalls receiving the camp rules on uniform requirements but does not recall any reprimands physical or otherwise attached to a uniform violation.

Officer Rodriguez testified that on 8/4/09 he again performed classroom work. The witness was shown PX 5B which indicates the physical activity and exercise was performed on that day at camp. However, the witness did not recall performing those activities. He did not recall performing physical exercise or activity during the classroom breaks on that day. Officer Rodriguez testified that on the third day of camp, 8/5/09, he went to camp wearing the required recruit uniform of long pants and long sleeves but does not recall changing into any work out attire. He testified that the recruits toured the jail on 8/5/09 and that he used stairs during the tour but again does not recall any training exercises that day.

The Arbitrator notes that during his confusing testimony, Officer Rodriguez agreed that he either performed or observed recruits doing pushups while at camp and that he noticed other recruits at the 3 day camp struggling to keep up but he did not specifically testify to having noticed Petitioner while at camp.

Petitioner testified that he was hired in 2009 and that as part of his hiring he was to attend training camp in August 2009. Petitioner testified that he was required to get a physical clearance from his own doctor, Dr. Wilkerson, before camp and that he was cleared physically to attend the training at the academy.

Petitioner testified that he had no health problems before he went to the academy. PX 1 is a list of physical activities Petitioner was required to perform at the camp. The document requires the doctor to certify his examination of Petitioner and that Petitioner is capable of participating in "... the training process, consisting of various strenuous exercises." PX 1. The document advises the doctor that the Petitioner will be participating in "physical training daily." PX 1. Petitioner was cleared to perform those activities and he turned the document into the academy. PX 1. Petitioner testified that he did not perform any strenuous physical activity between his physical and the start of camp and that he had no low back pain, bilateral thigh pain, blood in his urine, ongoing anxiety or depression or mental clarity problems prior to his attendance at the academy. Petitioner testified that prior to the camp he was physically active and that he participated in baseball, soccer, bowling, track and football.

Petitioner testified that on 8/3/09 he reported to training in the required uniform and carrying two suitcases and a duffle bag of required equipment on the warm humid summer day. Petitioner paints a vastly different picture of the training camp activities of 8/3, 8/4 and 8/5/09 than the picture offered by Officer Rodriguez. Petitioner testified that on 8/3/09 the approximately 30 recruits were lined up and approached aggressively by the instructors for an inspection of uniforms and general appearance. Petitioner testified that the instructors aggressively explained the camp rules and requirements on appearance. As an example of the aggression he experienced, Petitioner testified that all of the recruits were reprimanded due to one recruit's facial hair. Specifically, Petitioner testified that all of the recruits had to take their bags around the side of the building to do squats, pushups and mountain climbers until the point was sufficiently made. Petitioner further testified that on 8/3/09, throughout the day recruits were directed to go outside to do physical activities sometimes as a group and other times as individuals. Petitioner testified that he personally performed these exercises and that the instructors were not "letting off." He testified that he was tired and that he noticed other recruits struggling to complete the assigned exercises. Petitioner agreed that he received classroom instruction on 8/3/09. However, he further testified that there was also classroom discipline in place which included all of the recruits holding the roman chair (squat) position because one recruit yawned in class. Petitioner further testified that on 8/3/09 he was singled out for not correctly performing the turn and face maneuvers so he was ordered to do mountain climbers with one other recruit. He testified that he was allowed 2 minutes to get a drink of water which he testified was not enough time to sufficiently hydrate for that work out.

Petitioner testified that he had never done exercises to this magnitude prior to attending the academy. Petitioner testified that he had pain in his legs, arms and low back from the excessive exercises which also included pushups at the instructor's slow count. Petitioner testified that this type of exercise was ordered on all three camp days and that the discipline exercises were in addition to the scheduled morning exercises. Petitioner testified that he understood part of the goal of the academy was to increase fitness level but he did not believe the discipline exercises were included in the program. As part of the academy curriculum Petitioner was given PX 5 which lists the training dates of 8/3 through 8/7/09 and the scheduled events on those dates. No physical activity was scheduled for 8/3/09 and PX 5A indicates that no physical fitness was conducted. However, mountain climbers and crunches were listed as "demonstrated." PX 5A.

Petitioner testified that on 8/4 and 8/5/09, roll call was at 8 am and was preceded by physical training from 7 to 8 am. He further testified that in between the scheduled classroom coursework he was ordered to do pushups. During the physical training which took place on 8/4/09 Petitioner performed stretching, side straddle hops, pushups squat thrusts and leg lifts as documented "completed" on PX 5B. Petitioner

disagrees with the portions of PX 5B or PX 5C which indicate that indicate that he did not perform physical activities on 8/4 or 8/5/09 or that no such activity between 7 and 8 am was scheduled or required. Petitioner testified that on 8/4 he wore a fitness uniform for the exercise and then changed later into his dress uniform. He testified that any punishment physical activity he was forced to do was done in the dress uniform.

Petitioner testified that on the morning of 8/5/09 the temperature outside was in the low 80s. He testified that he was sore but showed up for training in his dress uniform. Petitioner testified that a jail tour was on schedule for that day. He testified that he performed physical training, marching, stretching and pushups on the sidewalk area by the jail. Petitioner testified that he entered the jail and went to the library where the instructors were administering punishment from the day before. He testified that several recruits had to do pushups with a book on the back of their necks. Petitioner testified that during the jail tour the recruits were required to walk 5 to 6 flights of steps at a rigorous pace required by the instructor and that he was physically worn out from the first two days of camp. Petitioner testified that at the end of the day the recruits went back outside to perform march and turn exercises. PX 5C indicates "no physical fitness conducted" and "recruit orientation at Division 5 with Executive Director Godinez and Superintendent Desadier." PX 5 C.

Petitioner testified that after camp on 8/5/09 he felt weak and confused and that he had pain in his back and legs. Petitioner testified that due to his confused and weakened condition he tried to drive home to Arlington Heights but ended up driving to Indiana by mistake. Petitioner testified that he ultimately made it home to Arlington Heights and noticed that he had difficulty climbing the stairs to his second floor apartment. Petitioner testified that he had chills and nausea. He further testified that he had blood in his urine which he had never experienced.

Petitioner testified that he went to St. Alexis medical center that day and described the events that led up to his condition. He advised of the heat, no water and excessive exercise that led to his back pain, chills, nausea and testicular pain. Petitioner was admitted to the hospital.

On cross exam, Petitioner testified that in his opinion, the required rigorous training and a lack of permissible adequate hydration caused his condition. Petitioner testified that on 8/3/09 he participated in 2 to 2.5 hrs of exercise, 2 hours on 8/4/09 and 4 hours of rigorous training exercises on 8/5/09. He further testified that he was only allowed one water break on 8/5/09 which occurred during lunch and that he received one Styrofoam cup of water. He further testified that after camp on 8/5/09, he was on the road driving for 2 hours with a water bottle in the car. Petitioner testified that he worked out 3 days per week before the academy engaging in elliptical training, weight lifting and sports.

Respondent called Officer Dawn Jimenez to testify in its case. Officer Jimenez currently works for Respondent as a drill instructor at the jail. She was a cadet at the training camp in 2009. Officer Jimenez testified that she brought all of her required equipment to camp on 8/3/09 and checked into the camp located in the gym at Moraine Valley Community College. She further testified that the gym was air conditioned and that no exercise was performed on 8/3/09. She reviewed PX 5 and testified that on 8/3/09, she participated in roll call, administrative time, and classroom instruction/orientation.

Officer Jimenez testified that on 8/4/09 she attended morning roll call. She further testified that she recalls watching but not participating in demonstrated physical training and that the remainder of 8/4/09

consisted of more orientation. When asked again if she performed the 45 minutes of stretches on the schedule for 8/4/09 at PX 5b she said that she did perform the stretches. PX 5B also indicates that officer Jimenez (fka Okonski) "completed" physical exercises including side straddle hops, push-ups, squat thrusts, and leg lifts on 8/4/09. PX 5B.

Officer Jimenez testified that on 8/5/09, roll call took place at the jail building. She did not recall any physical training taking place on 8/5/09. She testified that the cadets went to the library to complete more forms. Officer Jimenez testified that she did not recall any "corrective" training during August 3-5 2009 but agreed that corrective training was put upon the entire group based on the mistake of one individual cadet. She further testified that the cadets were always given a 10 minute break every hour to drink water and that water was required. Finally, she testified that she does not recall any physical exercises performed by the recruits on 8/3 through 8/5/09. She testified that organized physical stretching and all exercises started the second week of camp after the orientation portion was completed.

In the emergency room on 8/5/09, Petitioner was given two liters of saline. A urinalysis confirmed blood in his urine and a CPK level over 100,000. (PX 10) The next day, August 6, 2009, while still in the hospital, Petitioner had a phone conversation with Deputy Malave. He called his Supervisors to report his hospitalization and absence on August 7 and August 10, 2009. (PX 5) He advised the Deputy he had been hospitalized and was uncertain when he would be able to return to training. He was released from the hospital on August 11, 2009 and provided a copy of the off work slip to Respondent. (PX 4) Pursuant to the hospital's recommendation, he followed up with his primary care physician, Dr. Wilkerson, who recommended he remain off work, undergo CPK monitoring, a course of physical therapy, and medication. At that time, he did not have any group insurance and was not able to follow through with Dr. Wilkerson's recommendations. He completed an accident report with Supervisors at the Sherriff's Department dated September 2, 2009 and noted in the report that as a result of rigorous training outdoors in extreme heat and being deprived of the ability to drink water, he sustained injuries. PX 6.

Petitioner was fired by Respondent in October, 2009. He remained under Dr. Wilkerson's care. Dr. Wilkerson recommended facilities for physical therapy which would not treat him without insurance. He last saw Dr. Wilkerson on October 27, 2009, but was unable to see him after that due to lack of payment of bills. (PX 11)

Petitioner was next seen by Dr. Montella on February 18, 2010 and provided a history of being injured in the Sheriff's Academy. Dr. Montella's records indicate he recommended an EMG, medications, including Neurontin, Mobic, Vicodin and Ambien for sleep, along with physical therapy, which was provided at Total Rehab beginning March 15, 2010. An EMG completed March 18, 2010 did not reveal abnormalities. (PX 12) An MRI was completed on June 14, 2010. Petitioner was no longer able to continue with Dr. Montella or complete the treatment recommendations due to unpaid bills and lack of insurance. At no time did Dr. Montella release him to his full duties as a Corrections Officer.

On August 20, 2010, Petitioner was seen by Dr. Sclamberg and provided a history of being injured at the Sheriff's Academy. Dr. Sclamberg recommended Petitioner to complete the physical therapy and also obtain a neurology consultation. A Functional Capacity Evaluation was completed on August 15, 2010, noting Petitioner was not able to return to his regular duties as a Corrections Officer and that it was a valid test. (PX 14) Dr. Sclamberg did not release him to his full duties as a Corrections Officer.

On February 27, 2011, Petitioner was examined by Dr. Kelly, a neurologist, who recommended a sleep study and a further course of treatment with medication and epidural steroid injections for his low back. Petitioner was experiencing a lot of waking up at night, which he did not experience before August 3, 2009. He began to experience constipation from the medications following a GI consultation where he was prescribed Nexium for acid reflux. (PX 15) On August 1, 2011, Dr. Kelly performed an EMG, which revealed bilateral chronic, left greater than right, L5-S1 radiculopathy.

On November 30, 2012, Petitioner was interviewed by Vocational Specialist, Mr. Steven Blumenthal, at his attorney's request. Petitioner's highest level of education is some college with no degree. Petitioner completed 59 semester credit hours of class work at community college. Petitioner can type and has taken introduction computer operation courses. PX 18. He reported being an above average student in high school and at college. Prior to being employed with the Sherriff's Department, he was employed by Securitas Security Services where he performed unarmed Security Guard work. He has worked in inventory control before attending college. Mr. Blumenthal recommended additional testing and vocational evaluation to determine direct job placement or retraining options to improve Petitioner's employability and/or earning capacity. PX 18.

Dr. Kelly referred Petitioner to Premier Pain Specialists for pain management treatment in February, 2013. Petitioner remains under the care of Premier Pain Specialists. He was prescribed Mirapex, Percocet and work restrictions. He has also had injections in his low back. He last received treatment on February 12, 2014 and is scheduled to see them again. (PX 17)

On March 20, 2013, Dr. Wayne Kelly testified via an evidence deposition. (PX 16) Dr. Kelly is a board certified neurologist with fellowship training in neurophysiology, including EMGs and sleep disorders and has treated patients with rhabdomyolysis. He confirmed Petitioner provided a history of very heavy physical demands with a boot camp type preparation for physical activities as an officer, thereafter developing very severe achiness all over with blood in his urine. He was not aware of any pre-existing problems or symptoms prior to the injury on the job. Following his exam of Petitioner and his review of the medical records and the history taken from Petitioner, Dr. Kelly diagnosed "... as a result of his actual injury on the job, he sustained an acute rhabdomyolysis with subsequent consequences, as well as a lumbosacral radiculopathy with persistent ongoing symptoms from that time on, as well as secondary development of periodic limb movement disorder with consequential sleep impairment that effected his cognition and general cognitive functioning." PX 16, p. 10. In defining rhabdomyolysis, Dr. Kelly testified: "it is where the cells are being exerted and asked to expend enough energy that does not meet the energy—the ability for the cells to supply that energy, and they begin to actually get injured as a result, whatever the causes of it may be. And in his case it was from the physical demand." PX 16, p. 11. The included consequences are potential kidney failure, permanent injury to the muscles with persistent chronic pain associated with it, swelling with secondary injury to nerves and because of the nerve injury other consequences develop such as periodic limb movement disorder. PX 16, p. 11.

Dr. Kelly performed low back epidural injections followed by sleep studies. Dr. Kelly prescribed Mirapex to treat the diagnosed periodic limb movement disorder due to the underlying nerve injury and testified that Petitioner's condition improved as a result of the Mirapex. PX 16, p. 14. Dr. Kelly further noted an EMG he administered on August 1, 2011 revealed bilateral chronic, left greater than right, L5-S1 radiculopathy, which was consistent with his physical examination and diagnosis. PX 16, p. 16. Dr. Kelly recommended continued use of the Mirapex and Percocet for pain management and repeat periodic

lumbosacral injections to manage the radicular pain. PX 16, p. 16. Dr. Kelly did not release Petitioner to return to full duty work as a corrections officer and opined that Petitioner would never be able to perform full duties of a corrections officer due to chronic pain and that heavier type work would worsen his symptoms. PX 16, p. 17.

Dr. Kelly reviewed the St. Alexius Medical Center records from August 5, 2009 confirming that Petitioner was noted to have urine dark in color and that hemoglobin was present under evaluation. It was also noted that throughout his hospital stay, abnormalities were noted in the urinalysis. He explained that myoglobin is the product of muscle breakdown which was dramatically elevated, including a markedly elevated CPK (muscle enzyme) level, further adding to the breakdown of rhabdomyolysis of the muscles as a conclusion, acutely. Dr. Kelly noted Petitioner's rhabdomyolysis had to have been an acute process. If it was chronic, it would have killed him quickly because of renal failure. Dr. Kelly confirmed his diagnosis was acute process of rhabdomyolysis post-exertionally from excessive exertional activity, lumbosacral radiculopathy, neuropathic injury with persistent chronic neuropathic pain and secondary consequences of periodic limb movement disorder and chronic sleep impairment. PX 16, p. 22,30. He confirmed these conditions were causally related to his physical training activities with the Sherriff's Academy in August, 2009 and noted no alternative explanation of a prior medical condition or systemic illness. PX 16, p. 23-24. When asked if these conditions had reached a stage of MMI, Dr. Kelly testified, "Yes. He had pretty extensive non-surgical aggressive intervention. And fairly early in his course of treatment he had reached maximum medical improvement, but would need to maintain that treatment in order to maintain the benefits in the long run." PX 16, p. 24. In order to maintain, Dr. Kelly recommended "...continued use of prescription Mirapex to control the secondary permanent periodic limb movement disorder. To remain on pain medication to help control this baseline pain management, as well as the need for periodic lumbosacral epidural injections as the symptoms become exacerbated and the prior injections wear off." PX 16, p. 24. Finally, Dr. Kelly opined that Petitioner has permanent work restrictions including no work around inmates or in dangerous situations where he has to be fully intact cognitively and fully functional physically, and no moderate to heavy physical activity as that will worsen the underlying radicular symptoms and his chronic pain. PX 16, p. 25. He testified that Petitioner may be able to tolerate light duty. PX 16, p. 36. If he was given a sedentary job he would have to have the ability to change positions frequently due to his low back condition. PX 16, p. 37. He is further restricted due to his need for narcotic pain medication, Percocet, taken during the day. PX 16, p. 38.

Dr. Igor Rechitsky evaluated Petitioner at Respondent's request on June 22, 2011. Dr. Rechitsky noted Petitioner provided a history of an episode of acute rhabdomyolysis in August, 2090 following vigorous activity and conditions of extreme heat and water deprivation while training for a position with Respondent. In the report of June 22, 2011, Dr. Rechitsky noted Petitioner had an episode of severe strenuous exercise which induced rhabdomyolysis and reports residual muscular cramping, generalized fatigue and myalgia, which represents a well-known spectrum of symptoms in patients who suffer one or several episodes of rhabdomyolysis. Persistent symptoms of myopathy with objective weakness and bilateral quadriceps two years after the episode of acute rhabdomyolysis raises a concern about such complications as super imposed auto-immune anti-inflammatory myopathy, he noted. Dr. Rechitsky noted in his report "In my opinion, patient is not fit for any professional duties that require intense and prolonged muscular activities, such as running, repetitive lifting, carrying, physical training, swimming, etc., since he is at risk for a repetitive episode of rhabdomyolysis, which could be a potentially life threatening condition. From the standpoint of occupational description requiring such strenuous endurance activities, his disabilities should be viewed as severe." Dr. Rechitsky confirmed the causal

relationship between the Sherriff's Academy exercises and the rhabdomyolysis. Regarding continuous low back symptomatology, he noted that it could be a symptom of the same spectrum (myalgia) and that the minimal multi-level degenerative changes detected by and MRI scan of the lumbar spine would be less likely to account for persistent lumbar lumbalgia.

Dr. Rechitsky testified on February 24, 2014. (RX 1) He is board certified in neurology. Dr. Rechitsky noted that rhabdomyolysis does not appear immediately, but evolves over the course of hours or a few days to develop full blown manifestation with fever, muscle pain, acute weakness, involvement of the kidneys and discoloration of urine. RX 1, p. 19. He noted symptomatology may also include encephalopathy or a change in awareness and alertness. He agreed Petitioner's complaint of mental confusion on August 5, 2009 was consistent with developing rhabdomyolysis. RX 1, p. 31. He stated that the CPK levels showed a massive destruction of muscle fibers, with normal levels below 300 and Petitioner's levels in excess of 100,000 and confirmed this was life threatening. RX 1, p. 29. He confirmed Petitioner gave him accurate responses on physical examination and noted no inconsistent or exaggerated responses. He confirmed that anxiety, depression and fatigue were likely consequences from the severe episode of rhabdomyolysis and confirmed that Petitioner may have residual symptoms of muscle aches and pains including in the lumbar area. However, in his opinion, Petitioner did not sustain a lumbar disc injury with radiculopathy as a result of his exercises or activity at the training camp based on his reading of the MRI. RX 1, p. 43.

Dr. Rechitsky agreed that the August 1, 2011 EMG report noted a diagnosis of L5-S1 radiculopathy based on chronic abnormalities and needle EMG of L5-S1 muscles and agreed this was the first time he had seen this study, as it was conducted after the date of his examination. RX 1, p. 47. He confirmed Petitioner's low back complaints began with his August 5, 2009 hospitalization and continued throughout Petitioner's care with Drs. Wilkerson, Montella and Sclamberg. RX 1, p. 48. Dr. Rechitsky noted it would be consistent for Petitioner, who had suffered a recent, nearly fatal condition, to have adjustment disorder with anxiety and depression. RX 1, p. 52. Dr. Rechitsky noted that the care and treatment rendered by all providers up to the date of his examination is reasonable and appropriate and in addition thereto, recommended a neuromuscular consultation at a tertiary care institution to be certain there is no underlying condition that predisposes Petitioner to a second episode of rhabdomyolysis, as the risk of recurrence may be quite high. RX 1, p. 53. Dr. Rechitsky opined that a second episode may kill Petitioner. RX 1, p. 55. Dr. Rechitsky opined that Petitioner could never return to the duties of a law enforcement officer and should be limited to sedentary office work. RX 1, p. 55-56.

Dr. Rechitsky reviewed the 8/4/09 training schedule at PX 5B and noted that the activity of physical training could be strenuous. RX 1, p. 67. Dr. Rechitsky opined that Petitioner's rhabdomyolysis, myalgia, muscular cramping, weakness, and exercise intolerance are related to the training camp exercises. RX 1.

Petitioner's attorney requested vocational rehabilitation from Respondent in February 2013 but it was not provided. Petitioner began a self-directed job search and his job search records were admitted as PX 7. On October 24, 2013, Petitioner was hired by AMC Movie Theaters where he earned $8.25 per hour, averaging 16 to 17 hours per week. Petitioner greets guests, answers phones and does minor cleaning. His paycheck stubs are noted as PX 8.

After his shift, he notices soreness and is very tired with respect to his legs and back after approximately four hours of work, which involves a lot of standing. Petitioner testified that he continues to experience

chronic pain in his low back, cramping and soreness in his quadriceps, greater on the left. His sleep disturbance has improved with Mirapex, which he continues to take and his acid reflux has improved with Nexium. He also continues to have anxiety symptomatology and depression. It is his understanding that he is prohibited by his doctor from returning to the activity level and sports he previously enjoyed and is at risk for rhabdomyolysis recurrence. Petitioner testified that his fatigue symptoms impair his ability to play with his four year old son.

CONCLUSIONS OF LAW

The foregoing findings of fact are incorporated into the following conclusions of law.

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

Based on the foregoing and on the record as a whole, the Arbitrator finds that Petitioner sustained an accident on August 5, 2009 arising out of and in the course of his employment with Respondent. This conclusion is based upon Petitioner's credible testimony regarding strenuous exercise as buttressed by PX 5 and PX 1 documenting the requirement of strenuous exercise to be performed at the training camp. The Arbitrator specifically points to PX 5B which documents physical exercises including side straddle hops, push-ups, squat thrusts, leg lifts and 45 minutes of stretching performed by the recruits including Petitioner on 8/4/09. The Arbitrator finds these documents more clearly support Petitioner's testimony on the issue of performed strenuous activity than that of Officers' Rodriguez and Jimenez and more logically support Petitioner's acute diagnosis.

The finding of accident is further supported by the chain of events immediately preceding Petitioner's hospital visit on 8/5/09 when he was diagnosed with a life threatening case of rhabdomyolysis. The Arbitrator notes that Petitioner's history of strenuous exercises and activity immediately prior to his ER visit as reported to his treating physicians is consistent throughout his care. Further, the Arbitrator finds it significant that Petitioner had no prior health problems or symptoms prior to attending the training camp and that his diagnosis was of rhabdomyolysis was labeled acute by Drs. Kelly and Rechitsky in that it developed within hours or a few days after the strenuous activity. Accordingly, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of his employment for Respondent on 8/5/09.

Petitioner testified that he called his supervisors from the hospital to report his absence from training camp as of 8/7/09. He completed an accident report with Supervisors at the Sheriff's Department dated September 2, 2009 and noted in the report that as a result of rigorous training outdoors in extreme heat and being deprived of the ability to drink water, he sustained injuries. PX 6. Accordingly, the Arbitrator finds that Petitioner provided proper and timely notice of accident to Respondent.

Petitioner's treating physicians and Dr. Rechitsky all agree that Petitioner sustained acute rhabdomyolysis as a result of his training exercises and that Petitioner developed secondary consequences of periodic limb movement disorder and chronic sleep impairment. Petitioner also immediately and consistently complained of low back pain and radiculopathy since the accident as documented in his medical records,

confirmed by EMG and labeled causally related by Dr. Kelly. Based on the foregoing and on the finding of accident, the Arbitrator further finds causal connection for Petitioner's condition of ill-being and the accident of 8/5/09.

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

Respondent's dispute on the issue of medical expenses was based on liability. ARB EX 1. Accordingly, based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred by Petitioner in the care and treatment of his causally related conditions pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any. PX 9.

K. What temporary benefits are in dispute? TTD/Maintenance

Respondent's dispute on the issue of TTD and maintenance was based on liability. ARB EX 1. Based upon the Arbitrator's findings of accident and causal connection, the Arbitrator further finds Respondent shall pay temporary total disability benefits in the amount of $749.30 per week for 189 weeks from August 6, 2009 through March 20, 2013 pursuant to Section 8(b) of the Act. Following Dr. Kelly's March 20, 2013 deposition in which he provided permanent light duty restrictions, the Arbitrator finds Petitioner eligible for maintenance during his subsequent unassisted and unrebutted job search. PX 7. Based upon the above, the Arbitrator awards Petitioner maintenance pursuant to Section 8(a) of the Act in the amount of $749.30 per week for 31 1/7 weeks from March 21, 2013 through October 24, 2013. Respondent shall receive credit for amounts paid, if any.

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

The Arbitrator notes that Petitioner placed nature and extent at issue at trial. ARB EX 1. Petitioner did not proceed to trial on an interim request for additional vocational benefits. The Arbitrator further notes that Petitioner specifically requested a wage differential award under Section 8(d)(1) of the Act. Respondent's dispute on the issue of nature and extent is again based on liability.

The Arbitrator notes that Petitioner has established that his injury prevents him from returning to his job with Respondent. Specifically, the Arbitrator notes that all doctors agree Petitioner is unable to ever return to work in law enforcement or to any physically strenuous heavy job due to the likely chance of rhabdomyolysis recurrence. However, the Arbitrator finds that the record is devoid of sufficient evidence to support a finding that Petitioner's condition of rhabdomyolysis, its sequelae and low back radiculopathy has resulted in a permanent earnings impairment.

In so finding, the Arbitrator notes that Petitioner was released by Dr. Kelly with permanent light duty restrictions and the ability to work a sedentary job if allowed to change positions frequently due to his low back condition. PX 16, p. 37. Mr. Blumenthal's analysis was preliminary as it was performed prior to Dr. Kelly's release with restrictions. Mr. Blumenthal did not provide an opinion on Petitioner's employability or earning capacity. However, he noted that Petitioner completed 59 semester credit hours of class work at a community college, that Petitioner can type and has taken introduction computer operation courses. PX 18. He noted Petitioner's report of being an above average student in high school

and at college. Prior to being employed with the Sherriff's Department, Petitioner was employed by Securitas Security Services where he performed unarmed Security Guard work. Petitioner has experience working in inventory control. Purportedly using these skills, Petitioner testified that he performed a self-directed job search (PX 7) which resulted in his obtaining his current movie theatre job for $8.25 per hour. Based on the Arbitrator's observations of Petitioner at trial as well as the evidence including Petitioner's prior work experience and skills, his college course work, and his young age, the Arbitrator finds that Petitioner has failed to show a permanent earning impairment so as to support an award under Section 8(d)(1) of the Act.

Based on the foregoing, the Arbitrator finds that Petitioner sustained 10% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

M. Should penalties or fees be imposed on Respondent?

Based on the record in its entirety, the Arbitrator finds that Respondent's conduct in failing to pay Petitioner TTD/maintenance and medical expenses was neither unreasonable nor vexatious so as to justify the imposition of penalties or fees under Sections 19(k), 19(l) or 16 of the Act. Petitioner's request for penalties and fees 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	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Castillejo,

Petitioner,

15IWCC0761

vs. NO: 13WC 2680

Baker's Square,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2014, 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 $15,000.00. 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: OCT - 8 2015
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KWL/vf
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

15IWCC0761

CASTILLEJO, JOSE
Employee/Petitioner

Case# **13WC002680**

BAKER'S SQUARE
Employer/Respondent

On 11/13/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0009 ANESI OZMON RODIN NOVAK & KOHEN
JENNIFER KELLY
161 N CLARK ST 21ST FL
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
ERIN FIORE
140 S DEARBORN ST 7TH FL
CHICAGO, IL.60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

15IWCC0761

Case # 13 WC 02680

Consolidated cases: ___

Jose Castillejo
Employee/Petitioner

v.

Baker's Square
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 **Chicago**, on **May 9, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0761

FINDINGS

On the date of accident, **07-13-12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**26,759.97**; the average weekly wage was $**514.61**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**4,342.86** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**4,342.86**.

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

ORDER

The Arbitrator finds that the outstanding medical care and corresponding charges are reasonable and necessary to cure or relieve the effects of Petitioner's accidental injury. Therefore, the Arbitrator orders Respondent to pay the outstanding medical bills of $594.83, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

The Arbitrator finds that Petitioner is entitled to TTD and TPD benefits and orders Respondent to pay Petitioner TTD benefits of $344.41/week for 39-3/7 weeks, from 02-05-2013 through 09-26-2013 and from 03-29-2014 through 05-09-2014, as well as TPD benefits of $184.41/week for 26-1/7 weeks, from 09-27-2013 through 03-28-2014. Respondent is entitled to a credit of $4,342.86 for TTD benefits previously paid.

The Arbitrator finds that Petitioner is entitled to prospective medical care and orders Respondent to authorize and pay for the testing and treatment that Dr. Lorenz has recommended, which includes a lumbar discogram and, if warranted, based on the results of the discogram, surgery that consists of an L5-S1 discectomy and fusion, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

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

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

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

Brian T. Cronin

Signature of Arbitrator

November 11, 2014

Date

ICArbDec19(b)

BRIAN T. CRONIN

NOV 13 2014

Re: Jose Castillejo v. Baker's Square
I.W.C.C. No. 13 WC 02680
Date of Accident: July 13, 2012

FINDINGS OF FACT

The Petitioner, Jose Castillejo, is a 36-year-old cook and kitchen manager, who was employed with Respondent, Baker's Square, on July 13, 2012. The Arbitrator notes that Petitioner's native language is Spanish and an interpreter was used during his trial testimony. Petitioner is married with three dependent children, and had been working for Respondent for approximately two years prior to his accident at work on July 13, 2012.

On July 13, 2012, Petitioner reported to work as usual and was feeling good. He testified that during his shift he was arranging merchandise in the freezer and was lifting many boxes of soups and potatoes. He estimated that each box of potatoes weighed approximately 40 pounds, and that he lifted 10 boxes of potatoes that morning. There were many boxes that needed to be stacked. Petitioner testified that when he lifted the last box up to the ceiling, he got hurt. At the hearing, Petitioner demonstrated the manner in which he lifted such box. He was leaning back with his palms facing outward and was pushing the box overhead. Petitioner testified that he did not twist his back. At that time, Petitioner testified, he felt as though something had "pushed [him]" and experienced pain in his lower back. He reported the injury to Jason, the general manager. Petitioner testified that although he was "in a lot of pain," he finished his shift. Jason asked Petitioner to complete an incident report, which he did. The Arbitrator notes that Respondent is not disputing the accident itself and stipulates that proper notice was provided.

After completing his shift on July 13, 2012, Petitioner presented to Premier Occupational Health (hereinafter referred to as "Premier") and was evaluated by Dr. Anatoly Gorovits. Petitioner testified he went to that facility at the direction of his employer. Petitioner reported

injuring his back at work that day while stacking boxes filled with potatoes in the freezer. (Px.1) He complained of constant pain in the lumbar region, made worse with bending and standing for long periods. Physical examination revealed left-sided radiculopathy, pain with low back movement, and spasm in the paraspinous muscles. The diagnosis was lumbar sprain. Petitioner was prescribed medication and limited to lifting of 10 pounds or less. Petitioner testified that he did return to work for the Respondent within his restrictions.

Petitioner returned to Premier on July 18, 2012 and July 25, 2012, with ongoing low back pain. Physical therapy was recommended, and his work restrictions were continued. (Px.1) Petitioner began treatment at Achieve Physical Therapy on or around August 22, 2012. During this time, he also continued to attend follow-up visits at Premier and to take his prescribed medication. Petitioner also continued to work for Respondent with lifting restrictions.

At the visit to Premier on October 1, 2012, Petitioner reported ongoing low back pain made worse with movement but improved with medication. The medical records reflect, and Petitioner testified, that he did not experience any improvement with physical therapy. A lumbar MRI was ordered. (Px.1)

The lumbar MRI performed on October 10, 2012 revealed disc bulging with stenosis at the L3-4, L4-5 and L5-S1 levels, and edema within the L5-S1 disc consistent with an annular tear. (Px.1) Petitioner returned to Premier on October 15, 2012, at which time Dr. George Pitsilos reviewed the MRI results and found mild stenosis and disc bulge. He then referred Petitioner to a spine specialist. Petitioner continued to follow up at Premier while awaiting authorization to see the specialist. At a visit on October 29, 2012, Petitioner reported ongoing low back pain radiating into the right leg. Physical examination revealed spasm in the paraspinous muscles and

tenderness to palpation in the right paraspinal region. The recommendation for a spine specialist evaluation was reiterated.

Pending approval of the specialist visit, Petitioner continued to present to Premier on November 5, 2012, November 12, 2012, and November 19, 2012. At those visits, he reported constant low back pain radiating down the right leg. Straight leg raising test was positive on the right side. He continued to take the prescribed medication and to work light duty for Respondent.

Petitioner eventually was evaluated by a specialist, Dr. Kern Singh, on November 21, 2012. (Px.2) He testified he was directed to see Dr. Singh by the workers' compensation insurance adjuster for Respondent. The Arbitrator notes that Dr. Singh's records are addressed to April Walls at Sedgwick, and that Petitioner's Exhibit 2 contains a letter dated November 8, 2012, from Sedgwick to Dr. Singh thanking him for agreeing to evaluate the Petitioner. Petitioner reported a consistent history of injury on July 13, 2012, stating he was putting away boxes of potatoes weighing approximately 40 pounds and was lifting them overhead to place them on a shelf when he felt back pain. Petitioner complained of worsening axial low back pain and anterior right thigh pain. He also stated that he was working light duty at the time of the visit.

Dr. Singh indicated that the lumbar MRI from October 10, 2012 was within normal limits with no evidence of spinal stenosis. His diagnosis was lumbar muscular strain causally related to the industrial accident. He recommended work conditioning, and ongoing light-duty work restrictions. (Px.2)

Petitioner underwent a work conditioning evaluation at Accelerated Rehabilitation on December 10, 2012. (Px.3) Petitioner demonstrated the ability to perform 79.4% of the physical demands of his job, which was classified at the medium-heavy level, and required occasional

lifting of 75 pounds. Petitioner testified that he attended a couple of sessions of work conditioning at Accelerated, which increased his back pain significantly.

Petitioner continued to attend follow-up visits at Premier. At a visit on January 2, 2013, Petitioner reported continuing low back pain with lower extremity discomfort. (Px.1) It was noted he was only able to attend one work conditioning session so far due to conflicts with his job schedule. He was evaluated by Dr. Thomas E. Cronin at Premier, who indicated that he reviewed the lumbar MRI report that day and found that it illustrated mild stenosis and disc bulge. Dr. Cronin restricted Petitioner to no lifting, pushing or pulling over 10 pounds and no bending. He prescribed continued medication. He also indicated they would contact the spine specialist regarding the work conditioning recommendation.

On January 7, 2013, Petitioner presented to Community Nurse Health Center, which he testified is the facility he uses for general health concerns. He reported that he injured his low back at work four to five months prior and that he was under the treatment of workers' compensation providers. (Px.6) He was also examined regarding his cholesterol level and a fungal toenail.

Petitioner returned to Premier on February 4, 2013 with no improvement. Dr. Gorovits recommended that Petitioner be completely off work until February 18, 2013, due to the four hours of work conditioning he had to perform each day. (Px.1)

Petitioner testified that the last day that he worked for Respondent was February 4, 2013, after which time he became separated from his employment there.

Petitioner began a two-week work conditioning program at Premier on February 5, 2013. (Px.1) Progress notes reflect that Petitioner reported increasing pain in the right leg and back, especially after he completes his treatment sessions. The final work conditioning progress note

from February 18, 2013, indicates that Petitioner had discomfort with all activities and his goals had not been met due to pain. Work conditioning was discontinued.

Petitioner was also evaluated by Dr. Gorovits at Premier on February 18, 2013. (Px.1) Petitioner reported constant and severe low back pain worsened by the work conditioning. Straight leg raise testing on the right was positive. Dr. Gorovits limited Petitioner to light-duty work, prescribed continued medication and recommended re-evaluation by a spine specialist. It appears this visit was Petitioner's last visit to Premier.

Petitioner returned to Dr. Singh on March 14, 2013, after completing work conditioning. (Px.2) Dr. Singh notes that the final work conditioning record indicates Petitioner's goals were not met due to pain, and that the Premier physician recommended re-evaluation by a specialist. Petitioner complained of axial low back pain radiating to the right anterior aspect of his right thigh, and reported his pain as sharp in character. Dr. Singh stated that Petitioner forgot to bring his lumbar MRI for review and asked him to return with the MRI. The Arbitrator notes this is inconsistent with the indication in Dr. Singh's November 21, 2012 record that the lumbar MRI was reviewed at that time. A completed form, also dated March 14, 2013, indicates that Dr. Singh found Petitioner was unable to work and was not yet at MMI. (Px.2)

On March 28, 2013, Petitioner returned to Dr. Singh with his lumbar MRI and reported increased pain. Dr. Singh found no evidence of spinal stenosis, acute fracture, subluxation, or spondylolisthesis on the MRI. The diagnosis was lumbar muscular strain, which he causally related to the work accident. Dr. Singh opined that Petitioner was at maximum medical improvement and could return to work without restriction. (Px.2)

Petitioner testified that was unable to return to the full duties of his employment as of March 28, 2013, due to his ongoing pain.

Petitioner came under the care of Dr. Mark Lorenz on May 23, 2013 and gave a history of injury at work on July 13, 2012. (Px.4) Specifically, he stated he was lifting a 40-pound bag of potatoes onto a stack above his head by bending over, picking it up and then throwing it on a stack that was above his head when he had a significant onset of lower back pain with the sensation of a pop. He reported being in excellent health with no lower back problems prior to that day. Dr. Lorenz noted that Petitioner had undergone months of physical therapy and work conditioning to no avail. Petitioner complained of ongoing back pain with vague radiation toward the left lower extremity.

Dr. Lorenz reviewed the lumbar MRI from October 10, 2012, and found it to demonstrate an annular tear at the L5-S1 level with edema. He mentioned that Dr. Singh failed to comment on the annular tear. Physical examination revealed significantly limited range of motion of the back, production of back pain with bilateral straight leg-raising, and negative Waddell signs. Dr. Lorenz's diagnosis was axial back pain related to an annular tear. He noted that Petitioner had failed conservative care. Dr. Lorenz outlined two options for Petitioner: live with his current condition and permanent restrictions, or proceed with discographic study. If concordant pain is shown on the discogram, Dr. Lorenz would recommend proceeding with a discectomy and fusion at the L5-S1 level.

Petitioner expressed a desire to proceed with the discogram and surgery if indicated.

In the meantime, Dr. Lorenz opined, Petitioner should limit his work to no lifting more than 10 pounds. (Px.4)

On October 21, 2013, Petitioner returned to Dr. Lorenz with continued complaints of pain across the lower back and down the right leg and knee. (Px.4) He also reported occasional numbness in the right thigh with weakness. The discogram had not yet been completed.

Petitioner indicated he had returned to work and was experiencing increased pain. Dr. Lorenz re-ordered the discogram and gave Petitioner prescriptions for Tramadol and Flexeril. He directed Petitioner to return after undergoing the discogram in order to determine further treatment recommendations.

Petitioner visited Community Nurse Health Center on February 8, 2014, with complaints of low back pain with shooting pain and numbness down the right leg. (Px.6) He stated that it began following a work injury in July 2012 and that he treated with a worker's compensation doctor, but that the doctor had discharged him. The note indicates Petitioner advised that everything was well, but that he continues to experience low back pain with occasional radiation to the right leg. Petitioner was asked to return with his records after having x-rays. Petitioner testified that he did not return to Community Nurse Health Center.

Petitioner submitted the transcript from Dr. Lorenz's deposition that was taken on February 3, 2014. (Px.5) Dr. Lorenz testified that Petitioner's ongoing low back and leg complaints are causally related to his work accident of July 13, 2012. He further opined that the annular tear demonstrated on the MRI was more likely than not caused by Petitioner lifting a sack of potatoes at work on the accident date.

During cross-examination, the following exchange took place:

Q: And so you can say that lifting a sack of potatoes is exactly what caused an annular tear that you saw in an MRI that was taken six months after the injury?

A: Well, what I can say is that the likelihood - - again, remember, it's what's more likely than not in medicine. Based on my experience and my knowledge of the literature and all these other good things, is that when you see a patient who has no pain, and then develops pain, and then

you investigate and you find an annular tear in that patient, and then you investigate further, and you find that the patient did a lifting activity, which biomechanically is capable of tearing the annulus, like bending over, lifting up something and twisting with it, then I would have to say that more likely than not that that was the cause of it, absent any other issues as well.

Q: And I believe before you testified about the load-bend-twist maneuver?

A: Yes.

Q: Well, annular tears can occur with just a straight forward lift, but they typically occur with a combined - - with a momentum, an angular moment, okay. So bending forward, you have an angular moment when you do that. And then when you come back up and on top of that rotate, the fibers are just not made to withstand that under certain load conditions, and certain parts of the day and certain health of the disc pre-existing before, and that can create some issues for you. (Px.5, pp. 38-39)

Dr. Lorenz acknowledged that, for some patients, the symptoms that stem from an annular tear diminish, but for other patients, like the Petitioner, the symptoms fail to improve. Dr. Lorenz testified that the recommended discogram is universally accepted among spine surgeons, and is used as another diagnostic tool to assist in determining whether surgical intervention is likely to be beneficial. He testified that Petitioner is a candidate for a discogram, and if concordant pain is shown, he would then recommend surgery. On the other hand, if the discogram fails to demonstrate concordant pain, he would reconsider his position on surgery.

Petitioner was also examined by Dr. Andrew Zelby on July 22, 2013, at the request of the Respondent. (Rx.1) Petitoner reported a consistent history of injury and denied any similar symptoms before the injury at work on July 13, 2012. Dr. Zelby reviewed the MRI from October

10, 2012 and found it to demonstrate bulging discs at L1-2, L2-3, L3-4, L4-5 and L5-S1, as well as a partial thickness annular tear at L5-S1. Dr. Zelby opined that Petitioner sustained a work-related muscular lumbar strain in the context of an annular tear, and concluded that Petitioner's subjective complaints were inconsistent with the objective medical evidence. Dr. Zelby further stated that Petitioner's condition would not require any consideration for surgical intervention. Dr. Zelby opined that Petitioner was at maximum medical improvement by mid-November 2012 and was able to perform work without restrictions as of that time.

Respondent submitted the transcript from Dr. Zelby's deposition that was taken on April 9, 2014. (Rx.2) Dr. Zelby acknowledged that there was no indication Petitioner had prior low back symptoms or prior low back treatment before the work-related injury of July 13, 2012. Dr. Zelby further testified that he agreed with Dr. Lorenz's interpretation of the lumbar MRI, including the L5-S1 disc bulge and annular tear. Dr. Zelby also acknowledged in his testimony that Petitioner was working full duty as a kitchen manager until the work accident of July 13, 2012, after which he required light-duty restrictions. Dr. Zelby testified that a discogram can be a helpful diagnostic tool, but he did not believe it was indicated in Petitioner's case. (Rx.2)

Petitioner testified that he would like to undergo the discogram, and would also wish to proceed with surgery if Dr. Lorenz recommended surgery. Dr. Lorenz stated that his recommendation for surgery would be based upon the discogram results. He has not proceeded with this treatment because it is not authorized by workers' compensation and Petitioner has no other health insurance available to him.

Petitioner testified that prior to July 13, 2012, he had never injured his low back and had never received medical treatment directed at the low back. He further testified that he has not had any new injuries to his low back since July 13, 2012.

Petitioner testified that, currently, he experiences ongoing low back pain radiating into the right leg, along with some numbness and weakness in the right leg. He testified that this condition affects his ability to work and to carry out his daily activities. He can no longer play soccer like he used to before the injury, and has difficulty playing with his children.

Petitioner testified that he last worked for Respondent on February 4, 2013, after which time he was separated from his employment. He never returned to work for Respondent after that date, but he did obtain a new job at Foxy's Restaurant, which he performed from September 27, 2013 through March 28, 2014. While at Foxy's, Petitioner worked an average of 20 hours per week and earned $12.00 per hour. Petitioner has not worked anywhere from March 29, 2014 through the date of trial.

CONCLUSIONS OF LAW

IN SUPPORT OF HIS DECISION ON ISSUE (F) "IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?", THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator acknowledges that accident and notice were not placed in dispute by Respondent. Accordingly, the first issue to address is causal connection.

Based upon his review of the medical evidence, the reports of Dr. Singh, the deposition testimony of Dr. Lorenz and Dr. Zelby, and Petitioner's testimony, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident of July 13, 2012.

Petitioner testified that he did not twist his back on July 13, 2012 when he lifted the box of potatoes and experienced low back pain. However, he did testify that he leaned back when he pushed the 40-pound box overhead toward the ceiling. Moreover, Dr. Lorenz testified that annular tears can occur with a straight forward lift.

The Arbitrator gives weight to the credible testimony of Petitioner and the supporting medical treatment records. Petitioner immediately reported the accident and sought prompt medical treatment that same day. He testified that he had never experienced similar low back pain or received treatment for his low back prior to the accident of July 13, 2012, and no evidence was entered to contradict his testimony in this regard. The evidence indicates that Petitioner suffered an acute injury while lifting a box of potatoes and experienced a sudden onset of pain. Since his initial visit to Premier on July 13, 2012, he has consistently reported low back pain and from October 29, 2012 forward, he has also complained of pain radiating into the right leg. These complaints, and his history of injury, remained consistent when he saw Dr. Singh, Dr. Lorenz, Community Nurse Health Center, and Dr. Zelby.

Per the radiologist report, a lumbar MRI demonstrated positive findings that included an L5-S1 disc bulge and annular tear, as well as other multi-level disc bulging and stenosis. The doctors at Premier, Dr. Lorenz, and Dr. Zelby, acknowledged positive findings on the MRI. Dr. Singh, on the other hand, found the MRI was within normal limits and failed to address any of the objective findings on the MRI. The Arbitrator is troubled by Dr. Singh's indifference regarding the MRI, especially when taken in conjunction with Dr. Singh's apparent disregard of Petitioner's consistent and ongoing pain complaints and his inability to meet work conditioning goals. It is apparent that he viewed himself as an examining physician hired by the Respondent insurance company rather than a treating doctor advocating for the best interests of a patient. Accordingly, the Arbitrator gives the opinions of Dr. Singh little, if any, weight.

Similarly, the Arbitrator is unpersuaded by the opinions of Dr. Zelby. After reviewing the MRI films, Dr. Zelby agreed with Dr. Lorenz that such images show an annular tear at L5-S1. (Rx.2, p. 23) Yet, Dr. Zelby diagnosed Petitioner with a "soft tissue lumbar strain." (Rx.2, p. 21)

While Dr. Zelby acknowledged that Petitioner sustained a work-related injury on July 13, 2012, he attempts to draw an arbitrary line in the sand to terminate causation "in mid-November 2012". Dr. Zelby opined that there is a "self-limiting process" with an acute annular tear in that the prostaglandins and irritants that can be released with such tears go away and that this condition resolves itself within three to four months. Dr. Zelby opined that Petitioner's complaints "should have" resolved by that time, but fails to account for the fact that every patient is different and sometimes complaints of pain are not alleviated by conservative measures. Dr. Zelby fails to outline any valid basis as for Petitioner's persistent and continuing low back and right leg complaints.

The Arbitrator found Dr. Zelby to be somewhat evasive on cross-examination (e.g., Rx.2, p. 24, l. 20 through p. 25, l. 14).

The Arbitrator instead relies on the opinions of Dr. Lorenz that Petitioner suffered a work-related accident on July 13, 2012 and that the annular tear shown on the MRI was likely caused by that accident. Dr. Lorenz noted that the MRI, which was taken months after the accident, showed edema, which indicates that an inflammatory process is occurring.

The Arbitrator concludes that Petitioner's ongoing subjective complaints of pain are valid and that his current condition of ill-being remains causally related to the work event. The Arbitrator's decision is supported by the opinions of Dr. Lorenz, the records of Premier, Petitioner's credible testimony, and the lack of evidence of any prior low back injuries or complaints.

IN SUPPORT OF HIS DECISION ON ISSUE (J) "WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?", THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator incorporates and adopts the findings contained within Section (F) of this decision. The Arbitrator determines that the unpaid charges of Hinsdale Orthopaedics and IWP, documented in Petitioner's Exhibit 7, were reasonable and necessary to cure or relieve the Petitioner of the effects of his injury. Therefore, the Arbitrator awards these bills pursuant to Section 8(a) and subject to Section 8.2 of the Illinois Workers' Compensation Commission Act.

IN SUPPORT OF HIS DECISION ON ISSUE (K) "IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?", THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator notes that Petitioner has consistently reported low back and right leg pain since his injury of July 13, 2012, despite undergoing physical therapy and work conditioning. A lumbar MRI demonstrated objective findings to corroborate Petitioner's ongoing subjective complaints.

Petitioner has failed conservative treatment, so Dr. Lorenz is recommending a discogram. If the discogram reveals concordant pain at that level, Dr. Lorenz would recommend an L5-S1 discectomy and fusion. As the Arbitrator has found the opinions of Dr. Lorenz to be more persuasive than those of Doctors Zelby and Singh, he awards prospective medical care per the recommendations of Dr. Lorenz, and orders Respondent to pay for the discogram, and if the discogram reveals concordant pain at that level, the surgery that Dr. Lorenz has prescribed, pursuant to Section 8(a) and subject to Section 8.2 of the Illinois Workers' Compensation Commission Act.

IN SUPPORT OF HIS DECISION ON ISSUE (L) "WHAT TEMPORARY BENEFITS ARE IN DISPUTE? TPD AND TTD", THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator incorporates and adopts the findings contained within section (F) of this decision. As the Arbitrator has determined that a causal relationship exists between Petitioner's July 13, 2012 accident and his current condition of ill-being, the Arbitrator finds that Petitioner is entitled to temporary total disability and temporary partial disability benefits.

The Arbitrator notes that Petitioner worked for Respondent in a light-duty capacity from the date of accident, July 13, 2012, through February 4, 2013, after which date he became separated from his employment with Respondent. Petitioner testified that the last day he worked for Respondent was on February 4, 2013. From February 5, 2013 through September 26, 2013, Petitioner did not work at all. The Arbitrator notes that when Petitioner visited Dr. Gorovits on February 4, 2013, he took Petitioner completely off work in order for him to undergo work conditioning. Dr. Gorovits subsequently released Petitioner to light-duty work as of February 18, 2013. Based on this evidence, there is no question that TTD benefits were due and owing from February 5, 2013 through February 18, 2013.

As of the light-duty release on February 18, 2013, Respondent would continue to remain liable for TTD benefits unless they provided Petitioner with a modified job consistent with his light-duty restrictions. Respondent failed to accommodate Petitioner and therefore TTD benefits remained due and owing from this date forward until at least March 28, 2013 when Dr. Singh released Petitioner to full-duty work with no restriction. However, as outlined in section (F) of this decision, the Arbitrator places little, if any, weight on the opinions of Dr. Singh and therefore does not agree with his full-duty release. Instead, the Arbitrator relies on the opinions of Dr. Lorenz that Petitioner remained restricted to light-duty work, which was not

accommodated by Respondent. Accordingly, the Arbitrator awards TTD benefits from February 5, 2013 through September 26, 2013, after which Petitioner began working at Foxy's Restaurant.

As for temporary partial disability benefits, Petitioner provided unrebutted testimony that he worked an average of 20 hours per week at Foxy's and earned $12.00/hour (= $240.00 per week). This is a difference of $274.61 when compared to his average weekly wage with Respondent of $514.61. Two-thirds of that difference is $184.41. The Arbitrator therefore awards TPD benefits of $184.41 for a period of 26-1/7 weeks from September 27, 2013 through March 28, 2014. From March 29, 2014 through the hearing date of May 9, 2014, Petitioner remained off of work. The Arbitrator awards TTD benefits for this period as well.

In sum, the Arbitrator awards, and orders Respondent to pay, a period of 39-3/7 weeks of TTD benefits at the rate of $344.41 and a period of 26-1/7 weeks of TPD benefits at the rate of $184.41. Respondent is entitled to a credit in the amount of $4,342.86 for benefits previously paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REYMOND NAVA,

Petitioner,

15IWCC0762

vs.

NO: 08 WC 52389

CHICAGO TRANSIT AUTHORITY,

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 issue of wage differenital rate 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 Decision of the Arbitrator, filed on November 13, 2014, in part, ordered Respondent to pay Petitioner the sum of $664.72 per week commencing on April 28, 2014, and continuing through the duration of Petitioner's disability as provided in Section 8(d)1 of the Act. The Commission recognizes an error was made in the Decision of the Arbitrator with respect to the awarded sum and moves to correct the error.

$664.72 per week is the maximum benefit rate for claims adjudicated under Section 8(d)2 and 8(e) of the Act for injuries sustained between July 15, 2008, and January 14, 2009. Petitioner, however, elected to have his claim adjudicated under Section 8(d)1. The maximum benefit rate under Section 8(d)1 differs from the one that controls Section 8(d)2 and Section 8(e). The differing maximum benefit rates are not interchangeable.

Section 8(b) of the Act states the maximum benefit rate under Section 8(d)1 is to be 100% of the State average weekly wage. The State average weekly wage governing the date Petitioner sustained his injury was $912.56. Petitioner, under Section 8(b)1, is entitled to a benefit rate up to that amount. Petitioner's actual average weekly wage was below $912.56 and is the figure used in determining the wage differential award.

Petitioner, had he remained employed as an ironworker, would have weekly earnings of

15IWCC0762

$1,720.00 per week. His accident precluded a return to working as an ironworker and result in him having a new career as a computer service specialist. He earns $600.00 per week in that position. Two-thirds of the difference between what Petitioner would have earned as an ironworker and what he earns as a computer service specialist will be the wage differential award. In this case, the difference between the two weekly salaries is $1,120.00. Two-thirds of that amount is $746.70. $746.70 is the weekly differential award amount to which Petitioner is entitled.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,073.33 per week for a period of 256-6/7 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 $1,073.33 per week for 31-2/7 weeks, that being the period of time maintenance benefits is due.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $746.70 per week commencing on April 28, 2014, and for the duration of his disability, under Section 8(d)1, as Petitioner's injuries precluded him from pursuing his usual and customary line of employment and resulted in a diminution of earnings.

IT IS FURTHER ORDERED BY THE COMMISSION that, per the stipulation of both parties, Respondent is to deduct $200.00 per week for 20 weeks as the parties have stipulated that Petitioner received an overpayment of benefits in the amount of $4,000.00. After 20 weeks, Respondent shall pay to Petitioner his full benefits in the amount of $746.70 per week as set forth above.

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: OCT - 8 2015
KWL/mav
O: 08/11/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0762

NAVA, REYMOND
Employee/Petitioner

Case# 08WC052389

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

On 11/13/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1987 RUBIN & CLARK LAW OFFICES LTD
ARNOLD G RUBIN
20 S CLARK ST SUITE 1810
CHICAGO, IL 60603

0515 CHICAGO TRANSIT AUTHORITY
J BARRETT LONG
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

15IWCC0762

Reymond Nava
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 08 WC 52389

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **August 28, 2014**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's 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. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On 11/22/2008, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$83,720.00**; the average weekly wage was **$1,610.00**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**270,325.81** for TTD, $**16,074.06** for wage differential, $**33,579.76** for maintenance, and $**-0-** for other benefits, for a total credit of $**319,979.76**.

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

ORDER

- Respondent shall pay Petitioner temporary total disability benefits in the amount of **$1,073.33**/week for **251-6/7** weeks, for the period of **11/23/2008 through 9/20/2013**, which is the period for which temporary total disability benefits are due.

- Respondent shall pay Petitioner maintenance benefits in the amount of **$1,073.33**/ week for **31-2/7**, for the period of **9/21/2013 through 4/27/2014**, which is the period for which maintenance benefits are due.

- Respondent shall pay Petitioner the sum of **$664.72**/week for the further period commencing **4/28/2014** and for the duration of the disability as provided in Section 8(d)1 of the Act, because the injuries sustained by Petitioner caused Petitioner's inability to pursue his usual and customary line of employment.

- The parties stipulated that there was an overpayment of benefits in the amount of **$4,000.00**. The Arbitrator orders Respondent to deduct the amount of **$200.00**/per week for the duration of **20** weeks until the overpayment has been repaid. Thereafter, Respondent shall pay Petitioner's full benefits in the amount of **$664.72**/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.

Milton Black

Signature of Arbitrator

November 12, 2014

Date

NOV 13 2014

Respondent for approximately one (1) year prior to November 22, 2008. Petitioner testified that his regular work week was forty (40) hours. He did not work mandatory overtime.

Petitioner testified regarding his job duties as an ironworker for Respondent. Petitioner testified that he lifted and carried up to 125 pounds. He was required to lift that amount overhead. Petitioner climbed ladders and scaffolding. Petitioner also operated heavy tools. The tools were used for welding and to buster steel. The welding equipment weighed 75 pounds.

B. Prior Medical Treatment

Petitioner testified that prior to November 22, 2008, he did not receive any medical treatment to his neck or back. He also testified that he had not sustained any accidents involving his neck or back prior to November 22, 2008.

C. Work-Related Accident of November 22, 2008

Petitioner testified that on November 22, 2008, he was working for Respondent at Michigan and Wabash. Petitioner was working on "L" structures. Petitioner was in the cage approximately ten (10) to twenty (20) feet in the air. As he was operating the man lift, Pet... crushed between the control panel and steel. Petitioner passed out. He woke up in an ambulance. When Petitioner woke up, he could not move or feel his body; he was paralyzed.

D. Medical Treatment

Following the work-related accident of November 22, 2008, Petitioner was taken by ambulance to Stroger Hospital. (PX 1). Petitioner was admitted at Stroger from November 22, 2008 through December 2, 2008. (PX 1). Petitioner underwent an MRI study of the cervical spine and CT scan of the cervical spine at Stroger on November 22, 2008. (PX 7). The MRI report set forth that Petitioner sustained cervical spondylitic changes, diffuse high T2/STIR signal intensity within the cervical spinal cord from C5 through C7 reflecting edema/contusion, C6-C7 circumferential disc bulge with right posterolateral disc protrusion and C5-C6 circumferential disc bulge and diffuse posterior paraspinal soft tissue edema from C2-C6. (PX 7). Petitioner underwent surgery on November 24, 2008. (PX 2). The surgery was performed by Dr. Patricia Raksin at Stronger. (PX 2). Petitioner underwent a C5-C6 and C6-C7 anterior

Reymond Nava v. Chicago Transit Authority
Case Number: 08 WC 52389
Date of Accident: 11/22/2008

RIDER TO THE ARBITRATION DECISION

I. Introduction

Evidence in the above-captioned claim was presented to Arbitrator Milton Black on August 28, 2014. On that date, the Arbitrator heard the testimony of Petitioner. The Arbitrator also received into evidence various exhibits, which included: 1) medical records from Stroger Hospital, Dr. Giri Gireesan, Loyola University Health System and RIC; 2) operative report dated November 25, 2008; 3) FCE report dated July 24, 2009; 4) work conditioning notes from ATI Physical Therapy; 5) various diagnostic reports; 6) vocational report of Joseph Belmonte; 7) vocational reports of Thomas Grzesik; 8) educational certificates; 9) pay stubs from Robert Half; and 10) Local 1 union wage scale. The Arbitrator is [illegible] the disputed issue nature and extent of the injury (wage differential).

Before making a finding of law in connection with this case, the Arbitrator makes the following findings of fact:

II. Findings of Fact

Petitioner testified before the Arbitrator on August 28, 2014. The Arbitrator finds that Petitioner's testimony was credible. The Arbitrator notes that Petitioner's testimony was unrebutted. The Arbitrator also finds that Petitioner's testimony was consistent with the histories, treatment and objective findings documented in the medical records, which were offered into evidence at the time of the hearing.

A. Work and Educational Background

Petitioner testified regarding his educational background. Petitioner testified that he is 34 years old. He graduated high school in 1998.

Petitioner testified that he was employed as an ironworker. He was a member of the Local 1 ironworkers union. Petitioner had been employed as an ironworker since 1999. He worked for

cervical diskectomies and fusion with allograft and instrumentation. (PX 2). His postoperative diagnosis was traumatic cervical spinal cord injury with asymmetric quadriparesis, C5-C6 posterior osteophytes and C6-C7 right paracentral disk herniation. (PX 2).

Following his discharge from Stroger Hospital, Petitioner was admitted at RIC. (PX 9). Petitioner was admitted at RIC from December 2, 2008 through March 25, 2009. (PX 9). While Petitioner was admitted at RIC, he was also under the medical care of Dr. Gireesan. (PX 3).

Petitioner was initially examined by Dr. Gireesan on December 16, 2008. (PX 3). Dr. Gireesan set forth a diagnosis of fracture of the C5 level requiring a C5-C7 decompression and anterior cervical fusion with allograft and cervical plate. (PX 3). Dr. Gireesan recommended that Petitioner continue to use the cervical brace and take gamma benzene, baclofen and heparin and remain off work. (PX 3).

Petitioner continued to have follow up examinations with Dr. Gireesan. (PX 3). On January 19, 2009, Dr. Gireesan recommended that Petitioner undergo occupational therapy and remain off work. (PX 3). Petitioner did participate in occupational therapy.

Petitioner underwent an MRI study of the spine on March 18, 2009. (PX 8). The MRI study revealed postoperative changes compatible with anterior fusion of the C5 through C7 levels with corresponding interbody fusion. (PX 8).

On May 20, 2009, Dr. Gireesan set forth that Petitioner had significant function following his rehab at RIC. (PX 3). He also noted that Petitioner completed physical therapy. (PX 3). Dr. Gireesan recommended that Petitioner begin work conditioning and remain off work. (PX 3). Petitioner participated in work conditioning at ATI Physical Therapy from June 8, 2009 through July 26, 2009. (PX 5).

On July 24, 2009, Petitioner underwent an FCE at ATI Physical Therapy. (PX 4). The FCE report set forth that Petitioner had the physical capabilities of lifting above the shoulders with the right hand 26.2 pounds, left 25.3 pounds and bilateral 57.8 pounds; desk to chair 39.4 pounds right, 43.8 pound left and 107.8 pounds bilaterally; and from floor to chair 100.3 pounds bilaterally. (PX 4). Petitioner could carry 57 pounds with the right and left arm and push 108.3 pounds and pull 108.3 pounds. (PX 4).

Petitioner required regular breaks when standing and could only stand for five (5) to six (6) hours per day. (PX 4).

On July 27, 2009, Dr. Gireesan examined Petitioner. (PX 3). He reviewed the FCE. (PX 3). Dr. Gireesan released Petitioner to return to work with the restrictions of no lifting over forty (40) pounds and no climbing ladders or working at heights or on high beams. (PX 3). Dr. Gireesan noted that Petitioner had atrophy of all four extremities. (PX 3). He recommended that Petitioner obtain a membership to a gym. (PX 3). Pursuant to Dr. Gireesan's recommendations, Petitioner exercised at a gym. (PX 3).

Petitioner continued to have follow up examinations with Dr. Gireesan. (PX 3). Petitioner continued to participate in an exercise program and home exercise program. (PX 3). Dr. Gireesan noted that Petitioner was also participating in vocational rehabilitation. (PX 3).

On August 5, 2011, Petitioner was examined at Loyola University Health Systems. (PX 6). Petitioner noted swelling in the back of his neck. (PX 6). A CT scan was performed. (PX 6). The CT scan revealed no evidence of posterior cervical soft tissue mass. (PX 6). Petitioner was referred to his primary care physician. (PX 6).

Petitioner was examined by Dr. Gireesan on August 23, 2011. (PX 3). Dr. Gireesan set forth that the CT scan was normal. (PX 3). Petitioner continued to have follow up examinations with Dr. Gireesan. (PX 3). Dr. Gireesan recommended medication, including T3, Ibuprofen and Neurotin. (PX 3). Dr. Gireesan noted some weakness in Petitioner's hands. (PX 3).

Petitioner's last examination with Dr. Gireesan was February 10, 2014. (PX 3). Dr. Gireesan noted that Petitioner was working out at home. (PX 3). He provided Petitioner with a refill on his medication. (PX 3).

E. Vocational Rehabilitation

At the request of Respondent, Petitioner was provided vocational rehabilitation services under the direction of Joseph Belmonte. Mr. Belmonte recommended and supervised Petitioner's educational program in computer services. The initial vocational report of Mr. Belmonte, dated November 2, 2009, was submitted into evidence. (PX 10). Mr. Belmonte obtained information regarding Petitioner's

educational background, work restrictions and job history. (PX 10). Mr. Belmonte opined that Petitioner was unable to return to work in his usual and customary line of employment. (PX 10). He set forth that Petitioner was employable in an unskilled or semiskilled occupation such as retail, customer services, telemarketing, cashier or hotel clerk. (PX 10). Mr. Belmonte opined that Petitioner could earn between $8.00 per hour and $13.00 per hour. (PX 10). He also set forth that Petitioner was a candidate for vocational training. (PX 10).

As part of his vocational training, Petitioner received training in various computer systems through Vocamotive, Inc. The certificates documenting the completion of the training were submitted into evidence. (PX 12). Petitioner received a certificate of completion from CITC IT Training Services for completion of the Data Networking Training. (PX 12). Petitioner was also A+ certified and completed the Cisco Certification requirement to be recognized as a Cisco Certified Entry Networking Technician. (PX 12).

Petitioner was interviewed by Thomas Grzesik, a certified vocational counselor, on December 22, 2009. (PX 11). Mr. Grzesik noted that Petitioner failed to pass the CITC certification examination. (PX 11). Mr. Grzesik reviewed Petitioner's educational background, work history and work restrictions. (PX 11). He opined that if Petitioner passed the CITC certification examination, he would earn $15.00 per hour over a forty (40) hour work week or $600 per week. (PX 11). Mr. Grzesik opined that Petitioner would be capable of earning $8.25 per hour to $13.00 per hour. (PX 11).

Mr. Grzesik prepared an addendum report dated May 13, 2014. (PX 11). Mr. Grzesik reviewed Petitioner's employment at Information Technology Partners as a computer support specialist. (PX 11). The job was consistent with Petitioner's training, vocational interests and within his work restrictions. (PX 11). Petitioner began work on April 28, 2014. (PX 11). He was earning $15.00 per hour over a forty (40) hour work week. (PX 11). Mr. Grzesik opined that Petitioner's position as a computer support specialist with Information Technology Partners constituted suitable employment. (PX 11).

F. Post- Accident Employment

Petitioner obtained employment through Robert Half Technologist with Information Technology Partners. Petitioner obtained employment as a computer support specialist. Petitioner began employment with Information Technology Partners on April 28, 2014. Petitioner earned $15.00 per hour and worked forty (40) hours per week. The paystubs documenting Petitioner's earnings were submitted into evidence. (PX 13).

The union pay scale for Local 1 ironworkers was also submitted into evidence. (PX 14). Effective June 1, 2014 through May 31, 2013, a journeyman ironworker would earn $43.00 per hour. (PX 14).

III. Conclusions of Law

In support of the Arbitrator's decision relating to "L," nature and extent of the injury, the Arbitrator concludes as follows:

Petitioner seeks an award pursuant to Section 8(d)1. The Arbitrator finds that Petitioner is entitled to wage differential benefits pursuant to Section 8(d)1 of the Act in the amount of $664.72 per week effective April 28, 2014 for the duration of the disability. In support of his finding, the Arbitrator relies on the credible and unrebutted testimony of Petitioner, the medical records of Dr. Gireesan and the vocational opinions of Mr. Belmonte and Mr. Grzesik.

To qualify for a wage differential award, a petitioner must establish: 1) that he is partially incapacitated from pursuing his usual and customary line of employment; and 2) an impairment of earnings. *Copperweld Tubing Products, Co. v. Workers' Compensation Com'n*, 402 Ill.App.3d 630, 931 N.E.2d 762 (1st Dist. 2010). To establish an impairment of earnings, the Commission considers the amount that the claimant "is earning or is able to earn in some suitable employment or business after the accident." *Id.*

A. Usual and Customary Line of Employment

The Arbitrator finds that Petitioner's usual and customary line of employment was that of an ironworker. The Arbitrator relies on the credible and unrebutted testimony of Petitioner in finding that his usual and customary line of employment was an ironworker. Further, both Mr. Belmonte,

Respondent's vocational rehabilitation counselor, and Mr. Grzesik document that Petitioner's usual and customary line of employment was that of an ironworker.

B. Partial Incapacity

The Arbitrator finds that Petitioner has established that he is partially incapacitated from pursuing his usual and customary line of employment. The Arbitrator relies on Petitioner's credible and unrebutted testimony, the medical records of Dr. Gireesan and the vocational opinions of Mr. Belmonte and Mr. Grzesik.

As a result of the work-related accident of November 22, 2008, Petitioner was provided permanent work restrictions by Dr. Gireesan. Dr. Gireesan set forth that Petitioner could return to work with the restrictions of no lifting more than forty (40) pounds and no climbing ladders, working at heights or working on high beams. Further, both Mr. Belmonte, Respondent's vocational rehabilitation counselor and Mr. Grzesik opined that Petitioner was incapable of returning to work in his usual and customary employment as an ironworker. Accordingly, the Arbitrator finds that Petitioner is partially incapacitated from pursuing his usual and customary line of employment as a Local 1 ironworker.

C. Impairment of Earnings

The Arbitrator finds that Petitioner has also established an impairment of earnings. The Arbitrator finds that Petitioner would be earning $43.00 per hour in the full performance of his job as an ironworker. The Arbitrator finds that Petitioner would work forty (40) hours per week, in the full performance of his job as an ironworker. This equates to a weekly wage of $1,720.00.

The Arbitrator finds that Petitioner obtained employment with Information Technology Partners as a computer support specialist earning $15.00 per hour, forty (40) hours per week, or $600.00 a week. The Arbitrator finds that this job constitutes suitable employment. Mr. Grzesik opined that the job constituted suitable employment. The Arbitrator relies on the opinions of Mr. Grzesik in finding that the job with Information Technology Partners constitutes suitable employment. The Arbitrator also notes that the amount Petitioner would earn in his employment with Information Technology Partners fell within the range of reasonable earnings set forth by both Mr. Grzesik and Mr. Belmonte, Respondent's vocational

rehabilitation counselor. Further, Mr. Grzesik's opinion was unrebutted. Mr. Grzesik specifically relied on the fact that the employment was consistent with Petitioner's training and vocational interests and within his work restrictions.

Suitable employment is any work which takes into consideration both the attributes and limitations that the disabled worker presents to the marketplace. *Lavery v. United Airlines*, 04 IIC 0038, 2004 WL 384160 (IWCC Jan. 15, 2004). The Commission has found that Petitioner obtained suitable employment where Respondent's vocational rehabilitation counselor advised the employee to accept the job offer. *Lehman v. Halliburton*, 05 IWCC 0285, 2005 WL 1325016 (IWCC April 11, 2005). Further, the Commission has found employment to be suitable where the employment fell within the range of jobs and earnings set forth by Respondent's vocational rehabilitation counselor. *Fernandes v. Industrial Commission*, 246 Ill.App.3d 261, 615 N.E.2d 1191 (4th Dist. 1993)

Accordingly, Petitioner has established an impairment of earnings since Petitioner is earning $600.00 per week in suitable employment and Petitioner would have been earning $1,720.00 per week in the full performance of his job as an ironworker.

D. Calculation of the Wage Differential

Petitioner is entitled to a wage differential award based on 2/3 of the difference between what he could have been earning in his former occupation as an ironworker ($1,720.00 per week) and what he is earning in suitable employment as a computer service specialist ($600.00 per week). This would result in a maximum wage differential benefit of $664.72 per week. The Arbitrator finds that Petitioner is entitled to wage differential benefits in the amount of $664.72 per week for the duration of the disability effective April 28, 2014 since Petitioner has established that he is partially incapacitated from pursuing his usual and customary line of employment and that he sustained an impairment of earnings.

The parties have stipulated that there is an overpayment of benefits in the amount of $4,000.00. The parties have stipulated further stipulated that Respondent is to deduct the amount of $200.00 per week for twenty (20) weeks until the overpayment is satisfied. that The Arbitrator orders Respondent to deduct the

amount of $200.00 per week for twenty (20) weeks until the overpayment is satisfied. After twenty (20) weeks, Respondent shall begin payment of Petitioner's benefits in the amount of $664.72 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

James Kenaga,

Petitioner,

vs. No. 13 WC 40032

15IWCC0763

Village of Hoffman Estates,

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, temporary total disability, medical expenses, nature and extent, permanent disability and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

Petitioner worked as a patrol officer for Respondent for almost 24 years. His duties include responding to calls and enforcing traffic rules. Additionally, he is required to appear in court to testify in connection with arrests he makes. On November 15, 2013, Petitioner had the day off. He went from home to the Rolling Meadows courthouse to testify. Petitioner is assigned court appearance dates by Respondent. These appearances may fall on a regular duty day for Petitioner, or on Petitioner's day off. Court attendance is mandatory and Petitioner is required to appear in uniform. Petitioner has no choice as to what days he will go to court and testify.

Petitioner testified that on regular duty days, he takes the patrol car to the courthouse. On his days off, when court attendance is required, he must provide his own transportation. Petitioner is not reimbursed mileage when attending court using his personal vehicle. Petitioner testified that he is not paid for his time going to and from the courthouse when he is called to

testify on non-duty days. However, under his union contract, he is compensated by Respondent for the time he spends in court.

Petitioner testified that 99% of his court appearances are at the Rolling Meadows Courthouse. On Friday, November 15, 2013 Respondent scheduled Petitioner to appear at the Rolling Meadows courthouse at 9:00 a.m. This was a day when Petitioner was scheduled to be off work. Petitioner testified that he drove his personal vehicle from home to the Rolling Meadows courthouse and parked in the municipal garage, which is the only available parking on the premises. The garage has two levels of designated parking reserved for court personnel, attorneys, and law enforcement officers. Petitioner parked within the designated levels and proceeded to his court appearance.

Petitioner testified that after he finished his appearance he returned to the parking garage. As he was descending the stairs in the parking garage Petitioner missed a step and used his right arm to spare a fall by grabbing the railing. He felt pain in his right arm. In his testimony Petitioner acknowledged that the stairs where he fell are utilized by the general public and that there was no defect in the stairs.

Petitioner testified that on Monday, November 18, 2013 he sought medical care from Dr. Seeds, an orthopedist. An MRI was performed which showed "essentially a complete tear of the distal biceps with retraction by 3.5 centimeters." After a review of treatment options surgical intervention was recommended based upon the injury to Petitioner's dominant arm and the nature of his occupation. Dr. Seeds performed surgery on November 27, 2013.

Petitioner underwent physical therapy and returned to light duty on January 6, 2014. Dr. Seeds released him to full duty on March 10, 2014. Petitioner remains employed as a patrol officer for Respondent. He testified that his right arm now fatigues more quickly and he takes ibuprofen, as needed.

The Commission finds that Petitioner must prove that the accident arose out of and in the course of his employment in order to be compensable. To "arise out of" employment, the injury must have had its origin in some risk connected with, or that is incidental to, the employment so that there is a causal connection between the employment and the injury. Three categories of risk are recognized by the case law: "(1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have particular employment or personal characteristics." Illinois Institute of Technology Research Institute v. Industrial Comm'n, 314 Ill.App.3d 149,163 (2000). The general rule is that "[f]alling while traversing stairs is a neutral risk and injuries resulting therefrom generally do not arise out of employment." Village of Villa Park v. Workers' Compensation Comm'n, 2013 IL App (2d) 130038 WC, ¶ 20, citing Illinois Consolidated Telephone Company v. Industrial Comm'n, 314 Ill.App.3d 347, 353 (2000).

The second district's decision in Village of Villa Park is instructive in analyzing the present case before the Commission. In that case a police officer sustained a fall on a stairway

restricted to use by police personnel. The claimant was required to traverse the stairway where he fell, continuously throughout his workday. The appellate court found that "the evidence established that the claimant was required to traverse the stairs at the police station a minimum of six times per day," which "constituted an increased risk on a quantitative basis from that to which the general public is exposed." Village of Villa Park v. Workers' Compensation Comm'n, 2013 IL App (2d) 130038 WC, ¶ 21.

The instant case is distinguishable from Village of Villa Park. The evidence presented here fails to support that Petitioner was exposed to a risk that was greater than the risk to which the general public is exposed. Petitioner admitted that there was no defect on the stairs. Like the general public, Petitioner traversed the stairs of the parking garage twice on November 15, 2013. Petitioner missed a step and fell on a staircase used by the general public. Petitioner admitted that there was no defect on the stairs.

The Commission finds therefore, that the Petitioner failed to meet his burden of proof that the accident arose out of his employment. The Petitioner suffered an unexplained fall which is not compensable. For the foregoing reasons, the Commission denies Petitioner's claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 27, 2015, is hereby reversed and Petitioner's claim is denied.

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

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: OCT 9 2015
o-09/03/2015
SJM/msb
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KENAGA, JAMES
Employee/Petitioner

Case# **13WC040032**

15IWCC0763

VILLAGE OF HOFFMAN ESTATES
Employer/Respondent

On 1/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

1357 RATHBUN CSEVENYAK & KOZOL
LUIS MAGANA
3260 EXECUTIVE DR
JOLIET, IL 60431

0445 RODDY LAW LTD
PAUL W SCHUMACHER
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

15IWCC0763

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

James Kenaga
Employee/Petitioner

v.

Village of Hoffman Estates
Employer/Respondent

Case # **13** WC **40032**

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 C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **11-24-14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11-15-13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**91,000.00**; the average weekly wage was $**1,750.00**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **2** dependent children.

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

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

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

Respondent is entitled to a credit of $**9,167.97** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner the reasonable and necessary medical expenses enumerated in PX 1, subject to the fee schedule and with Respondent receiving Section 8(j) credit (see above) per the parties' post-hearing stipulation. Respondent shall hold Petitioner harmless against any claims made by the group carrier.

Respondent shall pay Petitioner temporary total disability benefits in the amount of $1,166.66 per week from November 27, 2013 through January 6, 2014, a period of 5 6/7 weeks, pursuant to Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits in the amount of $721.66 per week (the applicable maximum rate, based on the stipulated average weekly wage) for 37.95 weeks representing 15% loss of use of the right arm under Section 8(e) of the Act.

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

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

Molly C Mass

Signature of Arbitrator

1/26/15

Date

JAN 2 7 2015

James Kenaga v. Village of Hoffman Estates
13 WC 40032

Arbitrator's Findings of Fact

Petitioner testified he has worked as a patrol officer for Respondent for almost 24 years. His duties include responding to calls and enforcing traffic rules. He is also required to make occasional trips to court to testify in connection with arrests he makes. He is not able to choose the dates on which he appears in court. Respondent assigns those dates to him. He is typically required to appear in court about three times per month. He can be reprimanded for failing to appear and has, in fact, been reprimanded in the past for missing a court date.

Petitioner testified he is required to provide his own transportation to court when his court day falls on a scheduled day off. He uses his own vehicle and is not reimbursed for mileage. If he is scheduled to appear for court on a day when he is on duty, he uses his patrol car. 98 to 99% of his court appearances are at the Rolling Meadows courthouse. There is a distance of about eight miles between police headquarters and this courthouse.

Petitioner testified he always wears his police uniform when he appears at court.

Petitioner testified that Respondent pays him for the time he spends at court. Per his union contract, he can opt to be paid in one of two ways. He can either receive five hours of time due or two hours of double time for the first two hours and time and a half thereafter.

Petitioner testified that Respondent scheduled him to appear in court at 9 AM on Friday, November 15, 2013, a day he would have otherwise been off work. He had no other reason to go to court that day. He drove to the Rolling Meadows courthouse, using his own vehicle, and parked in the municipal parking garage. He testified this was the only available garage at the courthouse. He testified that the two lower levels of the garage are reserved for court employees, attorneys and police officers. He parked in one of these two levels, went into the courthouse and made his appearance. After he finished, he returned to the same parking facility. As he was walking down some stairs, he missed a step, lost his balance and grabbed the handrail with his right arm. He felt pain in his right arm when he did this.

Petitioner testified he reported the accident to Respondent. Because Sergeant Collins, his immediate supervisor, was off duty that day, he provided notice to Sergeant Paez, the "on duty shift supervisor." [Notice is not in dispute. Arb Exh 1.]

Petitioner testified he first sought care on November 18, 2013, the Monday after the accident. He saw Dr. Seeds that day. He opted to see Dr. Seeds because the doctor had treated his son in the past.

Petitioner denied injuring his right arm prior to the accident of November 15, 2013.

Dr. Seeds' initial history of November 18, 2013 is fully consistent with Petitioner's testimony. The doctor described Petitioner's November 15, 2013 accident as follows:

> "The patient is a 45-year-old gentleman who injured his right elbow while he was at court for his job. He is a police officer. He was at court and going down some stairs and stumbled on the stairs, grabbed the railing and suffered a traction injury to the right elbow. He is right hand dominant."

Dr. Seeds noted that Petitioner described his elbow as popping or cracking at the time of the accident. He also noted that Petitioner complained of pain and limited motion in his right biceps and forearm. On examination, he noted that Petitioner was "black and blue" in these areas. He noted full flexion of the right elbow but limited extension. He was able to palpate the biceps but indicated this caused discomfort. Based on the traction injury Petitioner described, along with the bruising and right elbow deformity, he assessed Petitioner as having a possible biceps tear. He ordered a right elbow MRI. PX 2.

The MRI, performed the same day, showed no acute fracture or effusion and "essentially a complete tear of the distal biceps tendon with retraction by 3.5 centimeters." PX 2.

On November 21, 2013, Dr. Seeds reviewed the MRI and discussed treatment options with Petitioner. He indicated he recommended surgery based on Petitioner's occupation and the fact the injury involved Petitioner's dominant arm. He indicated it would take about four months after the surgery for Petitioner to be able to resume full duty. PX 2.

On November 27, 2013, Dr. Seeds performed an open surgical repair of the right distal biceps rupture. In his operative report, he described Petitioner's mechanism of injury as follows:

> "The patient is a 45-year-old gentleman who tripped on the stairs while he was at court. He is a police officer and he was at court testifying. He slipped on the stairs, went to grab his arm up to protect himself from falling and suffered a traction injury to his arm."

PX 2. Dr. Seeds placed Petitioner's right arm in a posterior mold splint and sling at the conclusion of the surgery.

At the first post-operative visit, on December 3, 2013, Dr. Seeds removed the splint, noted no signs of infection, applied a posterior splint and recommended range of motion exercises. PX 2.

At Dr. Seeds' direction, Petitioner began a course of physical therapy at ATI on December 12, 2013.

Petitioner testified he was off duty from November 27, 2013 until January 6, 2014, at which point he began performing light duty. He performed light duty for about two months.

Petitioner returned to Dr. Seeds on February 13, 2014. The doctor noted that Petitioner voiced no complaints but was still lacking strength and full extension of the right elbow. He released Petitioner to work with no lifting over 5 pounds with the right arm. He instructed Petitioner to continue therapy. PX 3. On February 15, 2014, the therapist at ATI noted that Petitioner reported 90% improvement. Petitioner was discharged from therapy on March 6, 2014. PX 4.

Petitioner returned to Dr. Seeds on March 10, 2014. The doctor described Petitioner as "doing great." On examination, he noted a well-healed incision, full extension, full flexion, full supination and 5/5 strength. He also noted good stability of the elbow and a full range of shoulder motion. He discharged Petitioner from care and released him to full duty. PX 3.

Petitioner resumed full duty thereafter. He testified he continues to perform full duty.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Atluri on June 17, 2014. In his report of June 18, 2014, Dr. Atluri indicated that Petitioner described missing a step, losing his footing and grabbing a railing with his right hand on November 15, 2013. Dr. Atluri also indicated that, while Petitioner felt some pain in his right arm after this accident, he did not immediately realize his injury was significant. It was when Petitioner got to his car and tried to rotate his forearm to start the ignition that he realized the severity of the problem.

Dr. Atluri noted that Petitioner underwent a biceps repair on November 27, 2013 and therapy thereafter. He indicated that Petitioner reported being able to perform his customary activities but complained of some right arm weakness and occasional pain at the dorsal radial aspect of the right forearm when lifting something heavy. He also noted that Petitioner complained of infrequent numbness and tingling in his fingertips. He indicated that Petitioner denied any previous right arm problems and had resumed his regular police officer duties.

On examination, Dr. Atluri noted a well-healed, curved incision, a slight loss of terminal extension, some tenderness over the antecubital fossa, particularly near the biceps tendon, a little bit of residual soft tissue swelling in the elbow and flattening of the biceps on the right compared to the left.

Dr. Atluri described Petitioner as cooperative. He noted no inconsistencies.

Dr. Atluri obtained right elbow X-rays. He interpreted the films as showing hardware in the proximal forearm along the proximal radius consistent with a distal biceps tendon reinsertion and a lucency in the proximal radius also consistent with the biceps surgery.

Based on Petitioner's history of a "sudden traction injury to the right upper extremity" after stumbling, along with the corroborating clinical notes, Dr. Atluri found a causal relationship between the accident and Petitioner's right elbow condition. He described Petitioner's treatment as reasonable and appropriate. He found Petitioner to be at maximum medical improvement and capable of continuing to perform full duty.

At Respondent's request, Dr. Atluri performed an AMA impairment rating. He indicated he performed a diagnosis-based rating rather than one based on range of motion "due to the absence of any significant motion loss." He went on, however, to use a physical grade exam modifier of 2, stating: "this patient has a moderate loss of motion along with moderate palpatory findings on exam." In conclusion, he rated Petitioner's upper extremity impairment at 5%. Along with his report, he submitted a "Quick Dash" form purportedly completed by Petitioner, reflecting mild difficulty with opening jars and washing his back and no difficulty with carrying a bag or briefcase or using a knife to cut food. The form indicates that Petitioner rated his pain and numbness/tingling as mild. RX 1.

Petitioner testified he has had to appear in court since he resumed full duty. He continues to park in the same garage but not in the lower levels. He received sick pay and used sick time while he was off work following the accident.

Petitioner testified his right arm now fatigues more quickly. He owns a large pull-start mower and has to use more force to get it started. He takes Ibuprofen as needed.

Under cross-examination, Petitioner testified he last saw Dr. Seeds in March 2014. He has no upcoming appointments concerning his arm injury. He is not subject to any restrictions. He drives his patrol car and performs his required work duties.

Petitioner testified that the general public also uses the parking garage and the stairs he used on the day of the accident. There was no defect in the stairs. There was no ice or carpeting on the stairs. He told Paez and his treating physician he lost his footing. He either missed a step or tripped over his own feet.

On redirect, Petitioner testified that the area where he parked on the day of the accident was not for use by the general public.

Under re-cross, Petitioner testified he has seen private and public attorneys park in the area where he parked at the time of the accident.

In addition to the exhibits previously described, Petitioner offered into evidence a collection of medical bills. Some of the bills reflect group payments and adjustments. PX 1.

No witnesses testified on behalf of Respondent.

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure with Respondent weighs in his favor, credibility-wise. Petitioner's account of the accident is fully consistent with his medical records.

The Arbitrator found Petitioner to be a very credible witness.

Arbitrator's Conclusions of Law

Was Petitioner a traveling employee as of his claimed work accident? Did the accident arise out of and in the course of Petitioner's employment?

As a preliminary matter, the Arbitrator considers the question of whether Petitioner was a "traveling employee" at the time of his accident. A "traveling employee" is "any employee for whom travel is an essential element of his employment," Urban v. Industrial Commission, 34 Ill.2d 159, 163 (1966).

The Arbitrator finds that Petitioner falls into the "traveling employee" category, both in terms of his ordinary duties and the specific task he was performing for Respondent at the time of his accident. No one contradicted Petitioner's testimony that his police officer job requires him to patrol the streets. Nor is there any controversy that he is required to make special trips each month in order to appear at court. He has no say over the dates on which such trips are to be made. If a mandatory appearance falls on a day on which he would otherwise be off work, he has to provide his own transportation to make the trip to and from court. He was in the process of completing such a trip when his injury occurred.

The Illinois courts have consistently held that "the determination of whether an injury to a traveling employee arose out of and in the course of employment is governed by different rules than are applicable to other employees." A traveling employee is deemed to be in the course of his employment from the time he leaves home until he returns. Cox v. IWCC, 406 Ill.App.3d 541, 545 (2010). The Arbitrator finds that Petitioner was in the course of his employment at the time of his accident because he had not yet returned home following his assigned task. An injury sustained by a traveling employee arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable, i.e., conduct that "might normally be anticipated or foreseen by the employer," Robinson v. Industrial Commission, 96 Ill.2d 87, 92 (1983). The Arbitrator finds that the activity Petitioner was engaged in immediately prior to his accident, i.e., using stairs in order to gain access to his car and return home after making a mandatory court appearance, was reasonable and foreseeable. Respondent had every reason to anticipate that Petitioner, who was required to make his own way to court since it was his day off, would park his car in a municipal lot adjacent to the courthouse. Petitioner was acting reasonably by using the stairs in this lot to return to his car

after appearing in court. There is no evidence suggesting he was doing anything out of the ordinary when he lost his footing on the stairs.

Based on the foregoing, the Arbitrator finds that the accident of November 15, 2013, arose out of and in the course of Petitioner's employment. The Arbitrator's accident-related analysis ends here, based on Kertis v. IWCC, 2013 IL App (2d) 120252WC. In Kertis, the Appellate Court held that, because the claimant was a traveling employee, the "dispositive question," accident-wise, was whether the claimant was injured while engaging in conduct that was reasonable and that might reasonably be anticipated by his employer. The Court went on to state: "Because we may resolve this appeal under the analysis applicable to traveling employees, **we do not need to address** the claimant's alternative argument that he was exposed to a neutral risk more frequently than members of the general public by virtue of his employment." [emphasis added]. The Arbitrator, having found that Petitioner was a traveling employee who was engaged in reasonable and foreseeable conduct at the time of his accident, finds no need to engage in an "increased risk" analysis.

Did Petitioner establish a causal connection between his accident of November 15, 2013 and his current right arm condition of ill-being?

The Arbitrator finds that Petitioner established a causal connection between the accident of November 15, 2013 and his current right arm condition of ill-being. In so finding, the Arbitrator relies on the following: 1) Petitioner's credible denial of any right arm problems prior to the accident; 2) Petitioner's credible account of the mechanism of injury; 3) the consistent histories in Dr. Seeds' records and Dr. Atluri's report; 4) Dr. Seeds' initial examination findings, including the finding of bruising; 5) the pathology demonstrated on MRI; and 6) Dr. Atluri's opinion that the traction injury described by Petitioner resulted in a right biceps tear.

Is Petitioner entitled to temporary total disability benefits? Is Petitioner entitled to reasonable and necessary medical expenses?

The Arbitrator, having found in Petitioner's favor on the issues of accident and causation, and in reliance on Dr. Seeds' records, finds that Petitioner was temporarily totally disabled from November 27, 2013 through January 6, 2014, a period of 5 6/7 weeks. Noting there is no dispute as to the reasonableness or necessity of Petitioner's care, the Arbitrator awards Petitioner the medical expenses enumerated in PX 1, subject to the fee schedule, and with Respondent receiving Section 8(j) credit, per the parties' post-hearing stipulation.

What is the nature and extent of Petitioner's injury?

Since Petitioner's accident occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in assessing the nature and extent of Petitioner's injury. That section provides that various factors, including any AMA impairment rating, are to be considered in determining permanent partial disability. The section also provides that none of the enumerated factors shall be the sole determinant of such disability.

In the instant case, the Arbitrator considers not only Dr. Atluri's AMA impairment rating of 5% but also Petitioner's patrol officer occupation, his age at the time of injury (46), the impact, if any, of the injury on his future earning capacity and the "evidence of disability corroborated by the treating medical records." The Arbitrator considers Petitioner to be a middle aged individual. The Arbitrator finds no evidence that the injury impacted Petitioner's future earning capacity. Petitioner was able to resume his full patrol officer duties following the accident. While he credibly testified to experiencing some weakness and fatigue in his right arm when performing household tasks or yard work, he did not claim that the injury has affected his ability to perform his job. As for "evidence of disability corroborated by the treating medical records," the Arbitrator notes the MRI (which showed a complete biceps tear with retraction) and Dr. Seeds' operative finding of a right distal biceps rupture. The Arbitrator also notes the complaints recorded by Respondent's examiner, Dr. Atluri, and the doctor's examination findings.

Having considered all of the foregoing, the Arbitrator awards permanency equivalent to 15% loss of use of the right arm, or 37.95 weeks of compensation, pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Abel Zertuche,

Petitioner,

vs. No. 07 WC 00578

15IWCC0764

John Deere Parts,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the circuit court. The circuit court remanded the matter to the Commission with directions to allow Respondent to file a response to Petitioner's statement of exceptions and supporting brief and to reconsider the matter in light of Respondent's response. The Commission complies with the order of the circuit court. After reconsidering the issues of accident, causal connection, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, the Commission corrects and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On January 4, 2007, Petitioner filed an application for adjustment of claim alleging repetitive trauma to the hands resulting in carpal tunnel syndrome, with the manifestation date of January 12, 2006. On April 13, 2009, Petitioner amended the manifestation date to May 24, 2006. On June 15, 2009, the Arbitrator filed a decision finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent and that he also failed to prove his present condition of ill-being is causally connected to the alleged accident. The Arbitrator therefore denied the claim.

Petitioner timely filed a petition for review of the Arbitrator's decision. However, he filed his statement of exceptions and supporting brief two months late, on January 8, 2010. Respondent objected to the untimely filing of the statement of exceptions and supporting brief.

The Commission denied oral argument, but did not strike Petitioner's statement of exceptions and supporting brief. The Commission's deliberations in the matter took place on January 19, 2010. On March 5, 2010, the Commission issued a decision and opinion on review reversing the Arbitrator's decision and awarding benefits. Respondent promptly appealed the Commission's decision to the circuit court.

On October 23, 2013, the circuit court entered an order finding and ordering as follows: "Respondent did not have an opportunity to file its Response and supporting brief in response to Petitioner's Statement of Exceptions. Thus, Respondent did not have [an] opportunity to be heard in front of the Commission which violated its due process rights. This Court reverses the opinion of Illinois Industrial Commission entered on March 5, 2010, and remands it to the Commission to allow Respondent to file a Response to Petitioner's Statement of Exceptions and/or Additions and supporting briefs and to reconsider the matter with that Response in the record." On July 22, 2015, Respondent filed its response brief with the Commission.[1]

Turning to the merits of Petitioner's claim, Petitioner, who is right hand dominant, worked for Respondent for 33 years picking and packing various parts. Petitioner summarized his job duties as follows: "[The job] consists of going to the auto control, grabbing a load of *** pick tickets, go pick the parts, put them in a box, staple it, put them in a container. And *** just going around the warehouse filling orders." Petitioner used a scooter with a trailer to travel throughout the warehouse and collect parts. Petitioner attributes his bilateral carpal tunnel syndrome to his job duties. However, Petitioner admitted to ongoing treatment for hypothyroidism and diabetes since approximately 1999. Petitioner also admitted that he restored classic cars for the past 10 to 15 years, spending several hours a day every day working on mechanical systems and employing two full-time workers to do the rest of the work. Dr. Chesser, who had performed EMG/NCV studies, opined that Petitioner's job duties were a significant contributing factor in the development of the carpal tunnel syndrome. Petitioner's treating surgeon, Dr. Boardman, indicated he did not know Petitioner considered his condition to be work-related, and declined to provide a causal connection opinion. Respondent's company physician, Dr. Allen, opined Petitioner's bilateral carpal tunnel syndrome was related to auto reconditioning activities, hypothyroidism and diabetes, and not his job duties.

Having carefully considered the record and the parties' briefs, the Commission agrees with the Arbitrator that Petitioner failed to carry his burden of proof by a preponderance of the evidence. The Commission corrects the date of accident on page 2 of the Arbitrator's decision to May 24, 2006, and otherwise affirms and adopts the Arbitrator's decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 15, 2009, is hereby corrected as stated herein, and otherwise affirmed and adopted.

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[1] There was a delay in setting the matter on the Commission's review/remand calendar because of a delay in dispatching the record to the Commission and the Commission's misplacing the file in the matter. The parties have agreed to proceed on remand on their respective briefs and the record that came back from the circuit court.

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: OCT 9 2015
d-09/24/2015
SM/sk
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZERTUCHE, ABEL
Employee/Petitioner

Case# 07WC000578

JOHN DEERE PARTS
Employer/Respondent

15IWCC0764

On 06/15/2009, an arbitration decision on this case 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:

2208 CAPRON & AVGERINOS PC
NICK J AVGERINOS
55 W MONROE ST STE 900
CHICAGO, IL 60602

2119 SNYDER PARK & NELSON
STEVEN NELSON
PO BOX 3700
ROCK ISLAND, IL 61201

000008

STATE OF ILLINOIS)
)
COUNTY OF Rock Island)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Abel Zertuche
Employee/Petitioner

Case # 07 WC 00578

v.

~~Rock Island~~

15IWCC0764

John Deere Parts
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 J. Holland**, arbitrator of the Commission, in the city of **Rock Island**, on **6-2-09**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

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

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

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

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

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

G. [ ] What were the petitioner's earnings?

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

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

J. [x] Were the medical services that were provided to petitioner reasonable and necessary?

K. [x] What amount of compensation is due for temporary total disability?

L. [x] What is the nature and extent of the injury?

M. [ ] Should penalties or fees be imposed upon the respondent?

N. [ ] Is the respondent due any credit?

O. [ ] Other ____

FINDINGS

15IWCC0764

- On 6-2-09, the respondent John Deere Parts *was* operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.
- On this date, the petitioner ***did not*** sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident ***was*** given to the respondent.
- In the year preceding the injury, the petitioner earned $ 65,083.72 ; the average weekly wage was $ 1,251.61
- At the time of injury, the petitioner was 51 years of age, ***married*** with 0 children under 18.
- Necessary medical services ***have*** been provided by the respondent.
- To date, $ 3,119.20 has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ N/A/week for _____ weeks, from _____ through _____, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of $ N/A/week for a further period of _____ weeks, as provided in Section _____ of the Act, because the injuries sustained caused _____.
- The respondent shall pay the petitioner compensation that has accrued from _____ through _____, and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of $ N/A for necessary medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay $ _____ in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ _____ in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $ _____ in attorneys' fees, as provided in Section 16 of the Act.

Claim for compensation is hereby denied (see attached findings).

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

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

Douglas J. Holland

Signature of arbitrator

6-9-09
Date

000310

JUN 15 2009

In support of the Arbitrator's decision relating to (C) whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent, and relating to (F) whether the Petitioner's present condition of ill-being is causally related to the alleged injury, the Arbitrator finds the following facts:

The Petitioner claims that he injured his right hand and left hand as a result of repetitive trauma on or about May 24, 2006.

As of that date the Petitioner had been as employee of the Respondent for thirty-three years picking parts. His job required him to pick, pack and/or load parts in preparation for shipment to customers, branches, factory or dealer. He operated a Taylor Dunn traveling throughout a huge warehouse picking parts of various weight and sizes.

On May 25, 2006, he saw Dr. Castro, his family doctor complaining of numbness and tingling of his hands. Dr. Castro referred him to Dr. Chesser for EMG/NCV studies.

On May 25, 2006, Dr. Chesser performed EMG/NCV studies: Based on studies, Dr. Chesser's diagnosis was moderate to severe bilateral carpal tunnel syndrome.

On May 25, 2006, he was seen in the Respondent's medical department by Dr. Deignan with complaints of numbness and tingling in both hands. The Petitioner felt that this was related to work picking parts for years. Dr Deignan found that the Petitioner did have risk factors for peripheral neuropathy since he is a diabetic and has hypothyroidism which is also associated with neuropathy and early carpal tunnel syndrome.

The Petitioner was referred to Dr. Boardman, an orthopedic surgeon, by Dr. Castro. On October 18, 2006, Dr. Boardman performed a left carpal tunnel release and on November 6, 2006, he performed a right carpal tunnel release.

The Petitioner testified to operating a side business that he has done for a number of years reconditioning automobiles. The Petitioner testified that he works two hours a day Monday through Friday, a half of a day on Saturday, and probably one to two hours on Sunday. In the last ten to fifteen years he has restored around nineteen automobiles. In performing this side business he uses air tools such as an impact wrench and an air ratchet wrench. He also uses various tools that a mechanic would use such as screw drivers and socket wrenches. He worked on engines, transmissions and brake systems.

Dr. Boardman, in a letter to Petitioner's attorney dated January 23, 2008, responding to petitioner's attorney's correspondence, asking whether condition of petitioner=s upper extremity was caused, accelerated or aggravated by his activities,

stated that he could not identify in his office notes a description of Petitioner's symptoms which he attributed to work activities.

The Petitioner seen for an evaluation by Dr. Chesser at the request of his attorney. The Petitioner told Dr. Chesser that his job required him to pick parts and, if necessary, bag them; and he uses a stapler with his right hand and picks the parts with his left hand. The frequency depends on the number of orders that are placed. Dr. Chesser could not completely eliminate that his part-time job using power tools, where he spent anywhere from twelve to sixteen hours week doing car restoration, as a contributing factor to developing carpal tunnel syndrome

At the request of the Respondent the Petitioner was examined by Dr. Rhea Allen on May 12, 2008. Dr. Allen reviewed the records from Dr. Chesser, Dr. Boardman, Trinity Work Fitness, Dr. Castro, and Dr. Deignan. At the time of his exam the Petitioner was doing his normal job of picking parts without any difficulties.

Dr. Allen indicated that there was a notation in the notes of Dr. Castro on May 19, 2006, of numbness and tingling in his hands due to diabetes By this time, the Petitioner had been diabetic for at least three 3 years. The Petitioner also suffered from hypothyroidism. The Petitioner also suffered from hypercholesterolemia.

It was the opinion of Dr. Allen that the Petitioner's bilateral carpal tunnel syndrome was related to his home activities of auto reconditioning and his personal medical issues.

Dr. Allen's opinion that the Petitioner's carpal tunnel were not work-related to his employment by the Respondent was based on the following:

a. Diabetes and hypothyroidism both are strongly associated with carpal tunnel syndrome and diabetes is strongly associated with trigger fingers.

b. He has done the same work for thirty-two years. The hand problems started when he developed diabetes and hypothyroidism.

c. His job is not ergonomically high risk for carpal tunnel syndrome or trigger fingers. His work at home reconditioning cars was a very high risk.

It was therefore, her opinion, to a reasonable degree of medical certainty, that the Petitioner's bilateral carpal tunnel syndrome was not work- related.

Based on the testimony and medical records, it is the Arbitrator=s opinion that the Petitioner failed to prove that he sustained an accident at work arising out of and in the course of his employment by the Respondent or that Petitioner's present condition of ill-being is causally related to the alleged injury.

Therefore, compensation is hereby denied.

Having so found, it is not necessary to address the other issues raised in this case.

DATED AND ENTERED 6-9, 2009.

Douglas J. Holland
ARBITRATOR

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Bassett,

Petitioner,

vs.

NO: 11 WC 07182

15IWCC0765

State of Illinois/Pinckneyville Correctional Center,
Respondent,

DECISION AND OPINION ON REVIEW

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

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

No bond or summons required for State of Illinois cases.

DATED: OCT 19 2015

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:9/10/15
43

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

BASSETT, DAVID
Employee/Petitioner

Case# **11WC007182**

15IWCC0765

SOI/PINCKNEYVILLE CORECTIONAL CENTER
Employer/Respondent

On 2/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 THOMAS C RICH PC
#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 CENTRAL MANAGEMENT SYSTEMS
WORKERS' COMP CLAIMS
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

FEB 5 - 2015

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

15IWCC0765

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Bassett
Employee/Petitioner

Case # 11 WC 007182

v.

State of Illinois/Pinckneyville 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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **December 4, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Admissibility of PX 8 - PX 18**

FINDINGS

On the date of accident, **February 7, 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 $**56,663.00**; the average weekly wage was $**1,089.67**.

On the 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.

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

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

ORDER

Petitioner failed to prove he sustained an accident on February 7, 2011 that arose out of and in the course of his employment or that his current condition of ill-being is causally related to said accident. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Signature of Arbitrator — **February 1, 2015** Date

ICArbDec19(b)

FEB 5 - 2015

15IWCC0765

David Bassett v. State of Illinois/Pinckneyville Correctional Center, 11 WC 007182

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner alleges that he sustained injuries to his bilateral hands and bilateral arms/elbows as a result of repetitive duties while working for Respondent. (AX2) Petitioner alleges an accident date of February 7, 2011. The issues in dispute are notice, accident, causation, medical bills, and prospective medical as Petitioner seeks authorization for surgery as recommended by Dr. Brown. (AX1)

The Arbitrator finds:

Petitioner presented to Dr. David Brown on February 7, 2011, for treatment and evaluation of his hands. (PX3) Petitioner reported to Dr. Brown that he had a six to twelve month history of progressive numbness and tingling in both hands. Dr. Brown noted that the numbness mainly involved Petitioner's middle and index fingers of both hands. Petitioner gave a history of working at Pinckneyville eight hours a day, forty hours a week. Petitioner reported that he locked and unlocked cell doors up to 300 times a day, opened and closed cell doors, and lifted food trays. Petitioner had been referred to Dr. Brown by his attorney.

Dr. Brown noted that Petitioner's medical history was significant for back surgery, surgery for a pectoral tear, and a hernia repair. On physical examination Petitioner had a negative Tinel's sign and direct compression test over the ulnar nerve at the right and left cubital tunnels. Elbow flexion test was also negative bilaterally. Petitioner had a positive Tinel's over his right and left carpal tunnels. The direct compression test/Phalen's test was positive bilaterally as well. Dr. Brown noted that Petitioner had some symptoms and findings consistent with a diagnosis of bilateral carpal tunnel syndrome. Dr. Brown ordered a nerve conduction study and advised Petitioner to wear bilateral wrist splints and to take nonsteroidal anti-inflammatory medication. Dr. Brown further advised Petitioner that he could work full duty with no restrictions. (PX 3)

Also on February 7, 2011, Petitioner presented to Dr. Daniel Phillips for a diagnostic study. (PX4) Dr. Phillips noted that Petitioner had a past surgical history of a disc rupture with competitive weightlifting resulting in lumbar surgery years earlier. Petitioner's history included a hernia and pectoralis repair. Dr. Phillips reported a diagnosis of relatively moderate predominantly demyelinative sensory motor median neuropathy across the right carpal tunnel and milder predominantly sensory median neuropathy across the left carpal tunnel.

On February 7, 2011, Dr. Brown added an addendum to his earlier office note following Dr. Phillips' study. (PX3) Dr. Brown noted that the electrodiagnostic study revealed findings consistent with moderate right carpal tunnel syndrome and milder left carpal tunnel syndrome. Dr. Brown advised he would see Petitioner back in six to eight weeks. (PX 3)

On February 17, 2011 Petitioner signed his Application for Adjustment of Claim alleging repetitive trauma to his hands and elbows bilaterally. (AX 2)

On March 6, 2011, Petitioner completed an Employee's Notice of Injury. (RX2) Petitioner reported that his injury was incurred through "[r]eptitive movements. Locking & unlocking doors, chuckholes, etc." Petitioner stated he reported his injury to Maj. Spiller at 9:00 a.m. on March 12, 2011.

On March 12, 2011, Major Spiller completed a Supervisor's Report of Injury or Illness. (RX3) Major Spiller noted that Petitioner was a correctional officer and had been so for 12 years. Major Spiller reported Petitioner's injury was "carpal-tunnel. Both wrists."

On April 20, 2011, Petitioner returned to Dr. Brown for a follow-up. Petitioner reported no improvement in his symptoms. (PX3) Dr. Brown noted that Petitioner had chronic bilateral carpal tunnel syndrome which had failed conservative treatment. Dr. Brown noted that Petitioner was a candidate for carpal tunnel releases, and Petitioner advised he wished to undergo the procedure. Dr. Brown noted he would proceed once he received approval, and that Petitioner could continue to work in the interim on a full duty basis with no restrictions.

Petitioner has undergone no further treatment since April 20, 2011.

On March 22, 2012, Dr. James Williams performed a records review on Petitioner. (RX9) Dr. Williams reviewed a First Report of Injury, a New Patient Questionnaire filled out at Dr. Brown's office, an EMG from Dr. Phillips, and Dr. Brown's records of 2/7/11 and 4/20/11.

According to Dr. Williams' report, Petitioner was noted to be right hand dominant. Based upon a written statement signed by Petitioner and included in Dr. Brown's records, Petitioner was experiencing symptoms in both of his hands and elbows and his symptoms included numbness and tingling. He had been experiencing symptoms for six months to a year before seeking treatment. He was a correctional officer for the State and worked 8 hours a day, 40 hours a week. Petitioner's job involved keying inmates in and out of their cells many times in an 8 hour day. He had no other job. Petitioner was working as of February 7, 2011. After reviewing the records available to him, Dr. Williams wrote in his report that "He comes in with complaints of numbness and tingling in both the right and left hands." Dr. Williams wrote that it looked as though Petitioner had a strong history of lifting weights. He wrote, His nerve study, as well as his physical exam, does confirm carpal tunnel and yet from the job duties described of the locking and unlocking of cell doors, as well as the opening and closing of chuckholes, those duties at least as described on the Corvel Job Analysis visit 1 and 2, as well as the job videos of which I have examined, as well as the key turning analysis, do not support an aggravating factor to his development of carpal tunnel syndrome nor on the visit that I did myself did I see anything such as I myself opened up and closed chuckholes. I, myself, opened up and used the large Folger Adams as well as the smaller keys, as well as cuffed and uncuffed an officer. I did not find any of those activities to either require any sustained, repetitive, forceful gripping and/or any

vibration, and/or impact which would either aggravate and/or cause the condition of carpal tunnel syndrome." (RX 9)

The Depositions of Dr. Williams and Dr. Brown

Dr. Williams testified via evidence deposition taken on December 18, 2013. (RX10) Dr. Williams testified that he is board certified in orthopedic surgery with an added qualification in hand and upper extremity surgery. Dr. Williams testified that he reviewed records on Petitioner, specifically the employee's notice of injury, demands of the job, new patient questionnaire completed by Petitioner at Dr. Brown's office, records of Dr. Brown, the nerve conduction study by Dr. Phillips, job roster of the Petitioner's work duties from 4/11/09 – 1/10/13, two job site analyses by Corvel, two DVD's from Corvel, and the key estimation study performed by Lt. Jason Thompson. (RX 10)

Dr. Williams testified that he toured Pinckneyville Correctional Center on July 12, 2011. Dr. Williams testified that while on the tour he performed job duties that a correctional officer performs. Dr. Williams testified that he performed key turning of small keys and Folger Adams keys, he cuffed/uncuffed an officer, opened and closed a chuckhole, opened and closed a cell door, pushed buttons and touch screens in the control towers, handled trays in dietary, and handled and manipulated property boxes.

Dr. Williams testified that based upon Petitioner's medical history, the activities Petitioner stated he performed, and the information Dr. Williams himself obtained from performing the job duties of a correctional officer at Pinckneyville CC (tour of July 12, 2011), Dr. Williams did not believe Petitioner's job duties caused or aggravated his upper extremity condition.

Dr. Williams further testified that carpal tunnel syndrome is most commonly idiopathic in nature (or of unknown origin) in more than fifty percent of the cases. Other medical problems such as diabetes, high blood pressure, thyroid problems, increased body mass index, arthritis in the wrist, hypothyroidism and different types of inflammatory arthritis are also causes. Smoking, jack hammering, drills, significant weight lifting which places stress on that area, shooting a gun, and shooting a bow can also be causes. (RX 10, p. 9)

Dr. Williams testified that while he toured Respondent's facility in July of 2011 he was there for approximately 3 1/2 hours. During that time he turned small and large keys, including the "Folger Adams" key. He cuffed and uncuffed an officer. He opened and closed a chuckhole, a cell door, and pushed buttons in a control tower, in the jailhouse. He also picked up a tray in dietary and handled and manipulated property boxes. (RX 10, pp. 12-13) Dr. Williams further testified that the risk factors for development of carpal tunnel syndrome include vibration, significant repetitive forceful gripping and/or pinching that's done over a prolonged period of time and consistently without significant rest. (RX 10, p. 13) Based upon this particular case and the activities which Petitioner performed Dr. Williams did not believe Petitioner's job duties

were an aggravating or contributing factor in his bilateral wrist/hand problems. (RX 10, pp. 13-14) Dr. Williams based this upon the activities which Petitioner testified he performed and Petitioner's additional medical history which included a significant history of weight lifting and a disc rupture form competitive weight lifting, a lumbar surgery, a hernia repair and a pec tear which had to be repaired. Dr. Williams also relied upon what he garnered from his tour of the facility. (RX 10, p. 14) Dr. Williams felt Petitioner had no evidence of bilateral cubital tunnel syndrome. (RX 10, p. 15)

Dr. Williams also testified that on the doors he opened at Respondent's facility he did not feel there was significant force, particularly that over a prolonged period of time. (RX 10, p. 16) He also did not feel there was significant force in opening and closing chuckholes. "You just turn the key in order to open it. To close it you just push the chuckhole shut." (RX 10, p. 16-17) He was under the impression there was very little bar rapping at Pinckneyville. (RX 10, p. 17)

Dr. Williams was asked questions about the history Petitioner provided to Dr. Brown. Dr. Williams also testified that he reviewed Lt. Thompson's key estimation study that was given to him. (RX 10, pp. 18-19)

Dr. Williams testified that Petitioner's hobby of competitive weightlifting could have caused or aggravated his bilateral carpal tunnel syndrome as it required significant force and significant gripping. (RX 10, p. 20)

Dr. Williams further testified that based upon his review of the job description, the job analysis and DVDs, the medical records, Lt. Thompson's key study, and his tour of Respondent's facility he did not believe Petitioner's bilateral carpal tunnel syndrome was causally related to his job duties for Respondent. (RX 10, p. 21) He added that he thought contractors doing roofing, siding and guttering work involving the use of hammers and heavy shingles to carry had jobs that could aggravate carpal tunnel syndrome. (RX 10, p. 21) Dr. Williams believed Petitioner was at maximum medical improvement. (RX 10, p. 21)

On cross-examination Dr. Williams acknowledged that carpal tunnel syndrome is a clinical diagnosis. He also agreed with the diagnosis of Dr. Brown and Dr. Phillips, and further stated that they were "two very good physicians" and "[did]n't have any reason to question their diagnosis by any means." Dr. Williams estimated that he had made $300,000-$400,000 doing examinations for the State of Illinois. He agreed that Dr. Brown's recommendation for surgical treatment for Petitioner's bilateral carpal tunnel syndrome was "very reasonable." (RX 10, pp. 23)

Dr. Williams testified that he did not know anything about what Petitioner's job duties or assignments were prior to 2009. He acknowledged that correctional officers are required to forcefully grip and pull on cell doors to make sure they are secure, that Petitioner had to use both of his hands and manually inspect everything in the inmate cell during shakedowns, and to lift property boxes weighing from 50 to 100 pounds. When asked if he would disbelieve Petitioner if Petitioner testified that he might key tens of thousands of heavy steel doors and chuckholes

during his career, Dr. Williams testified, "I think that's possible." (RX 10, p. 27) He testified that he did not have any direct knowledge of whether or not the frequently used locks are difficult to use, but testified that he would have no reason to disagree with same or any testimony that keys have to be jammed into the locks with the palm of the hand to disengage them. He testified similarly when asked about whether doors stick in the summer time due to heat and whether the chuckholes stick and have to be slammed shut. Dr. Williams acknowledged that these activities would add force and stress to the job duties performed with the hands. Dr. Williams testified that if this was done with the base of Petitioner's palm, his opinion as to causation could possibly change. (RX 10)

On further cross-examination Dr. Williams testified that wrist turning in and of itself would not aggravate or cause carpal tunnel syndrome. (RX 10)

Dr. Williams acknowledged that cuffing or restraining a resistant inmate would place additional stress on the hands. Dr. Williams testified that the Correctional Officer that he cuffed during his visit did not put up a struggle. He testified that depending on the amount of resistance the inmate created and how often this occurred, his opinion as to causation could change. Dr. Williams acknowledged that cuffing an inmate in segregation was arduous, but he did not know how long Petitioner worked in segregation. Dr. Williams acknowledged that the latency period for every individual is different. Dr. Williams was unaware that Respondent's Pinckneyville facility was on lockdown 27% of the time span that Petitioner began developing symptoms. He acknowledged that this also would place increased stress on the hands and carpal tunnel ligaments. (RX 10)

Dr. Williams ultimately acknowledged that all of the aforementioned activities and difficulties could be aggravating factors in the development of bilateral compression neuropathies. Dr. Williams did not have the deposition testimony of the correctional officers or the locksmith which were provided to Dr. Brown. He testified that at one point he had requested this information, but in over two years he has yet to see any of the testimony. He acknowledged that Respondent's videos do not show any of the commonly described difficulties encountered at the facility. (RX 10)

On August 19, 2014, Dr. Brown testified via evidence deposition. (PX6[1]) Dr. Brown, a board certified hand surgeon, testified that he initially saw Petitioner on February 7, 2011. At that time he took a history from Petitioner which was recorded in his office note. He also testified that Petitioner briefly wrote out his job description on the new patient questionnaire but he got more details from speaking with Petitioner verbally. Dr. Brown believed Petitioner had bilateral carpal tunnel syndrome; however, he sent him to Dr. Phillips for appropriate diagnostic testing which confirmed his diagnosis. He recommended a conservative approach to treatment consisting of night-time wrist splits and nonsteroidal anti-inflammatory medication.

Dr. Brown testified that he did not express a causation opinion in his February 7, 2011 office note because at that point in time he knew that a job site analysis had been performed and

[1] PX 6 references numerous exhibits; however, none of them were included in the deposition transcript marked as PX 6. The Arbitrator also notes some of the depositions were introduced independently as other exhibits..

before he rendered an opinion he wanted to see the analysis so that he could incorporate it into his causation opinion. Dr. Brown testified that "at some point in 2011" he received two job site analysis reports, two DVDs corresponding to the job site analyses, a key usage study performed by Lt. Thompson in February of 2011, a report of some kind from Dr. Williams pertaining to a general review of the job site analysis, and "at some point" sworn testimony from five correctional officers at Pinckneyville[2] including the current locksmith and Lt. Thompson who performed the key usage study. He also received a copy of Dr. Williams' records. Dr. Brown testified that out of all that information he found "the most compelling information came from the sworn testimony of the five correctional officers and their deposition testimony on how they in very vivid detail described what they're doing on a daily basis." (PX 6, p. 25)

Dr. Brown testified that he found the deposition testimony of the locksmith very useful as well as the deposition testimony of Lt. Thompson who talked about the frequency of the activities being performed. What really stood out to the doctor was that there are people there who have actually worked there day in and day out for over a decade and provided more detail than one can get through a job site analysis. (PX 6, pp. 25 - 29) Dr. Brown testified that the information he was able to obtain from reviewing the depositions was consistent with the frequency of key turning Petitioner was doing and opening and closing of cells. Dr. Brown testified that he relied on those depositions in preparing for his deposition and forming his causations opinions and testifying that day. Dr. Brown believed the job site analyses provided some useful information. He also wished some additional information had been provided, noting there was no inclusion of the amount of force required to turn the keys in the locks or the amount of force that's required to open and close the cell doors and chuckholes. (PX 6, p. 33) As an expert, Dr. Brown did not want to rely on the job site analysis performed by Respondent herein due to what it lacked. (PX 6, p. 34) Dr. Brown also took issue with the key usage study. (PX 6, p. 35) Dr. Brown believed Petitioner worked the daytime shift. (PX 6, p. 36) Dr. Brown found one DVD helpful but not the other. (PX 6, p. 36) Based upon his review of the depositions he believed there was a lot of forceful pinching involved in turning the keys in the locks and that it is done frequently. (PX 6, p. 38)

Dr. Brown further testified that the individuals who are actually doing the work day in and day out, year after year, are in the best position to describe what their job duties are and what effects it is having on their upper extremities. (PX 6, p. 39)

Dr. Brown also testified that some people are susceptible to repetitive trauma and others aren't. Some people can perform a job for decades and not get carpal tunnel; others get it after five years. The threshold varies by individual. (PX 6, p. 41)

Dr. Brown concluded, based upon all the information and documents he had been given to review, that Petitioner's job duties, at the very least, over the last 12 - 13 years would be an

[2] Robert Schuchert, Jason Thompson, Donna Jones, Jaelene Bryan, Jimmy Phillips

aggravating factor for carpal tunnel syndrome. (PX 6, p. 42) He based his opinion on medical literature and the fact Petitioner was a healthy, 37 year old young man with no other risk factors for developing carpal tunnel syndrome. (PX 6, p. 43)

Petitioner's attorney asked Dr Brown if, hypothetically, Petitioner was a weightlifter, would that change his causation opinion. Dr. Brown testified, "No." He explained that it is common for patients to have more than one risk factor but that doesn't preclude the other risk factor. (PX 6, p. 51)

Dr. Brown further testified that when Petitioner returned on April 20, 2011 he denied any improvement in his symptoms. His exam findings were unchanged. Dr. Brown felt Petitioner was a surgical candidate at that time. Dr. Brown has not seen Petitioner since then. Since he has not seen him since April of 2011 and if he assumed Petitioner "came back into [his] office today with recurrent symptoms" he would recommend repeating the electrical studies. (PX 6, p. 52)

Dr. Brown testified that his bills remain outstanding.

On cross-examination Dr. Brown acknowledged that Petitioner stated in his intake form that he was being seen for a work-related injury. (PX 6, p. 53) He also acknowledged that Petitioner listed no outside activities or interests. (PX 6, p. 54)

Dr. Brown also testified that the body mechanics that would cause or aggravate carpal tunnel syndrome would be forceful pinching and forceful gripping and grasping. Dr. Brown testified that the job duties Petitioner performs that include those body mechanics would be key turning, the opening and closing of cell doors, and wing checks where the officers walk down the wings and "forcefully pull on the doors to make sure they're not jimmied open..." (PX 6, p. 55)

Dr. Brown admitted that he did not know what days of the week Petitioner worked, and he did not know what job assignments he had other than wing officer or segregation. He re-affirmed that Petitioner worked the day shift. Dr. Brown admitted he did not review a staff assignment history for the Petitioner. He did not know how much time Petitioner spent in cell houses and in segregation. Dr. Brown testified that Petitioner did not discuss shakedowns with him. Dr. Brown testified that he did not know how many food trays the Petitioner lifted a day, or how many chuckholes he opened a day. He acknowledged that Petitioner did not specifically report any difficulties with locks or chuckholes. (PX 6, p. 61)

Dr. Brown testified that he had not been to Pinckneyville C.C.; therefore, he had not performed the job duties of a correctional officer at Pinckneyville C.C. Dr. Brown admitted he did not know the amount of force involved in turning a key at Pinckneyville CC.

Dr. Brown admitted that Petitioner did not inform him of any hobbies that he participated in. Dr. Brown testified that the activity of weightlifting and weightlifting competitively could cause or aggravate carpal tunnel syndrome if it's done on a frequent basis over a prolonged

period of time. (PX 6, p. 68) It is a potential factor because it involves forceful gripping. (PX 6, p. 68) Dr. Brown admitted that if Petitioner had informed him of the hobby he may have questioned him further about it to ascertain whether or not it would have affected his condition. (PX 6, p. 70) However, he didn't think it would change his opinion because both could be aggravating factors. One would not preclude the other. (PX 6, p. 70 - 72) He did not know if Petitioner still worked for Respondent or not. He didn't know if he still lifted weights. Dr. Brown then added that with regard to the work and the weightlifting activities, he would want to know with which activity Petitioner associated/noticed his symptoms. (PX 6, p. 73)

Dr. Brown acknowledged on cross-examination that he was first furnished the five depositions he had discussed on direct examination about two years earlier in connection with another case. (PX 6, p. 65) He did not disagree that he may have treated some of those people, at least Donna Jones. He also acknowledged receiving two pieces of paper the day before his deposition setting forth Petitioner's work history and a time line and comments on the DVD.

The Arbitration Hearing

Petitioner's counsel called Major Jason Thompson to testify. Maj. Thompson testified that he is currently employed by the Illinois Department of Corrections, Jacksonville Correctional Center. Maj. Thompson testified that he previously worked at Pinckneyville Correctional Center from August of 1998 through December of 2011. During that time Maj. Thompson held the position of a correctional officer at Pinckneyville C.C. for two to three months. Maj. Thompson testified that he knew Petitioner and, at one point, was his supervisor while at Pinckneyville. Maj. Thompson was asked what type of employee Petitioner was, and he testified that Petitioner did his job and what was required of him.

Maj. Thompson was asked if he recalled giving a deposition on October 5, 2011 and replied only that he recalled giving a deposition. Maj. Thompson testified that he was involved in giving several people a tour of the facility at one point in time. He further recalled that he accompanied Dr. Williams at one point during Dr. Williams' tour of Pinckneyville C.C. Maj. Thompson testified that they spent most of their time in housing units 3 and 4. Maj. Thompson testified that he did not go to the segregation unit with Dr. Williams. Maj. Thompson testified that housing units 3 and 4 are "x-style housing units" and they held 448 inmates at that time.

Maj. Thompson testified that he did not recall Dr. Williams attempting to open any cell doors. He did see him attempting to use a key to open and close a handcuff. To his recollection, Dr. Williams had a hard time manipulating the key getting it into the hole. Maj. Thompson further testified that the handcuffs use double-lock keys (cuffs with a double-locking mechanism). On the base of each cuff there's either a pin one pushes in with the non-key end of the handcuff key that is very small (about the size of a pencil head) and on the other side there's a slot next to the key hole where one sticks the end of the key in, pushes it and thereby engages the double lock.

Maj. Thompson testified that he didn't see Dr. Williams open a chuckhole. He further testified that there are chuckholes in the segregation unit at Pinckneyville. According to Maj. Thompson one opens the chuckholes using Folger Adams style keys.

Maj. Thompson also acknowledged reviewing a video provided by the State of Illinois and CorVel Corporation concerning the officer position. He testified that he was not asked to give any opinions at all concerning its accuracy.

Maj. Thompson testified that he prepared a key estimation study, which was his estimation of what a typical day of key usage was for a correctional officer. (RX6) Maj. Thompson testified that he performed the key estimation study primarily on the day shift (7:00 A.M. to 3:00 P.M.)

Maj. Thompson testified that keys break at Pinckneyville C.C. Maj. Thompson testified that there are different styles of breaking. Maj. Thompson testified that maybe 2-3 times a month a key would completely break. However, there were quite a lot of cracked and bent keys that they would have to be replaced.

Maj. Thompson testified Petitioner spent some time in segregation, but he did not know exactly how much time. He believed Petitioner spent the majority of his time as a wing officer.

Maj. Thompson testified that during an eight hour shift correctional officers would use their hands all day with breaks in between. He felt there were certain times of days they would use their hands more just as there were times during the day when they used their hands and arms very little. Maj. Thompson estimated correctional officers would use their hands in "continuous use" maybe five hours a day or six hours on a busy day. Maj. Thompson testified there were days when it was more than six hours.

Major Thompson also testified that some of a correctional officer's activities involve force and stress to one's arms and hands.

On cross-examination Maj. Thompson testified that there were times when Petitioner did more than what was required of him. He did not know if Dr. Williams might have toured the facility when he wasn't present.

Major Thompson further testified that he performed the key estimation study for all shifts at the Pinckneyville facility. He explained how he came up with the estimation.

Maj. Thompson testified that in his 13 years at Pinckneyville he had maybe one or two keys that actually broke in half when he was using them. Maj. Thompson testified that he personally when through maybe 3 or 4 total with broken and cracked keys.

With regard to the amount of time officers spent using their hands and arms during the day Maj. Thompson explained that most of the key usage was condensed into really busy periods

followed by inactive periods meaning one would be really busy for a short period of time and then get a little break in between. Maj. Thompson agreed that there were days when hand usage could be less than five to six hours a day as well.

Petitioner testified he began working with the Department of Corrections in November of 1998. Petitioner testified that he was still a correctional officer when he left Respondent's facility in January of 2012. Petitioner testified on cross-examination that when he began working at Respondent's facility it was a brand new state of the art facility, and that all the locks, doors, and hinges were new. During that time he worked at Respondent's facility. Petitioner estimated that he worked in R5 segregation probably four to five years, so approximately 27-33% of his time. Petitioner estimated that he spent half of the other 67 percent of his time as a wing officer. Petitioner testified that he worked the day shift, 7:00am – 3:00pm, and the evening shift, 3:00pm-11:00pm, while at Respondent's facility. Petitioner testified that he never worked the midnight shift.

Petitioner provided testimony concerning his job duties as both a wing officer and as a segregation officer.

As a wing officer, on the 7-3 shift, Petitioner started his day by counting/ checking inmates and letting them out of their cells. This activity did not involve putting a key in a lock. Petitioner was, however, required to manually key inmates out of their cells for call passes. Petitioner testified that 5 to 25 inmates are let out for passes such as school, chow, and other events in the prison. He testified that this could occur anywhere from 58 to 116 times just in the first hour of his day. After letting the inmates out, he completed paperwork to log which inmates have been checked in and out of their cells. He would then perform a wing check which required walking up and down the wings themselves. As he did that he would open up the cell door to make sure the inmate(s) was/were in the cell and pull the doors to make sure they were secure. The doors were made of heavy steel. Petitioner testified that in the summer time, the heavy steel doors would get stuck and he had to pull even harder to get them open.

Petitioner testified that he also performed property box checks and shakedowns. This involved going into a cell, lifting up mattresses, moving furniture, and going through all the inmates' belongings with his arms and hands to ensure the inmate was not in possession of any contraband.

Petitioner testified that, as a wing officer, he occasionally had to cuff and uncuff inmates, such as when an inmate was being escorted to segregation or when the facility was on lockdown. Lockdown occurred when there was an incident at the prison requiring all inmates to be placed in hand cuffs for movement. Petitioner testified that inmates occasionally resist while being cuffed or uncuffed and require him to be more "physical and get them cuffed." During lockdown the responsibilities of a Correctional Officer increased. Petitioner testified that regular wings became similar to segregation units and all services were rendered through a chuckhole. A chuckhole is unlocked with a Folger Adams key, a large, heavy key. Petitioner testified that some chuckholes are easier to turn and some get stuck. According to Petitioner they are regularly slammed so much that one often has to just "crank on and on" to get it open. This required the use of one's hands and wrists. Petitioner demonstrated the motions he used to do explaining that he would

pull on it, pop it with his right hand, pull on the chuckhole and close it with his left hand. He added that if he was "popping it" and picking up trays, he'd slam with his left hand and pop them with his right hand.

Petitioner further testified that inmates occasionally resist the officers when they are being cuffed and uncuffed. This, in turn, would require the officer to be more physical with his hands and arms in order to restrain the inmate.

Petitioner also testified to his duties in the segregation unit. According to Petitioner, there are two types of segregation units at Respondent's Pinckneyville Facility-- "receiving segregation" and "regular segregation" (or R5 segregation). Regular segregation/R5 has more inmates. Receiving segregation involves inmates coming in and getting ready to transfer out. All services in segregation are rendered through the chuckhole unlocked with a Folger Adams Key. Services rendered include laundry, food, correspondence, cuffing and uncuffing for movement, ice, and mail. Petitioner testified that the chuckholes in the segregation unit were not easy to open. He testified that the majority of the R5 chuckholes get stuck "a lot" because of inmates slinging food and feces that actually traps up into the chuckholes and makes them stick. When this happens, Petitioner has to slam the chuckholes shut with his hands. Segregation doors are also made of heavy steel and are equipped with a rubber strip on the bottom to keep the inmates from flooding the walkway and passing contraband underneath the doors.

Petitioner also testified to performing shakedowns in segregation in the same manner as he did on the regular wing. He also performed property box searches.

According to Petitioner, showers are given in segregation one inmate at a time. On Respondent's 3-11 shift Respondent often had one officer working the shower by himself.

During an eight hour work day Petitioner testified he was using his hands anywhere from 5 to 6 hours per day and occasionally the activity with his arms and harms would get "very busy, very hectic, and very frantic."

Petitioner testified that he also reviewed the CorVel job analyses, the deposition of Melanie Welch, the demands of the job form, and other documents prepared and/or submitted by Respondent. He testified that they did not accurately portray the duties of a Correctional Officer in anyway, since they did not show the pace and volume of the duties of a Correctional Officer.

Petitioner testified that during the course of performing his job duties at Pinckneyville Correctional Center, he began developing symptoms of numbness, tingling, pain, and weakness in his arms and hands. Petitioner denied he was diabetic or suffered from gout, hypothyroidism, or rheumatoid arthritis. He is right hand dominant.

Petitioner testified that he lifts weights and coaches kids in football. While he owns a motorcycle, he believed he had only put about 200 miles on it per year. Petitioner testified that as a result of his symptoms of numbness and tingling, he sought medical attention, including seeing Dr. Brown at his attorney's request.

Prior to his visit with Dr. Brown and Dr. Phillips in early 2011 Petitioner had never undergone a nerve conduction study or been diagnosed with either carpal or cubital tunnel syndrome.

Petitioner testified that after his diagnostic studies were completed, he realized he had a work-related condition. He then filled out an accident report.

Petitioner testified that he currently experiences symptoms of numbness, tingling, loss of strength, grip, and nighttime awakening with throbbing. He explained that he usually wakes up with his hands clasped together and he doesn't know why. He thought his symptoms were maybe now a little worse.

Petitioner testified that he voluntarily left his employment with Respondent in order to spend more time with his family, which includes his wife and three kids. Petitioner explained that he is now a personal trainer and works for First Source Contractors on a part-time basis as a sales representative selling roofs, siding, and gutters. He doesn't "bang any hammers." He would like to proceed with the surgery recommended by Dr. Brown.

Petitioner denied ever being examined by Dr. Williams.

Petitioner testified on cross-examination that the four to five years he worked in segregation was not consecutively; rather, it was off and on. When he began there it was a state of the art facility with everything new and in working order. Petitioner testified that when he was on the 3:00pm-11:00pm shift he worked two to two and a half years consecutively in segregation. Petitioner testified that in the initial part of his career he worked the 3:00pm-11:00pm shift, and that he switched to day shift between 2006 and 2007.

Petitioner agreed on cross-examination that he worked most every post at Pinckneyville CC, with the majority of his time being as a wing officer and in segregation. Petitioner testified that he had worked in the tower, and he agreed that in the tower he would not have used Folger Adams keys, bar rapped, or cuffed inmates. Petitioner testified that while working the post of "inner core," (also known as walk) he would not be bar rapping. As an inner core officer he would be escorting inmates, and he would only have to handcuff them if they were going to segregation or on lockdown. Petitioner also testified that as a control officer he would not be keying or cuffing, that it was "just paperwork."

Petitioner agreed on cross-examination that the general population cell doors were on a hinge and opened fairly easily.

Petitioner testified on cross-examination that he would do a wing check every 30 minutes. Petitioner agreed that when he would check the cell doors he would basically give it a light pull to hear if the metal clanked, and if it did not he would investigate further.

Petitioner agreed on cross-examination that inmates in general population were not cuffed for movement unless the facility was on lockdown. Petitioner also testified that inmates in general population are not fed through the chuckhole, but are taken out for a chow line.

Petitioner agreed that he spent over fifty percent of his career with Respondent as a wing officer in the general population. Petitioner also testified on cross-examination that the chuckholes in general population did not get used often, unless the facility was on lockdown. Petitioner agreed that approximately 98% of the chuckholes in general population worked well.

Petitioner testified that there was no bar rapping in general population.

Petitioner acknowledged that he reviewed Maj. Thompson's key estimation study. Petitioner agreed that it was an accurate average for the number of keys used. Petitioner agreed that for a couple of years while he worked in general population that inmates had their own keys, and that it cut down on the amount of keying that a correctional officer would have to do.

Petitioner testified that lockdown did not affect his workload when assigned to R5 segregation. Petitioner testified that Level 1 lockdown was the highest level of lockdown, and that on level 4 lockdown correctional officers were still allowed to use inmate porters. Petitioner agreed that parts of the facility could be on lockdown while other areas are not, therefore it was possible that a part of the facility could be on lockdown but he might not even be affected by it.

Petitioner testified that there was no bar rapping in R5 segregation. Petitioner agreed that the only bars in the facility were on the two shower cells in receiving segregation, or "little seg." Petitioner testified it would take two minutes to rap the shower cell bars.

Petitioner testified on cross-examination that he estimated that 15-20% of chuckholes were tough to operate. Petitioner testified that sometimes a chuckhole was difficult to operate because of the key you had. However, Petitioner admitted that he could put in a work order for a new key or a work order for the locksmith to fix the chuckhole. Petitioner agreed that Pinckneyville C.C. employed a full-time locksmith.

Petitioner testified on cross-examination that he might be required to shake down two cells per shift in segregation. Petitioner testified that inmates had smaller correspondence boxes in segregation. Petitioner testified that it would take approximately 10-20 minutes to shake down a cell in segregation.

Petitioner testified that he bought his motorcycle the previous year, and that he'd had another motorcycle for two years but had sold it in 2000.

Petitioner testified on cross-examination that he began weightlifting in high school, and that he had weightlifted competitively off and on for years. Petitioner testified that he works out four days a week for an hour and a half. Petitioner testified that he has competed in bodybuilding competitions and power lifting competitions. Petitioner testified he had competed

in five or six power lifting competitions. Petitioner testified that he can bench press 386 pounds. Petitioner testified that he lifts 30-40 pound dumbbells.

Petitioner testified that he saw Dr. Brown at the request of his counsel, Mr. Rich. Petitioner testified that he had never had a nerve conduction study prior to seeing Dr. Phillips, and he had never received a diagnosis of carpal or cubital tunnel syndrome. Petitioner testified that it was after his diagnostic study that he realized he had a work-related condition.

Petitioner testified that he had symptoms for six months to one year prior to seeing Dr. Brown. Petitioner admitted on cross-examination that on the intake questionnaire to Dr. Brown he stated that he was being seen for a work-related injury, that he might be involved in litigation, and that he was represented by an attorney. Petitioner acknowledged that he had not been seen by a doctor for his complaints before he filled out the questionnaire. Petitioner was asked by Respondent's counsel how he knew that he had a work-related condition if he had not been diagnosed by a doctor. Petitioner explained that he had contacted "Tom" who sent him to Dr. Brown to get it looked at. Petitioner further testified that he didn't personally know that his condition was work-related at that time but he "guessed" he told Dr. Brown it was work-related because of what he'd been doing and hearing other correctional officers at Pinckneyville say "they had been for it before."

Petitioner acknowledged that he had back surgery in 2000. Petitioner testified that weightlifting did not contribute to the need for back surgery. He had played football, was in the Marine Corps, and it could have been any number of things. Petitioner testified that his hernia repair in 2003 was due to playing football. Petitioner denied having suffered two pectoral tears; rather; he had only had one pectoral tear in 2006 or 2007. Petitioner testified that his pectoral tear was from weightlifting. Petitioner denied injuring his pectoral muscle since 2008. When asked about a possible pectoral injury being discussed by Petitioner on Petitioner's Facebook page in August 2014, Petitioner admitted that he thought at one point he had injured his pectoral muscle but he took time off and it healed, and he never received medical attention for it.

Maj. Thompson was recalled by Respondent's counsel for its case-in-chief. Maj. Thompson testified that Petitioner's estimate of 15-20% of the chuckholes in segregation being problematic or malfunctioning was a bit high. Maj. Thompson testified that as the segregation supervisor he was directly responsible for ensuring that everything worked. Maj. Thompson estimated that if he were generous he would estimate four out of 56 chuckholes were an issue, which would be about 7-8%. Maj. Thompson agreed with Petitioner's testimony that 98% of the chuckholes in general population worked well.

Additional Information/Exhibits

Two Job Site Analyses were admitted into evidence. (RX 7)

A CMS "Demands of the Job" form was completed on March 15, 2011. With regard to the demands of Petitioner's job, Petitioner's supervisor indicated activities were either 00-2 hours per day, less than three times per month, or never. Use of one's hands for fine and gross manipulations was graded as "0-2 hours per day." (PX 5; RX 4)

Petitioner's "Staff Assignment History" was admitted as RX 5. Petitioner generally worked Fridays through Tuesdays. Wednesdays and Thursdays were his days off. Between April of 2009 and the alleged date of accident Petitioner generally worked as a relief officer or wing officer. Work in the control room was also documented.

On July 8, 2011 the deposition of Melanie Welch was taken in the case of "Donna Jones, a/k/a 'Correctional Officer' et. al. v. State of Illinois, Department of Corrections, Pinckneyville Correctional Center, 10 WC 038807, et. al." Petitioner's attorney herein appeared on behalf of "Petitioners" and Respondent's attorneys[3] were present. This deposition was taken on behalf of Respondent. (PX 7)

Ms. Welch is a vocational rehabilitation counselor. Respondent's analyses and videos were created by Melanie Welch. Ms. Welch is an employee of CorVel, which is a national corporation providing services to employers, third party administrators, insurance companies, and government agencies.

Ms. Welch received her training in Job Site Analysis from ErgoRehab Incorporated. This certification was obtained by mail and through the Internet, and was paid for by Corvel.

Ms. Welch could not remember the last time she did any work on behalf of an injured worker, did not know the age of Pinckneyville Correctional Center, did not know that during the 5 to 7 years prior to the video being shot that the facility was short staffed, and admitted that the video was edited.

Ms. Welch also believed that it was a requirement that 20% of the entire staff rotate every 90 days, despite the testimony from other witnesses that some correctional officers stay in their positions for years. She did not take into account overtime and she mistakenly believed that the segregation unit was contained in the video that she filmed. The video did not show any of the locks that would not open, did not show how hard the locks were to open, did not show any bending or breaking of keys, did not show any new keys which were hard to put into the locks, and did not show the heaviness or the weight of the wing doors.

Ms. Welch testified that she had neither seen nor lifted a property box, and was completely unaware that they contained TVs, radios, books, paperwork, computers, clothing. She further acknowledged that the video showed nothing about Correctional Officers having to carry crates filled with cartons of milk or juice weighing hundreds of pounds up flights of steps to feed inmates. When asked whether it would be important in consider whether a Correctional Officer had to carry a milk carton and/or food tray and simultaneously open and close difficult

[3] While a different attorney appeared for Respondent in PX 8-17, it was nonetheless someone from the AG's Office.

chuckholes that often stick, Ms. Welch answered, "I don't know, I didn't try it." She also believed that restraining a combative inmate at a Respondent's Pinckneyville Correctional Center would fall in the "medium" category of job requirements.

She further acknowledged that there was nothing in the Job Site Analysis or video about keying and un-keying doors for moving of inmates through the housing units in passes run on any given day; nothing about the transfer box, writs, medical furloughs, medical and furlough bags. Nothing was contained in the video about keying out passes for clothing, barber shop, and commissary, or weapons and tactical training.

She did not videotape or observe any cell shake downs and, in fact, believed that shake downs were performed on Correctional Officers themselves when they entered the prison. She did not video tape the Correctional Officers having to push buttons and operate toggles to open doors, which required the officers to hold down the button with their thumb and toggle the switch with their little and pinky fingers at the same time. She had no idea that this happened almost 250 times in an hour and thousands of times in a day. After going through all this information, Ms. Welch testified that whether Correctional Officers are constantly and repetitively using their arms and hands in a forceful manner depended on their post. (PX 7)

The video deposition of Robert Schuchert was taken on October 5, 2011 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/PinckneyvilleC.C., No. 10 WC 23567." This deposition was taken on behalf of Petitioner. The parties were represented by the same attorneys who presented the instant case. (PX 8, 9)

Mr. Schuchert was employed at Respondent's Correctional Center as the facility's locksmith. He also operated an outside business called Schuchert's Lockshop in Chester, Illinois. He began working for the State of Illinois in 1981 at Menard Psychiatric Center, and transferred to Pinckneyville Correctional Center on August 16, 1998. He served as a Correctional Officer, like Petitioner, from 1998 until January 2004. Since 2004, he has been a locksmith at Pinckneyville. Schuchert viewed the videos from Menard Correctional Center and Pinckneyville Correctional Center. He also reviewed the Job Site Analysis. He testified that while employed as a locksmith at Pinckneyville, he developed bilateral compression neuropathies and filed a workers' compensation claim that was accepted by Respondent. He was voluntarily paid for his time off and received a settlement. He attributed his injuries to his repetitive work at Menard and Pinckneyville Correctional Centers. He testified that his problems began while working in the segregation at Menard and progressed while performing his job duties at Pinckneyville. He testified that, "It got to the point where if I had a tool box full of locks I couldn't carry them with my left hand, especially from one cell house to the next. I had to keep switching hands because it hurt so bad." When asked to describe the difference between the locks in the segregation unit and the general population, he stated:

> The seg unit—the difference between the locks in the seg unit and general pop over there is they have a mogul key—a bigger electronic lock in their unit over there than general pop. General pop has a Medeco lock, which is a smaller key, which is compared to your house key. The mogul keys that are over in the seg unit—they're a bigger key. I would say probably about

that big on the head. The length of the key is probably about that long. (Indicating.)

He acknowledged that all Correctional/Wing Officers had to key open chuckholes, cell doors, cabinets, and medical cabinets; and diary each item that had to be keyed out, logged out, keyed back in, and logged back in. The same requirements existed in medical. When asked to describe the locks at Pinckneyville, he stated:

> They have gotten worse, naturally, through the years. When we first arrived, the inmates had their own keys to their locks, so there was a lot of wear and tear. I was trying to remember last night how long it's been since we got rid of the—we pulled the inmate keys out over there.

He testified that approximately 7 to 8 years ago, the inmates had their own keys. However, the keys were taken away due to the atrocious wear and tear on the locks from constant inmate traffic. He described the current condition of the locks as fair to poor. When asked to describe the locks where Petitioner has worked the last 5 years, he stated:

> . . .We had a lot of wear on the locks then, and it's been—the chuckhole locks have got a lot of wear, especially in the seg, because they get keyed all the time. You're feeding them three meals a day, plus you're transporting them in and out, if you're—if they're going to – they're going to the yard; they're going to passes, and right now, you're—in warm weather, pass ice, mail, anything else—you got to open that chuckhole.

He acknowledged that Respondent's witness, Lieutenant Thompson, was correct in stating that the locks and the chuckholes were very difficult to open. The difficulty stemmed not only from the locks, but from the food spilled in them. He estimated that he switched out between 2 to 5 locks per week, or at times, 4 or 5 locks will go out in a day. (PX 8,9)

On October 5, 2011 the video deposition of Donna Jones was taken on behalf of Petitioner in the "Jimmy Phillips" case referenced above. Again, both parties in that deposition were represented by the attorneys in this case. (PX 10, 11)

Ms. Jones testified that she worked at Respondent's Pinckneyville Correctional Center as a Correctional Officer/Wing Officer since July 1, 1998, and has worked all 3 shifts. There was no part of the facility in which she had not worked. She reviewed both the video and the Job Site Analysis prepared by Respondent.

With regard to the video, she acknowledged while the video showed cuffing and un-cuffing the inmates, there was no difficulty or inmate resistance shown in the activity, which she testified happens quite often. She testified that it did not show the difficulty opening cell doors, contrary to daily events:

Q: Are the doors difficult to open?
A: Yes, they are. Some of them are.

Q: Why?
A: Well, they're heavy steel doors, and just because you stick a little key in it doesn't mean they're going to open right away.

Q: What do you have to do?
A: Well, first of all, you have to – I personally—I work two wings, so I have a lot of doors that I have to deal with.

Q: How many?
A: On each wing, there's 50-some-odd doors.

Q: 56.
A: 56. Thank you very much. 56 doors, that's just cell doors. Just to enter institutions—of course, we don't have to use a key to enter the institution, but we have to go through—one, two, three, four—there's probably six doors that we physically have to open. These are heavy metal doors. They're not like a wooden door that you open in a regular house or—they're very heavy. Very, very heavy.

Q: And when you say 56 steel doors, is that on your wing?
A: Yes.

Q: When you're working two wings, is that 112?
A: Yes, it is.

When asked to explain why key turning was difficult, she testified that Folger Adams keys in segregation are difficult to use in general. She testified that the pace of the work was not shown accurately in the video and testified that the majority of the work was done while in a "real big hurry." While walking or making rounds, a Wing Officer forcefully pulls on each door to check its integrity and make sure it was properly closed. This activity was not depicted in the video. She described a Wing Officer as having to shake down two wings every 30 days. Each wing has 56 cells and two inmates to a cell, which equates to 224 shake downs every month. During this process, she has to lift heavy objects, use her arms and hands to turn things over, look under beds, and physically move things to see if contraband exists. Each phase requires the forceful use of her arms and hands.

Ms. Jones described the property boxes contained in the cells as large plastic boxes which she could not lift. She has to slide them out from under the bed, and remove all the objects using her arms and hands. She confirmed that the video did not show any portion of this activity. She enumerated the lengthy process of taking an inmate to the shower as opening a chuckhole, which was difficult, cuffing the inmate through the chuckhole, keying open the door, escorting the inmate to the shower key, opening the shower door with the Folger Adams key, shutting the lock, and key the cuffs off the inmate. She described that this was very difficult, and she testified she performed this activity thousands of times in her 13 years of employment with Respondent.

She testified that there was no mention of movement in the housing unit or how many passes are run on any given day in the video or in the Job Site Analysis. There was nothing about moving inmates to the transfer bus, writs, furloughs, medical visits, lifting medical bags, passing commissary workers to the chuckholes, or keying and lifting radios hundreds of thousands of times in her career. She also confirmed that pieces of metal were altered by the inmates, either through kicking or pounding. She testified that when there was a lockdown in place, the amount of keying doubles and triples. The video did not show any opening or closing of the closet doors, or any officer performing the daily count of inmates. After reviewing the video, she stated, "It's not very accurate at all."

On October 5, 2011 the video deposition of Jimmy Phillips was taken in connection with his worker's compensation claim against Respondent. Both parties were represented by the same attorneys as are involved in the instant case. (PX 12, 13)

Mr. Phillips testified that he was hired by Respondent in 1998. At the time of his deposition he was an "R5 A Wing Officer" at Pinckneyville. He began working for the State of Illinois on July 20, 1998. After serving a month as a correctional officer at Menard Correctional Center, Petitioner was transferred to Pinckneyville Correctional Center, where he has served as a correctional officer for 13 years.

Mr. Phillips testified that as a result of performing his job duties he began to develop symptoms of numbness, tingling, and pain in his arms and hands and they increased as he performed his job duties. Two days before his deposition, his attorney sent him a copy of two Correctional Officer Job Site Analyses ("JSA") to review. Mr. Phillips did so and provided his attorney with written comments regarding the accuracy of those videos. Mr. Phillips agreed that the JSA showed difficulty opening doors. He further commented that the officer on the video started off trying to line the key back up with the hole so he could put the key in it and then after he did the food slot (chuckhole) he had trouble closing it. The video showed him slamming it shut more than once trying to get it to lock. This was something that happened daily. When asked if this activity required stress and pressure on one's arms, Mr. Phillips compared it to a car door that doesn't shut right and you have to have it looked at. He added, "But out there, there's so many doors that they don't get on it right away, so -- they eventually do, but, yes that have problems with them." (PX 12, p. 6)

Mr. Phillips agreed that the video showed cuffing and uncuffing of inmates. He explained that, in his case, in segregation the inmate is behind a door that has a chuckhole in it. The chuckhole requires a different key than the cell door. "Folgers Adams" is labeled on some of them. When asked if it is easy to use, he replied, "Normally. They're of good quality." (PX 12, p. 7) However, he found that the chuckholes weren't always easy to open explaining that due to the environment inmates aren't always happy and they do things to not make the chuckhole work. (PX 12, p. 8) The video did show the chuckholes being locked and unlocked and Mr. Phillips felt that if he took someone out there that day he would probably find some not working on his wing.

Mr. Phillips explained the process he went through to uncuff and cuff an inmate. He would draw a key for the cell door. The inmate is cuffed before the cell door swings open and to do that Mr. Phillips utilizes the chuckhole. He "drops the chuckhole" and asks the inmate to back

up to the door and he cuffs his wrists behind his back. If there are two inmates in a cell, you cuff both. Mr. Phillips uses both hands to cuff and uncuff inmates and he "clinches" the cuffs. Once cuffed, the door to the cell is opened using a key larger than a car key. Mr. Phillips didn't believe the video showed any difficulty turning the keys. He didn't see any locks breaking down other than the one where "he" was slamming on it trying to get it shut. The video didn't show any keys breaking off locks. It didn't show an officer struggling to get the key to work for minutes at a time. Mr. Phillips testified that that has happened to him on a regular basis. (PX 12, pp. 8 - 12)

Mr. Phillips works the 3:00 - 11:00 shift in the segregation unit. He has been in that unit about fie years. He believes he's been there that long because he does a good job there and "you wouldn't want to put the wrong person back there." (PX 12, p. 9)

Mr. Phillips testified that he was aware of the staff rotation policy wherein staff is rotated so "you're not just locked into a certain place there." (PX 12, p. 9)

Mr. Phillips further testified that the video did not show officers pulling on cell doors to ensure that they are shut during wing checks. He testified that every door must be checked because the computer pod does not always accurately reflect whether a door is shut. Petitioner was asked if he knew whether most of the correctional officers behaved the same way he did. He replied, "I'm sure they do." (PX 12, p. 13) Mr. Phillips agreed that Ms. Welch's description of what was involved in running an inmate to the shower was correct, (PX 12, p. 13) He added that sometimes one had to restrain the inmate which required force. Showering was not done on a daily basis. (PX 12, pp. 13-14)

Mr. Phillips testified that neither the video nor the analysis demonstrated the extent of inmate movement or how many passes occur in a day. Neither the video nor the analysis covered duties such as the transfer bus, writs, medical furloughs, medical furlough bags or their weight, wing officers passing commissary workers, or count slips. The video further omitted shakedowns and the lifting of heavy property boxes, the carrying of food carts or milk and juice cartons. (PX 12, pp. 14 - 17)

Mr. Phillips testified that there are 56 food slots on his wing. The slots must be opened and closed at every meal. They must be slammed shut with force if they don't shut the first time and it can hurt because it is unexpected. (PX 12, pp. 14 - 19)

Mr. Phillips testified that the video didn't show the area where he worked. It did not show officers carrying trays up and down steps. Carrying a cart of trays up the stairs requires two people and it probably weight over 200 pounds. In sum, Mr. Phillips didn't feel the video accurately showed what he did. Mr. Phillips testified that there was no part of his job that did not involve using his hands and arms. (PX 12, pp. 14 - 21)

Mr. Phillips testified that there is no bar rapping in his segregation unit. (PX 12, p. 22) When on lockdown everyone gets cuffed and lockdowns occur quite a bit. (PX 12, pp. 22 - 23)

On cross-examination Mr. Phillips explained that there are four wings in R5, the segregation unit. There are 56 cells in R5 A Wing where he works. The first two cells are

isolation cells; the others are generally double occupancy. (PX 12, pp. 24-25) There is no bar rapping. He has never worked the day shift. He hasn't worked the midnight shift since July of 2010. According to Mr. Phillips the inmates on A Wing don't always get yard privileges. On shower day he might take 106 inmates out of their cells. However, the officers work together so he might have help. (PX 12, p. 28) On his shift there are four officers and a pod officer. (PX 12, p. 29)

With regard to the video, Mr. Phillips did not believe it showed the segregation unit; he believed it showed a regular population door being swung open. Different keys are used to open the chuckholes than are used to open the cell doors. Each door in segregation has a separate key but it's a larger size key. (PX 12, p. 30) Inmates sometimes assist with passing food trays even in segregation. The officer would open the chuckhole and the inmate worker would pass the food tray through. When the chuckholes wouldn't shut as they should it would jar your hand. Mr. Phillips estimated he opened an average of ten cell doors a day. The locks for the cell doors in segregation are harder to open than those in the general population but he hasn't really been in general population. Mr. Phillips felt he would be unsure how things worked in general population. He did believe he used more keys than someone working in general population. He wasn't sure of the number of times he used a key per day. (PX 12, pp. 30 - 36)

Mr. Phillips was asked questions about the job duties in general population. (PX 12, pp. 37 - 38) Mr. Phillips did not work the transfer bus. He denied that he would spend minutes unlocking a lock because it would take him away from his routine it. Once he would know he had a bad lock he would write it up to get fixed and they would either come out and change the key and tumbler or "-- I don't know. Sometimes it takes a while for them to get to it." (PX 12, p. 39) Mr. Phillips has broken a key into a lock but it would be less than five keys. (PX 12, p. 40)

Mr. Phillips reviewed the JSA reports about six months before his deposition. He reviewed two videos of Pinckneyville. (PX 12, p. 42) He did feel the video accurately portrayed the general population activities. (PX 12, p. 43) Mr. Phillips did not believe the video or JSAs portrayed the repetition of his job but it did reflect the content. (PX 12, p. 45) Mr. Phillips also testified that Pinckneyville is different than Menard in that Menard prison is an "older setup. It's -- I hesitate to use the word 'antique,' but it's kind of -- it's old." (PX 12, p. 45) Also, there is "most definitely" bar rapping at Menard but only in certain areas of Pinckneyville (certainly not in the general population). The cell keys are larger at Menard, too. (PX 12, pp. 45-46)

Mr. Phillips agreed that Mr. Rich was his attorney and that he had a repetitive trauma claim involving his hands and elbows. (PX 12, p. 47)

On redirect examination Mr. Phillips testified that he thought key-turning played a "big part" in the development of his symptoms. He was also asked about the difficulties of handling inmates. Mr. Phillips explained that there is stress and strain on his arms, elbows, and hands on a daily basis as he interacts with the inmates who like to act out and play games. (PX 12, pp. 51-53) He didn't think it put stress on his arms and elbows on a daily basis but "it only takes once. In my job, if you get hurt, then tomorrow you heal? Is that the way it works? It don't work like that. You got to go to work. ... And so you work with an injury, and then it gets worse." (PX 12, p. 53) In Mr. Phillips' case, he thought his situation got worse over time. " (PX 12, p. 53)

On October 5, 2011 the deposition of Jason Thompson was taken in the "Jimmy Phillips" case on behalf of Petitioner with the parties being represented by the same attorneys as those involved in the instant claim. (PX 14, 15) Mr. Thompson began with the Department of Corrections in 1996 at Pittsfield Work Camp/Jacksonville. He transferred to Pinckneyville in 1998 and began as a correctional officer. He was then promoted to his current position of lieutenant. (PX 14, p. 4) Lt. Thompson could not be sure if he had seen one of Dr. Williams' reports. He knew the doctor had been to the correctional facility but he was never introduced to him until the end of a tour. Dr. Williams was with Lt. Thompson when filming was done in R3 and R4. Lt. Thompson was asked about his observations during the tour. He saw the doctor turn a key on the R3 C Wing door. He turned a handcuff key. He found the handcuffs a little bit awkward, trying to get the hand position movements and he had a little bit of trouble hitting the double-lock key portion of it. Lt. Thompson did not take Dr. Williams to R5. He was not taken to the showers in R5. He saw a 38 minute video but was not asked to comment upon it. He was asked to do a key use estimation for Pinckneyville which he did. He was the subject of a video regarding a correctional lieutenant's job but he has not seen the video. The basic difference between a correctional officer and a correctional lieutenant is that the latter supervises the work being done to make sure that security and procedures are being upheld. They don't do as much key turning as the officers. (PX 14, pp. 1 - 12)

On cross-examination Lt. Thompson was asked additional questions about Dr. Williams' tour. He did not know who accompanied the doctor or where he had bee prior to meeting up with the lieutenant. He had no knowledge if the doctor ever went to the segregation unit -- certainly not with him. After the doctor left, two ladies from CorVel videotaped him in R3 and R4 during chow lines. He didn't recall if segregation was shown on the video.

Lt. Thompson was shown a copy of his key estimation study which he prepared on February 17, 2011. He prepared a key estimation for every position at the prison and worked on it for three days. He prepared it mostly from observation and review of paperwork from various units when observation wasn't possible.

Lt. Thompson testified that most of the key-turning occurs in R5 -- almost 200 keys a day. Additionally, key-turning in R5 involves Folger Adams keys for the chuckholes. According to Lt. Thompson every housing unit uses Folger Adams keys for the chuckholes; however, in R5 you use them a lot more. (PX 14, p. 19)

Lt. Thompson was uncertain how many lock downs there had been in the previous year. He also testified about shakedowns. He has had maybe three or four keys snap off on him in a lock over his entire 13 years. The keys break but don't always snap off inside the lock. They break a lot of keys because they get bent and hard to remove in and out. He would have no idea how many keys gets broken in a year. According to Lt. Thompson they don't bar rap the showers but the officers do check them with a broom. It makes a different sound. Lt. Thompson testified about the job duties of dietary workers (cooking and packaging food) and how the officers then pass it out. Trays are taken to the second floor manually via a gray laundry cart weight in excess of 100 lbs. and requiring two officers to carry. Lt. Thompson also testified about the process of transferring inmates. (PX 14, pp. 19 - 32)

On further cross-examination, the following exchange took place with regard to the condition of the chuckhole locks:

Q: Do you use keys as a lieutenant?
A: Yes.

Q: Do you have any difficulties with keys?
A: Sometimes.

Q: How often?
A: Chuckholes stick all of the time, and the reason they stick is because food and stuff gets – you're passing trays through it, so food would drip down in the lock and gum it up. On top of that, every now and then, you get an inmate try to sabotage a unit. It doesn't happen very often that way, but a lot of the chuckholes are sticky. And when I say "sticky," I just mean what they're supposed to do is you just should be able to turn it like that. (Indicating.) [Sic]. When they're brand-new, they're really easy to use. Ours are more difficult. (PX 14, pp. 32-33)

With regard to the doors, his deposition testimony revealed that sometimes the pins in the door become loose and caused problems. When asked to describe the cell doors, the following exchange took place:

Q: Comparing it to like your front door at home --
A: Uh-huh.

Q: -- the key -- is it more smooth than that, or less smooth, as long as your house key or house door is in functioning -- it's --
A: I would say in general it's comparable to a front door, except for the fact that it -- there's more constant tension on some of ours, whereas with a house key it's only when the lock engages and disengages. But yes. Similar.

Q: Are the cell doors -- are they heavy?
A: They're heavy, but they're on fairly stout hinges. I mean, the doors themselves are very heavy.

Q: Are they easy to open?
A: Comparatively speaking, like with a house door -- they're harder than your average house, like your civilian residence. They're -- you have to be -- get more momentum to open them, because they're heavy.

Q: Would they be comparable to like a hospital door?
A: Well, luckily, I haven't spent much time in a hospital, so I --
Q: Or is there a door that -- outside of a prison -- that you can say it would be comparable to?
MR. RICH: Look, Ms. Hagan, what you're doing is you're asking this witness for opinions. Unless you want to lay some foundation as an expert, then I need to start objecting. That's my objection.
Q: (By Ms. Hagan) You can answer.

A: Is it comparable to the outside door on the prison?

Q: Any outside door.
A: Let me try and think of one it would be comparable to. I can't really -- they're heavy doors. They're a lot harder than most doors you're ever going to come across in the civilian world. (PX 14, pp. 33 - 35)

Lieutenant Thompson testified that keying cells and chuckholes, opening and closing doors, cuffing and un-cuffing inmates, turning difficult keys, opening difficult doors, pulling on bars, checking cell doors, weapons training, working mandated double shifts, performing extra duties on lock down, opening and closing chuckholes, lifting property boxes, carrying trays upstairs, restraining inmates, guiding inmates through lines, and performing various amounts of paperwork were the duties of a Correctional Officer. He further agreed that there was hardly a single part of the job that did not involve using one's arms, hands, or elbows. In addition, he acknowledged that these activities involved force and stress. (PX 14, pp. 36 - 40)

The deposition of Jaelene Bryan was taken on October 5, 2011 in the "Jimmy Phillips" case and, again, both parties were represented by the same attorneys involved in this claim. (PX 16, 17) Ms. Bryan testified that she has been a Correctional Officer/Wing Officer at Pinckneyville Correctional Center for over 13 years. Ms. Bryan acknowledged that she filed a claim for repetitive trauma injuries and that she had surgery in her neck area (thoracic outlet syndrome). (PX 16, pp. 3-5)

Ms. Bryan was provided with videos and the Job Site Analysis prepared by Respondent and furnished to her by her attorney, Mr. Rich. She testified that the heavy steel doors were very difficult to open, especially in the summer because the doors expand and stick. While the video showed cuffing and un-cuffing the inmates, it did not show the degree of difficulty it took to perform this activity. (PX 16, p. 7) When asked to comment on the chuckholes, she stated:

Q: Are the chuckholes easy to open?
A: Some are not bad, and others, they are very difficult.

Q: And what do you have to do when it gets difficult?
A: You have to repeatedly jerk the key as hard as you can until you finally can get it to click just right so you can open it. (PX 16, p. 8)

Ms. Bryan testified that one difference about the way a correctional officer approaches an inmate in segregation is that you can't open the door without them being cuffed. (PX 16, p. 9) Ms. Bryan testified that the video did not show the locks breaking down, the keys malfunctioning in the lock, the duties of a yard officer, the difficulty of using new keys, or the pulling and force needed to open doors, especially in the summer heat. It also did not show any shake downs, lifting, or moving of property boxes, or how much they weighed. She testified that it takes between 20 and 30 minutes of constant arm and hand use. She confirmed testimony of Jimmy Phillipsr and Donna Jones regarding the procedure of taking an inmate to shower and the various difficult maneuvers required to do so. She confirmed that there was no mention in the video or Job Site Analysis concerning the day movement and passes in the housing unit, the movement of inmates to the transfer buses, or the completion writs and medical furloughs. It also did not depict wing officers passing commissary

workers, carrying medical bags, using radios, carrying heavy carts of trays up and down steps, or carrying milk or juice cartons.

When asked if a Correctional Officer/Wing Officer performing the activities depicted in the Videos and the Job Site Analysis was depicted at a leisurely pace, she stated:

Q: And by the way, are you doing all these tasks that I've mentioned that aren't even depicted on the video—are you doing them at a nice, leisurely pace?
A: No.

Q: What are you—why are you not taking your sweet time?
A: Because you have to get things done. You have to—you only have so much time to get stuff done. You have to get it done.

Q: What happens if you don't?
A: Then you get in trouble. You get written up. (PX 12, pp. 18-19)

She testified that the activities of the Correctional Officer/Wing Officer increase several fold while on lock down, stating that one year lock down occurred 18 times, one of which lasted for over a month. When asked to describe the difficulty on lock down, she stated:

> . . .The entire facility has to be cuffed for anything—going through the chuckholes for anything. You're—that's when you're feeding in the housing units, carrying those trays. That's when you have to do the cleaning. That's when everything is done by the officers. There is not—I like the—"Oh, the workers do everything." Well, that's not true, and that wasn't always true in seg, either, because we used to not have seg workers. That's just recently in the last year or two. (PX 16, pp. 21-22)

Finally, when asked whether Respondent's exhibits were accurate, she stated:

Q: A lot of people have this vision or thought that a Correctional Officer simply stands there and pats inmates on the back and says 'Atta-boy. Go back to your cell.' Is that true?
A: No.

Q: Is this Job Site Analysis even close to being accurate?
A: No.

Q: Does it show anywhere near the repetition and volume of what you do?
A: No.

Q: Does it show anywhere near the intensity?
A: No.
(PX 16, p. 23)

She believed there was no part of her job that did not involve using her arms and hands. (PX 16, p. 17)

The Arbitrator concludes:

Issue (O) Other -- Admissibility of PX 8 - 18.

Petitioner seeks to admit Petitioner's Exhibits 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 into evidence. These consist of the following:

PX 8 - Deposition of Robert Schuchert taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 9 - Video deposition of Robert Schuchert taken taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 10- Deposition of Donna Jones taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 11- Video deposition of Donna Jones taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 12- Deposition of Jimmy Phillips taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 13- Video deposition of Jimmy Phillips taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 14- Deposition of Jason Thompson taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 15- Video Deposition of Jason Thompson taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 16- Deposition of Jaelene Bryan taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567;

PX 17- Video deposition of Jaelene Bryan taken on 10/5/11 in the case of "Jimmy Phillips, a/k/a 'Correctional Officer', et. al. v. SOI/Pinckneyville C.C.," 10 WC 23567; and

PX 18- Dr. Williams' Fiscal Report.

At the time of Dr. Brown's deposition certain exhibits were brought up with Respondent objecting to their admissibility. Some of these exhibits were not included as part of the deposition exhibit itself and, therefore, the Arbitrator has a difficult time being able to consider their admissibility. Other exhibits, while not included as part of the deposition itself appeared identical to those found in PX 8 - 17, and the job site analyses. To the extent Dr. Brown relied upon these to form his causation opinion, they are admitted.

Respondent objected to the admissibility of these exhibits at trial on the basis of hearsay and relevance. At trial Petitioner's attorney contended that these exhibits were not taken with regard to any specific correctional officer but, rather, were intended to address comments on DVDs, job site analyses, and videos that were offered by Respondent. There is no question that the accuracy of the foregoing exhibits/documents is an issue in the case. However, the real issue is whether they accurately reflect the job duties of this particular claimant. Petitioner, and not Donna Jones, Robert Schuchert, Jimmy Phillips or Jaelene Bryan is in the best position to comment and address that issue. He did so. Furthermore, the deposition of Melanie Welch has been admitted. What others had to say about the job site analysis or DVDs or videos does not matter in this case. Therefore, what others have or might say is irrelevant.

The Arbitrator further notes that the evidence depositions of Robert Schuchert, Donna Jones, Jimmy Phillips, Jason Thompson, and Jaelene Bryan (Petitioner's Exhibits 8-17) were all taken for and tendered for use in the case of Jimmy Phillips, a/k/a "Correctional Officer," et.al. v. SOI/Pinckneyville D.D., 10 WC 23567. In *Dustin Bowles v. Pinckneyville Correctional Center*, the Commission found these same depositions to be inadmissible hearsay as it related to a case similar to the one at bar. *Dustin Bowles v. Pinckneyville Correctional Center*, 14 IWCC 0842. PX 8 - 13, 16 - 17 are not admitted.

Petitioner's Exhibits 14 and 15 are the deposition transcripts and video deposition of Major/Lt. Jason Thompson. Major Thompson testified live at trial. Petitioner's counsel asked many of the same questions as were asked during the deposition. Major Thompson's testimony is relevant. There appears to be no harm in allowing PX 14 and 15 into evidence in light of him also testifying at trial. PX 14 and 15 are admitted.

Petitioner's Exhibit No. 18 purports to be Dr. Williams' fiscal report. The report was not drafted or prepared by Dr. Williams' office, nor is the report certified. Respondent's Exhibit 10 reflects that Petitioner's counsel had the opportunity to cross-examine Dr. Williams regarding his financials. Therefore, the report is hearsay and is inadmissible.

Issues (C), (D), and (F) Did an accident occur that arose out of and in the course of Petitioner's employment with Respondent? What is the date of the accident? and Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner failed to prove he sustained an accident on February 7, 2011, that arose out of his employment with Respondent. Petitioner failed to prove that his condition of ill-being in his bilateral hands/wrists is causally related to his alleged accident of February 7, 2011. In so concluding the Arbitrator relies on the following: (1) the varied nature of Petitioner's job duties; (2) the circumstances surrounding Petitioner's initiation of treatment; (3) deficiencies in Petitioner's testimony as to the onset and cause of his hand/wrist complaints; (4) Petitioner's weightlifting activities; and (5) Petitioner's ongoing ability to work since being diagnosed with bilateral carpal tunnel syndrome and his ongoing complaints despite the fact he no longer works for Respondent. Additionally, the Arbitrator was not persuaded by the testimony of Dr. Brown.

Petitioner is alleging an accidental injury to his left and right hands and wrists due to repetitive work activities which manifested itself on February 7, 2011. In *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d. 524, 505 N.E. 2nd 1026, 106 Ill.Dec. 235 (1987), 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 equally important that the medical experts have a detailed and accurate understanding of the petitioner's job duties. It is axiomatic that in a repetitive trauma case the unique facts of each and every case are to be analyzed in determining compensability. Petitioner bears the burden of proof.

Petitioner's testimony was very problematic in this case. Contrary to what was stated in Dr. Brown's records, Petitioner never testified to a six to twelve month history of progressive numbness and tingling in his hands. Indeed, Petitioner never really provided any testimony as to how, when, and under what circumstances his symptoms began to evolve. Petitioner's attorney asked him if he was in the course of performing his job duties when he began developing symptoms in his arms and hands and Petitioner replied, "Yes." When asked about his symptoms Petitioner testified to having numbness, tingling, pain, loss of strength, grip, "stuff like that." He was then asked if it was his symptoms of numbness and tingling that led him to seek medical attention and he again said "Yes." That was it. There was a paucity of evidence from Petitioner as to a correlation between specific job duties and his symptoms.

Further troubling was Petitioner's testimony as to when he believed he had a work-related problem. According to Petitioner's testimony on direct, he reported his hand injury to Respondent after being seen by Dr. Phillips for electrodiagnostic studies which confirmed carpal tunnel syndrome. However, on cross-examination Petitioner was asked about the fact that when

he presented to Dr. Brown he related to the doctor that he was there for a work-related problem. Petitioner's explanation was that he "guessed" he had a work-related problem because others at work did. However, just because others at work might have the condition doesn't mean he has or that it is work-related. Dr. Brown testified that some people get carpal tunnel syndrome and others do not.

Also troubling were the circumstances surrounding Petitioner's initiation of treatment in this case. Petitioner sought out an attorney before he even sought any medical care. He was then sent to Dr. Brown by his attorney. He signed his Application for Adjustment of Claim the same day he saw Dr. Brown. Of further concern is the fact Petitioner presented to Dr. Brown on February 7, 2011 with complaints of symptoms of numbness and tingling in his hands, most especially the middle and index fingers of both hands. When he saw Dr. Phillips that same day his complaints were of bilateral medial elbow pain with intermittent numbness preferentially involving the second and third fingers. Thus, on the very same day Petitioner gave inconsistent descriptions of the origin of his complaints -- to one doctor, it was his hands with no mention of the elbows and to another it was the elbows. These circumstances together with Petitioner's inconsistent testimony/explanations as to how and when his condition became work-related in his mind undermine Petitioner's credibility.

A causation opinion is only as good as the facts upon which it is based. Dr. Brown concluded, based upon all the information and documents he had been given to review, that Petitioner's job duties, at the very least, over the last 12 - 13 years would be an aggravating factor for carpal tunnel syndrome. (PX 6, p. 42) He based his opinion on medical literature and the fact Petitioner was a healthy, 37 year old young man with no other risk factors for developing carpal tunnel syndrome. (PX 6, p. 43) In the first place, Dr. Brown did not accurately know what Petitioner did. Petitioner presented to the doctor stating he locked and unlocked cell doors up to three hundred times a day, open and closed cell doors, and lifted food trays. There were other aspects to his job -- in sum, what others might have done in their jobs does not prove what Petitioner did in his. Petitioner, himself, did not provide Dr. Brown with a full, complete, and accurate understanding of his job. Dr. Brown also incorrectly assumed Petitioner worked only the day shift. He did not. Petitioner never testified to locking and unlocking cell doors up to three hundred times per day. Thus, that initial history to Dr. Brown was not corroborated by Petitioner's testimony.

Dr. Brown did not know the specifics of Petitioner's employment (job assignments) with Respondent. For example, he was unaware of Petitioner's work in the control room or inner core. Dr. Brown was unaware of the job Petitioner was performing when his symptoms initially began. He did not know how much time Petitioner spent in general population versus segregation. He did not have a true understanding of the pace and volume of Petitioner's job duties. In the end, Dr. Brown made enough concessions during his cross-examination to show that he did not have a thorough, accurate, and complete understanding of this petitioner's job duties for Respondent.

The history provided by Petitioner to Dr. Brown at the time of their initial examination was not borne out by Petitioner's history at arbitration. While Petitioner sought to bolster his treating physician's opinions by providing him with depositions, reports, and records from various outside sources none of that information is really relevant because it does not pertain to this particular individual. Dr. Brown may have known alot about the job of a corrections officer in general based upon these documents but he knew very little about the specifics of Petitioner's specific job activities and how he performed them.

In addition, and perhaps most importantly, Dr. Brown erroneously believed Petitioner had no other risk factors for developing carpal tunnel syndrome and he appeared unaware of Petitioner's weightlifting activities. Dr. Brown acknowledged that weightlifting activities also involve forceful gripping. When questioned about the possibility that Petitioner was a weightlifter, he testified that it really didn't matter whether Petitioner had told him about that activity or not because both could be aggravating factors. However, he later added that it would be important to know which activity brought on Petitioner's symptoms. While he relied upon Petitioner' statement to him that it was his work that was causing his problems, it is interesting to note Petitioner's testimony that he has continued to be symptomatic even though he stopped working for Respondent in January of 2012. He has not, however, stopped his weightlifting activities. While not reflected in the record per se, Petitioner was observed by the Arbitrator to be a very physically fit man. His upper body strength and build were clearly apparent upon observation and reflective of someone working out very regularly. It was obvious he was a weightlifter and has continued to do so despite his symptoms. It is also troubling that Dr. Brown never limited Petitioner's activities in any way (other than a splint) to determine any relationship between symptoms and activities.

For the foregoing reasons, Petitioner failed to prove he sustained a repetitive trauma injury to his hands and wrists arising out of his employment with Respondent. Petitioner's claim for compensation is denied. All other issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☒ 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

R. Dwight Seaton,
Petitioner,
vs.
Dynegy Midwest Generation,
Respondent,

NO: 12 WC 07326

15IWCC0766

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 the extent of Petitioner's permanent disabilityand being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 24, 2014 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 $38,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 19 2015

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:9/10/15
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SEATON, R DWIGHT
Employee/Petitioner

Case# **12WC007326**

15IWCC0766

DYNEGY MIDWEST GENERATION
Employer/Respondent

On 10/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% 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:

0368 WIMMER & STIEHL
WILLIAM L WIMMER
2 PARK PL PROFESSIONAL CENTRE
BELLEVILLE, IL 62226

0299 KEEFE & DePAULI PC
NEIL GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

15IWCC0766

STATE OF ILLINOIS)
)SS.
COUNTY OF ST. CLAIR)

☐ 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

Case # 12 WC 7326

Consolidated cases: None

R. DWIGHT SEATON
Employee/Petitioner

v.

DYNEGY MIDWEST GENERATION
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Belleville**, on **September 30, 2014**. By stipulation, the parties agree:

On the date of accident, **August 1, 2011**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**76,725.48**, and the average weekly wage was $**1475.49**.

At the time of injury, Petitioner was **60** 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 $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**9133.99** for other benefits, for a total credit of $**9133.99**.

Respondent is entitled to a credit of $12,265.88 under Section 8(j) of the Act for medical bills paid by group insurance.

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 $669.64/week for 57 weeks, because the injuries sustained caused the 15% loss of use to each hand, 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

10/17/14
Date

15IWCC0766

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

R. DWIGHT SEATON
Employee/Petitioner

v. Case No. 12 WC 7326

DYNEGY MIDWEST GENERATION, INC.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, R. Dwight Seaton, was hired by Respondent, Dynegy Midwest Generation, Inc., in 2000. From 2003 until his retirement in September, 2012, he worked as a Shift Technician in maintenance. He testified that this job required him to repair and maintain heavy equipment and machinery in the power plant. These activities required the use of hand tools, including impact wrenches, air ratchets, grinders, and jackhammers, and that the tools caused substantial vibration to his hands.

Petitioner presented to his family doctor with complaints of hand pain. Bilateral upper extremity nerve conduction studies on August 1, 2011, showed bilateral carpal tunnel syndrome, (PX8) Petitioner was referred to Dr. Harvey Mirly for a surgical consultation.

Dr. Mirly first saw Petitioner on May 10, 2012, and diagnosed him with bilateral carpal tunnel syndrome. (PX1) An operative report dated June 6, 2012, outlines Dr. Mirly's surgery for right carpal tunnel release. A nearly identical procedure was done for a left carpal tunnel release on June 27, 2012. (PX1; PX2) Following these procedures on July 5, 2012, Petitioner was placed at maximum medical improvement and released to full unrestricted duty on August 9, 2012. (PX2)

Petitioner testified that after returning to work for Respondent, he experienced a loss of grip strength in both hands of between 20% and 30%, hand less range of motion in both hands and occasionally would drop things.

CONCLUSIONS OF LAW

Issue (L): What is the nature and extent of the injury?

Petitioner underwent bilateral carpal tunnel releases and was returned to full duty work. Since returning to work for Respondent, Petitioner experienced a loss of grip strength in both hands of between 20% and 30%, hand a reduction in range of motion in both hands and occasionally would drop things.

Based upon the foregoing, the Arbitrator finds that Petitioner experienced the 15% loss of use of the right and and 15% loss of use of the left hand, pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK BOWERS,

Petitioner,

15IWCC0767

vs.

NO: 13 WC 028804

MENARD CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Decision of the Arbitrator, filed with the Commission on January 28, 2015, concluded Petitioner sustained a temporary aggravation of the pre-existing degenerative process in his left knee that was the result of a compensable accident on August 20, 2013, finding that the accident neither worsened the condition of Petitioner's left knee nor accelerated the need for the total left knee replacement surgery that had previously been recommended. The Commission finds the August 20, 2013, accident did more than result in a temporary aggravation of his pre-existing degenerative condition. It finds the accident made the necessity of the total left knee replacement more acute.

Petitioner's left knee, prior to the events of August 20, 2013, was not a healthy one. The degenerative osteoarthritis process in the left knee was so advanced that Petitioner, as of the date of his injury, had already been recommended for total left knee replacement surgery. The Commission recognizes that, despite the condition of Petitioner's left knee, he continued to perform the duties required of him as a correctional officer, including, notably, running down stairs in response to an inmate fight. It was while performing this activity Petitioner experienced a pop and subsequent pain and, specifically, dysfunction that resulted in Petitioner no longer waiting for authorization for the surgery previously recommended but, instead, proceeding with a total left knee arthroplasty on October 31, 2013.

The dysfunction that resulted from the August 20, 2013, accident and that was the impetus for the October 31, 2013, total left knee arthroscopy was not the complained of pain that resulted in the earlier authorization for the total left knee replacement surgery. That purposed surgery was intended to address the end-stage degenerative osteoarthritic condition found in Petitioner's left knee. The October 31, 2013, total left knee arthroplasty was performed to address Petitioner's inability to bend his left knee more than about 10°. The Commission finds, while the same knee was in need of surgery, the reason for the surgeries differed. The Commission finds, further, the reason for the October 31, 2013, surgery to be directly the result of Petition's August 20, 2013, accident that left him unable to fully extend his left knee.

Petitioner began experiencing "popping" along the lateral side of his left leg as well as some "electrical-type" sensation running down and into the foot of the same leg six months after the October 31, 2013, surgery. Petitioner's treating physician, Dr. Nathan Mall, attributed these sensations to Petitioner's peroneal nerve stretching after having been contracted from the time of the injury through the time of the total left knee arthroscopy, a period of time approximately two months. To address this, Dr. Mall recommends dissecting and decompressing the peroneal nerve. No indication was made that Petitioner's current condition would resolve on its own. The Commission finds this procedure, one described by Dr. Mall as minimally invasive, as a reasonable and a necessary means to address Petitioner's condition. Accordingly, the Commission orders Respondent to authorize and pay the expenses incurred as a result of the surgery recommended by Dr. Mall and the reasonable, subsequent aftercare.

The Commission also orders Respondent to cover the medical expenses incurred by Petitioner to treat the injury sustained on August 20, 2013, and the complications that arose subsequent to that injury. Those expenses, specifically, are those from the treatment and/or services Petitioner received from Dr. Nathan Mall, Southeast Missouri Hospital, Cario Diagnostic Center Laboratory, Missouri Baptist Medical Center, K&S Medical, Cape Radiology and Mid America Rehab. The Commission agrees with the assessment of the Arbitrator with respect to the collection notice form CACi in the amount of $227.00. As noted by the Arbitrator, the collection notice lacks specificity for a finding that the charges both related to Petitioner's compensable injury and were reasonable. Respondent is liable for the remaining $51,073.97.

The Commission, recognizing Petitioner requires further treatment to address the lingering effects of his August 20, 2013, accident, also recognizes Petitioner continues to be unable to work in a capacity acceptable to Respondent. Except for a brief window from November 14, 2013, through February 18, 2014, when Petitioner was medically removed from working, Petitioner has repeatedly been found capable of returning to regular duty but with restrictions. It is the policy of Respondent, however, to allow an injured correctional officer to work with restrictions for only 90 days. The Commission understands Petitioner was allowed to work consistent with that policy. In view of the evidence, it is found Petitioner was, except for those 90 days, temporarily totally disabled from August 21, 2013, through December 5, 2014, the date of the arbitration hearing.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall authorize and pay all related costs for the dissection and decompression of the peroneal nerve in Petitioner's left lower extremity as recommended by Dr. Mall as well as for all resultant aftercare.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $771.17 per week for a period of 54-3/7 weeks, from August 21, 2013, through December 5, 2014, save 90 days, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and

determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $51,073.97 for medical expenses under §8(a) of the Act. Respondent shall be given a credit for any medical bills that have been pain, 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 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 in the amount of $22,044.30 for temporary total disability payments paid as well as any non-occupational indemnity disability payments Petitioner may have received and for which Respondent is entitled to a credit under Section 8(j) of the Act.

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

DATED: OCT 20 2015
KWL/mav
O: 08/21/15
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Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

15IWCC0767

BOWERS, MARK
Employee/Petitioner

Case# **13WC028804**

MENARD CORRECTIONAL CENTER
Employer/Respondent

On 1/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

JAN 28 2015

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

15IWCC0767

Mark Bowers
Employee/Petitioner

v.

Menard Correctional Center
Employer/Respondent

Case # 13 WC 28804

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 **Herrin**, on **December 5, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0767

FINDINGS

On the date of accident, August 20, 2013, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$60,151.51**; the average weekly wage was **$1,156.76**.

On the date of accident, Petitioner was **48** 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 **$22,044.30** for TTD, **$0** for TPD, **$0** for maintenance, a general credit for any non-occupational indemnity disability benefits paid for which credit may be allowed under Section 8(j) of the Act and **$0** for other benefits.

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

ORDER

Respondent is ordered to pay Petitioner temporary total disability benefits pursuant to Section 8(b) of the Act in the amount of **$771.17/week** for a period of **10 1/7 weeks**, which represents August 21, 2013 through October 30, 2013. Respondent shall be give a credit for any temporary total disability benefits paid ($22,044.30) as well as any non-occupational indemnity disability benefits Petitioner may have received and for which Respondent is entitled to a credit under Section 8(j) of the Act.

Respondent shall pay reasonable and necessary medical services of $815.00, as provided in Sections 8(a) and 8.2 of the Act and pursuant to the Medical Fee Schedule. Respondent shall be given a credit for any medical bills that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving the credit, as provided in Section 8(j) of the Act.

Petitioner's request for prospective medical care is denied as Petitioner failed to prove that his current condition of ill-being in his left knee is causally connected to his accident of August 20, 2013.

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

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

Village of Villa Park v. Illinois Workers' Compensation Commission, 3 N.E.3d 885, 890 (2d Dist. 2013).

As Petitioner was clearly in the furtherance of his work duties at the time the injury occurred, and was exposed to a greater risk than the general public as he was required to traverse stairs on an extremely frequent basis, and was running to respond to a fight at the time the injury occurred. Petitioner has met his burden of proof on the issue of accident.

With regard to Issue (F) Whether Petitioner's current condition of ill-being in his left knee is causally related to his accident of August 20, 2013:

The Arbitrator finds:

Petitioner has a history of bilateral knee complaints prior to August 20, 2013. He sustained two prior knee accidents on April 4, 2007 and September 5, 2010.

Petitioner was playing basketball in his job as a corrections officer on April 2, 2007 when he dislocated his right knee. Dr. David Keiffer performed surgery on April 12, 2007.

Petitioner sustained another injury to his right knee on September 5, 2010 for which he received treatment from Dr. George Paletta. Petitioner subsequently underwent a right knee arthrotomy with repair of the distal quadriceps tendon on September 14, 2010.

On September 21, 2010 Petitioner filed an Application for Adjustment of Claim against Tamms Correctional Center with regard to a leg injury occurring on September 5, 2010.[1]

Petitioner's recovery progressed well until January 28, 2011 when Petitioner reported some significant swelling appearing two weeks earlier. An MRI performed on February 1, 2011 showed post-surgical changes in the distal quadriceps tendon compatible with his prior repair and a small focal fluid collection at the lateral fibers of the tendon related to either a post-operative hematoma or seroma. Petitioner underwent additional surgery on February 1, 2011 involving an exam under anesthesia, right knee closed manipulation and an intra-articular injection. By April 4, 2011 Petitioner's outcome was described as "excellent."

Petitioner returned to see Dr. Paletta on July 27, 2011 reporting an atypical soft tissue cyst (a ganglion cyst status post quadriceps tendon repair). A third surgery to Petitioner's right knee followed and he did well post-operatively. He then returned to Dr. Paletta on June 6, 2012 with evidence of clear progressive post-traumatic degenerative changes in his right knee, both clinically and radiographically. Thereafter, Petitioner was examined by Dr. Choi on July 13, 2012 who felt he had right knee degenerative joint disease and by Dr. Mall on March 29, 2013. (RX 8, Rex. Ex. 2)

On March 29, 2013, Petitioner presented to Dr. Nathan Mall at Regeneration Orthopedics on a referral from Dr. George Paletta. Petitioner was noted to have a "significant history"

[1] The Arbitrator takes judicial notice of IWCC filings.

with his right knee in which he suffered a work-related injury playing basketball in prison. He suffered a knee dislocation and then went to St. Louis University Hospital where Dr. Kiefer reconstructed his MCL, ACL, PCL and LCL back in 2007. In 2010, he tore his quadriceps tendon of his right knee and Dr. Paletta fixed this for him. Since that time, Petitioner stated he has been favoring his right knee and putting a lot more stress on his left knee. His left knee has become "significantly painful." Petitioner reported he had no pain in his left knee prior to his injury back in 2007. He reported a history in the left knee of a prior meniscus tear in the late 1980's when he had a partial meniscectomy and patellar femoroplasty all done arthroscopically. Petitioner reported that following that he never had any symptoms or problems until 2007 or later when he was putting additional stress on his left knee. Petitioner reported he was currently working full duty at Menard Correctional Facility. The majority of the pain on the right side was medial-sided in nature, and he felt a tightness across the top. On the left side, Petitioner's entire knee was painful in both medial and lateral aspects of the knee as well as underneath the kneecap. Petitioner was 6'3", weighing 261 pounds. Petitioner's right knee had multiple incisions, one anterior and another one S-shaped medially curving around to the anterior aspect of the tibia. Range of motion of the right knee was from about 5 degrees short of full extension to about 95 degrees of flexion. Petitioner's left knee range of motion was from 2-3 degrees short of full extension to 95 degrees of flexion as well. Petitioner had two small arthroscopic portal incisions on the left knee. Petitioner had significant tibiofemoral crepitus and patellofemoral crepitus of the left knee. The right knee had tenderness to palpation on the medial side whereas Petitioner's left knee had tenderness to palpation medially and laterally. Petitioner had a stable ACL and PCL on the left side, stable MCL and LCL as well. Petitioner was intact to varus and valgus stress testing as well as anterior and posterior drawer testing.

According to Dr. Mall's notes, X-rays demonstrated severe osteoarthritis of the left knee with bone on bone of the medial compartment, significant osteophytes in the patellofemoral and medial and lateral compartments. There was subluxation of the knee medially. Right knee x-rays demonstrated two anchors on the insertion of the MCL as well as multiple staples for the ACL and MCL reconstructions. Petitioner was assessed with the following: 1) left knee end stage tricompartmental osteoarthritis; 2) right knee status post ACL, MCL and PCL reconstruction and status post quadriceps tendon repair; and 3) right knee osteoarthritis, significant adhesions, and medial joint line tenderness. In terms of the left knee, Dr. Mall opined that Petitioner was at his "last resort" as he had end stage osteoarthritis without any potential for a cartilage restoration type procedure. Dr. Mall thought Petitioner would need a total knee replacement on the left side. Dr. Mall noted that Petitioner's meniscus surgery in the 1980's was likely a predisposing condition. However, he thought that all of the work Petitioner had on the right knee put significantly increased stress on the left knee and likely caused the arthritis to worsen faster than would otherwise happen. Dr. Mall noted that Petitioner's type of job required a significant amount of time on this feet and stress on his leg. Given this, Dr. Mall related the symptoms in Petitioner's left knee to the work-related injury back in 2007 as the increased stress on the left knee as well as the job description increased his symptoms in Petitioner's left knee. Dr. Mall noted that while it did not completely cause Petitioner's arthritis as this was multifactorial in terms of genetics, his prior meniscus

surgery and other stresses that Petitioner put on the knee due to his right knee injury. However, Dr. Mall thought that Petitioner's symptoms that he was experiencing were causally related to his work and his work-related injury. Dr. Mall noted the following:

> I also think that a left knee injection would be beneficial for him while we are recommending a left total knee arthroplasty and while we are waiting to get this approved. I do not think there is any other option for his left knee at this point. Therefore, I would think that he is indicated for a left knee total knee arthroplasty.

Dr. Mall performed injections to Petitioner's bilateral knees. (RX 9)

On April 26, 2013, Petitioner returned to Dr. Mall for his bilateral knee pain. Petitioner informed him that the injections relieved the pain in both knees, but they did not relieve the mechanical symptoms in the right knee. The pain in the left knee returned, as well. The majority of the pain on the right side was medial sided in nature as well as a tightness across the top. On the left side, the entire knee was painful both in the medial and lateral aspects of the knee as well as underneath the kneecap. Petitioner's physical examination was changed. In terms of the left knee, Dr. Mall noted that Petitioner was, again, at his "last resort" as he had endstage osteoarthritis without any potential for cartilage restoration type procedures. Dr. Mall thought Petitioner would need a total knee replacement on the left side. He again opined that the left knee was causally related to the right knee problems dating back to 2007. (RX 9)

On May 31, 2013, Petitioner returned to Dr. Mall for his bilateral knee pain. Dr. Mall assessed Petitioner with left knee osteoarthritis, likely secondary to the multiple knee injuries in the past on the right side, which placed additional stress on the left side and caused it to breakdown a little faster than what normally would, as well as continuing to produce the symptoms in the left knee. The right knee had some scar tissue and loose bodies in it secondary to prior procedures that were covered by his work injury. Dr. Mall noted, "I do think that both of these knees are work related injuries and their symptoms had been aggravated by his job." Dr. Mall recommended Petitioner undergo a left knee total knee arthroplasty as well as a right knee arthroscopy, debridement, lysis of adhesions and removal of loose body. The risks, benefits, alternatives and complications associated with the procedures were discussed. Dr. Mall noted that they would continue to provide conservative treatment for this until approval had been obtained. Dr. Mall proceeded with another left knee cortisone injection since Petitioner was having significant pain on the left side and he had already lost the majority of the cartilage on that side and needed a total knee arthroplasty anyway. (RX 9)

On July 30, 2013, Petitioner returned to Dr. Mall for follow-up of bilateral knees. Petitioner showed Dr. Mall pictures of his left knee and left leg which demonstrated significant swelling which had lasted 4-5 days and made it difficult for him to get to work. Petitioner reported having been seen by Dr. Lehman for an independent medical exam the previous Thursday but it was only for his right knee. According to Petitioner, Dr. Lehman agreed that his right knee needed to be monitored closely and that surgery

would be appropriate if his symptoms persisted. He also stated that while Dr. Lehman did not address his left knee he did state that it was significantly arthritic. Dr. Mall noted that the left knee was significantly painful and had increased the amount of protrusion of the medial condyle. Petitioner had significant medial joint line tenderness and developed some numbness into his second and third toes. Petitioner had significant pain and increased numbness with palpation in the webspace between the third and fourth toes, which caused extenuation of the numbness into the two toes. Dr. Mall again recommended a left total knee arthroplasty. Dr. Mall noted that at the same time, they could scope the right knee and remove as much scar tissue as possible. Dr. Mall again related both knees to the work injury in 2007. Dr. Mall noted that they would see Petitioner back hopefully at the time of surgery. If not, they would see him back in 4 weeks. Petitioner was to continue physical therapy. (RX 9)

Petitioner's incident at work on August 20, 2013 followed.

On August 20, 2013, Petitioner completed a "Workers' Compensation Employee's Notice of Injury". He reported that he was "running down stairs to respond to a fight" when he felt a popping sensation in the left knee. Petitioner reported that this occurred at 9:30 a.m.

On August 20, 2013, Lt. Robert Hughes completed a "Supervisor's Report of Injury or Illness". Lt. Hughes noted that a fight occurred on North II yard at approximately 9:05 am. At 10:18 am, C/O Bowers stated that he was running to the fight and heard pop in knee and could not bend it."

On August 20, 2013, Lt. Hughes wrote an "Incident Report". He stated the following:

> On 8/20/13 at approx. 9:05 am this Lieutenant reported a 10-10 (fight in progress) on the North II seg. yard. Chemical agents were used and the fight stopped. The inmates involved were removed from the yard without incident. At approx. 10:18 am C/O Bowers reported to this Lt, in front of C/O Fleming, that he (Bowers) had ran to the fight and heard a pop in his left knee and could not bend it. I informed Bowers to got to the HCU. I notified Maj. Lyerla. C/O Bowers did not report anything after the incident. Shortly after the fight I observed C/O Bowers walking the complete length of 5 gallery North II without incident, while running chow lines.

On August 20, 2013, at 12:20 p.m. Petitioner presented to Southeast Missouri Hospital. He reported left knee pain after running up steps earlier that day at work. Petitioner was noted to be a correctional officer. He reported that if felt like something was in there getting in the way when he tried to bend his knee. Petitioner's past medical history included a right knee repair and right arm repair. Physical examination revealed tenderness with palpation of anterior and posterior knee swelling. Petitioner had limited active range of motion. Petitioner had pain with range of motion. It was noted that the examination of Petitioner's left knee was limited due to Petitioner's discomfort. X-rays

of the left knee revealed joint space remarkably small; degenerative changes; no fracture. The radiologist's report noted severe artthropathy involving the medial and lateral compartments with mild lateral subluxation of the proximal tibia relation to the distal femur; small ossific fragments projected anterior and posterior to the knee joint, suspicious for small loose bodies; findings suspicious for a small suprapatellar joint space effusion; and no acute fracture or dislocation. Petitioner was diagnosed with knee pain. It was recommended that Petitioner follow-up with an orthopedic specialist.

On August 21, 2013, Petitioner returned to Dr. Mall for a follow-up on his left knee. Petitioner reported that he was involved in an altercation the day before in which he was running down a flight of stairs to get to the fight and pulled some inmates back in and off the yard. He felt a severe grind and popping sensation in his knee. Fifteen to 20 minutes later while he was helping serve a meal, he felt a sharp pain in his knee and experienced immediate swelling and he felt like his knee locked. The right knee had been about the same as it was on the last visit. This forced him to go to the emergency department given the extreme amount of pain and locking that occurred with his left knee. Petitioner was noted to be 6'3", weighing 257 lbs. Examination of Petitioner's right knee was similar to the last visit. The left knee was locked. (PX 3)

Dr. Mall was unable to bend Petitioner's left knee more than approximately 10 degrees. There was significant crepitus when doing so as well. The knee was stable to varus and valgus stress testing as well as anterior and posterior drawer testing. Dr. Mall assessed Petitioner with left knee osteoarthritis with now a potentially locked piece of bone or osteophyte that was present in the knee and preventing Petitioner from flexing the knee. Dr. Mall recommended a cortisone injection into his knee to see if they could get it to unlock. He hoped that it would improve his symptoms and allow him to return to work. Dr. Mall noted that he was concerned that this would continue to happen over time and the ultimate treatment for it would be to do a total knee replacement "that we have been waiting approval for." Dr. Mall noted he would be in contact with Petitioner to see if his knee would unlock and should that happen they would be able to change his work status. At that point, Petitioner could not go back to work as he was unable to move his knee and could not work without a severe limp. Dr. Mall noted this might change over the next couple of days if he was able to unlock the knee.

Petitioner signed his Application for Adjustment of Claim in this case on August 26, 2013. (AX 2)

On September 3, 2013, Petitioner returned to Dr. Mall for follow-up of his bilateral knee complaints. Dr. Mall noted that a left knee cortisone injection was performed at the last visit since Petitioner had suffered a new injury in which his left knee locked up on him at work after having to run down the steps to be present for an altercation that was finishing up and as he was getting back to work at the food line he had the knee lock up on him. Petitioner's knee had remained locked at this point, and he had difficulty moving the knee at all. Physical examination revealed the right knee to have general stiffness and lack of range of motion. The right had, despite the overall appearance, well-preserved joint space. The left knee had end stage osteoarthritis with likely loose bodies that were

causing him to keep the knee in the position that he currently was in. Petitioner was assessed with right knee status post multiple procedures with scar tissue buildup and contracture and left knee significant osteoarthritis. Dr. Mall noted that the left knee remained locked, and, therefore, he recommended an urgent request for a left knee arthroplasty. Dr. Mall noted that he did not think a knee arthroscopy of the left knee was warranted to try to remove the loose pieces of bone as this would not give him long lasting benefit. While it would potentially unlock Petitioner's knee; however, Dr. Mall noted that the treatment for his left knee that would cure and alleviate his symptoms was a left total knee arthroplasty. In terms of the right knee, Dr. Mall recommended a knee arthroscopy and debridement of scar tissue to give him better motion of the knee. Petitioner stated that he never really had many issues with the left knee prior to his second right knee surgery in which he had to be non-weightbearing on the right side of a period of time and having to put a lot of stress on the left knee. This significantly impacted Petitioner's symptoms. Dr. Mall noted that Petitioner was significantly better than he was now and this new injury caused his knee to lock up and cause him even more pain and, therefore, Dr. mall felt that the left knee could be handled rather expeditiously because his knee was already quite stiff and would continue to stiffen making the knee arthroplasty even harder to do if this was not unlocked relatively quickly. (PX 3)

On October 2, 2013, Petitioner returned to Dr. Mall for follow-up of his bilateral knees. Petitioner states that last night his whole leg went into a seizure/spasm. He had no change in pain. He continued to feel like the left knee was locked and that there was something caught in the left knee. The right knee had limited range of motion which caused him discomfort at the end range of motion for his right knee. The left knee was stable with anterior and posterior drawer as well as medial and lateral stress testing, however, he could not flex and extend his knee more than 5 degrees before he felt a significant lock in the knee. That was actually somewhat palpated as well as small jolt of crepitus and his knee became locked up and unable to move. Petitioner was assessed with severe left knee osteoarthritis and right knee multiple procedures now with stiffness. Dr. Mall noted the following:

> In terms of Mr. Bowers' left knee I do believe that he suffers from significant osteoarthritis which is of no doubt. It does appear that based on his complaint that he was not having any problems with his left knee prior to his most recent surgery on his right knee. Following this surgery when he was using crutches he then began having some left knee pain. He states that his deformity began to increase as well on the left knee. The patient does have osteo-arthritis which obviously was present before any significant work injury including this most recent work injury in which his knee had locked up and he has been unable to get this straight despite several cortisone injections and attempted movement of the knee to unlock this. This most recent injury likely aggravated the osteoarthritis. The fact that he was on crutches for some period after the right

> knee injury also likely aggravated his osteoarthritis. While it did not cause it, certainly we do not see people with this severe of osteoarthritis in his young of age and, therefore, it is likely that his job duties actually did contribute to the acceleration of his osteoarthritis on this side. He may have developed osteoarthritis at some point in the future regardless due to genetic and postsurgical changes, however, even then this is still a very young age to develop this severe of osteoarthritis and, therefore, I do think that the amount of pounding that he does on this knee has contributed to the development of osteoarthritis at this early of an age as severe as it is. (PX 3)

On October 31, 2013, Petitioner underwent a left total knee arthroplasty for left knee osteoarthritis performed by Dr. Nathan Mall at Missouri Baptist Medical Center. (PX 3)

On November 1, 2013, Petitioner presented to Missouri Baptist Medical Center for x-rays of the left knee which revealed a left total knee arthroplasty with patella resurfacing. (PX 3)

On November 13, 2013, Petitioner returned to Dr. Mall. He was doing well. He had no complaints at the knee level; however, he did have some bruising in the quadriceps area where the tourniquet was. Petitioner had good knee range of motion. He was probably about 10 degrees short of full extension to about 90-95 degrees of flexion. X-rays looked great. There was a mild amount of patellar tilt present; however, it was hoped that would resolve as Petitioner got some quadriceps strength back. Dr. Mall recommended continued physical and occupational therapy. Petitioner was to return in 4 weeks for repeat x-rays and repeat evaluation. (PX 3)

On November 18, 2013, Petitioner presented to Mid America Rehab. He reported that he was running to break up a fight when he injured his left knee. He had pain, a "popping", and it locked up on him. Since that time, had been experiencing low back pain as well with symptoms down his left leg and occasional numbness and tingling into the last 3 toes. (PX 3)

On December 11, 2013, Petitioner returned to Dr. Mall. He was doing well 6 weeks post left total knee arthroplasty; however, he continued to have significant pain with stairs and steps and had significant quadriceps weakness. He stated his knee swelled up after 30 minutes. Petitioner had full extension of his knee. He could bend the knee to about 95-100 degrees of flexion and it was stable to varus and valgus stress testing as well as anterior and posterior drawer testing. Petitioner was to continue dedicated physical therapy three times a week as well as some home therapy. Petitioner was to ice and elevate the leg as much as possible throughout the day and was to return in 4-6 weeks. At that time, Petitioner would be three months from surgery and he would likely be able to return to work at a full capacity by three months. Dr. Mall noted that if Petitioner was

still struggling slightly they would put him back in a limited duty role but somewhere near that point should be close to full duty. X-rays of the left knee revealed no significant interval change with a postoperative appearance bilaterally. (PX 3)

On January 22, 2014, Petitioner returned to Dr. Mall. He was doing well, although, he continued to have some difficulty with range of motion and getting his knee completely bent. Petitioner had range of motion from 0-100 degrees of flexion. Petitioner's knee was stable to varus and valgus stress testing as well as anterior and posterior drawer testing. He had significant quadriceps weakness still on the left side as opposed to the right. Dr. Mall recommended continued quadriceps strengthening activities with formal physical therapy continuing. Dr. Mall believed Petitioner had gained some motion and would continue to improve over time. (PX 3)

On February 18, 2014, Petitioner returned to Dr. Mall. He continued to have pain with going down stairs and steps, and he stated that his knee swelled when he was on it. Petitioner had good range of motion from complete extension to approximately 100 degrees of flexion. X-rays looked good. Dr. Mall noted that Petitioner was suffering from some significant quadriceps weakness. He had about 4/5 strength or 4-/5 strength in his left quadriceps. Petitioner would benefits from home quadriceps stimulation unit as well as additional physical therapy. (PX 3)

On April 1, 2014, Petitioner returned to Dr. Mall. Petitioner was five months out from surgery. He continued to have left knee pain. He stated that his pain related to the arthritis in the knee was significantly improved from before surgery. However, he continued to have pain anteriorly as well as pain now in the posterolateral aspect of the knee. Petitioner also reported felling a popping sensation in this area as well, that would produce electrical signals down his leg and into his calf. Physical examination revealed a significantly weak quadriceps muscle on the left side as opposed to the right side. The patella seemed to be gliding normally. He had a small click on the posterolateral aspect of his knee that he stated was extremely painful. He was only able to get this to do this when he was lying on his side and flexed and extended his knee. X-rays demonstrated a well-aligned total knee arthroplasty. Petitioner had a mild tilt to his patella which had been persistent since the surgery with potentially an over-tightened medial retinaculum. Dr. Mall opined that he did not think that the patella was the source of Petitioner's symptoms. He believed the quadriceps weakness was the biggest issue for Petitioner in terms of the anterior knee pain. The posterolateral knee pain that started and persisted may be associated with the fact that Petitioner had a significant flexion contracture before the surgery and now this is his peroneal nerve popping along the area. Dr. Mall noted that Petitioner also described a significant fullness in the back of the knee that had been problematic for him and caused pain with flexion. Petitioner stated he lost flexion of about 10 degrees during physical therapy over the last 6 weeks or so. Dr. Mall recommended an ultrasound of the posterior aspect of the left knee to evaluate for a Baker's cyst. If Petitioner continued to have pain and snapping of the peroneal nerve, Dr. Mall noted that this may require a dissection and decompression. Dr. Mall noted that this would be extraordinarily rare, but he did believe that this was related to the fact that Petitioner's knee was flexed for so long that, now that he has it out straight, the tension in

the nerve is causing it to pop across the fibular head. Dr. Mall noted that potentially a release of the nerve could stop this. Petitioner did believe this had been worsening since the popliteal cyst came up. Dr. Mall noted that there was concern that the popliteal cyst could be causing the nerve to be pushed over and tension was causing the popping. (PX 3)

On April 7, 2014, Petitioner returned to Dr. Mall. Petitioner noted some swelling in the back of his knee and some popping on the lateral aspect of the knee. The popping seemed to occur on the lateral side of the knee and the pain shot over towards the anterior part of the tibia. Dr. Mall noted that when he pushed on the area Petitioner felt this around the Gerdy's tubercle, indicating more of an IT band problem rather than a nerve-related problem. Physical examination revealed good knee range of motion, only a degree or so short of full extension. Petitioner had good knee flexion to about 110 degrees. The knee was stable to varus and valgus stress testing. The patella seemed to be tracking well. Ultrasound did not demonstrate any evidence of symptoms of a Baker's cyst. Dr. Mall recommended IT band stretching program and physical therapy for peroneal nerve mobilization and quadriceps strengthening. Petitioner was to return in 5 weeks. Dr. Mall hoped that Petitioner would be able to return to work at that point. Dr. Mall discussed how the IT band, hamstrings, gastroc and peroneal nerve can all be tight. Given the fact that Petitioner had significant flexion contracture in his knee for so long, Dr. Mall felt that this would shorten the structures. Dr. Mall noted that it would take a significant amount of time to get completely stretched back. Dr. Mall thought that the swelling that Petitioner was noticing in the posterior aspect of the knee had just actually been there since the surgery and was just that the front of the knee became more normal-looking, and he continued to just notice the posterior part of the knee be different looking. Dr. Mall explained that the appearance of his knee would not look normal following a knee arthroplasty. (PX 3)

On May 13, 2014, Petitioner returned to Dr. Mall with continued complaints about his left knee, mostly in the lateral side of the knee over the IT band and Gerdy's tubercle, as well as on the posterolateral aspect of the knee with a popping sensation that then produced a shock that went down his lower extremity, and now also going up this thing a little bit. Physical examination revealed tenderness to palpation over the Gerdy's tubercle and over the IT band. Petitioner had a popping sensation that could be reproduced in the posterolateral aspect of the knee in the area of the peroneal nerve. This produced an electrical signal down the leg. Petitioner had a positive Tinel's at the peroneal nerve. Petitioner had full peroneal nerve strength, both through dorsiflexion and eversion of the foot. Petitioner had full strength and inversion of plantar flexion. In terms of the right knee, Petitioner continued to have limited range of motion in the right knee and discomfort. Petitioner was assessed with left knee posterloateral pain and right knee stiffness and pain. Dr. Mall opined that Petitioner was suffering from some symptoms that he believed were present due to the length of time that it was taking to get his knee to the operating room and the flexion contracture that he developed prior to the surgery. Dr. Mall noted that when a flexion contracture develops the peroneal nerve shortens, as does the IT band. When they enabled the leg to then straighten fully, these structures were under a significant amount of tension due to their lengthened status.

Therefore, they can be somewhat symptomatic. Dr. Mall's concern was that the peroneal nerve could really not be stretched and may require a decompression of the nerve to alleviate some of the symptoms. Dr. Mall noted that there was the potential over time that the nerve could grow and some of the symptoms would abate. In terms of IT band, Dr. Mall recommended continued stretching. Dr. Mall noted that he did not think that Petitioner could run and perform the duties of a correctional officer at that point. Petitioner was put on some continued restrictions for the left knee. In terms of the right knee, Dr. Mall noted that Petitioner would still benefit from a capsular release and manipulation under anesthesia with removal of scar tissue to give him some better range of motion in the right knee. Dr. Mall noted that they were waiting for workers' compensation approval for this. (PX 3)

On July 24, 2014, Petitioner presented to Dr. Richard Lehman at U.S. Center for Sports Medicine for a Section 12 examination. Dr. Lehman opined that Petitioner suffered from pre-existing degenerative arthritis and long term breakdown with a genetic predisposition that was not related to any specific incident. Dr. Lehman recommended an EMG/nerve conduction velocity test and re-evaluation to further identify the issues with the left peroneal nerve. Dr. Lehman believed Petitioner reached maximum medical improvement as it related to the work incident of August 20, 2013. Dr. Lehman did not believe the August 20, 2013, in any way caused the symptoms or pathology of Petitioner's left knee. Dr. Lehman gave Petitioner restrictions of no running, squatting or kneeling on his left knee, but he did not believe these were any way related to the work incident of August 20, 2013. (RX 6)

On August 12, 2014, Petitioner returned to Dr. Mall for follow-up of his bilateral knees. His left knee pain associated with his total knee arthroplasty and knee arthritis had resolved; however, he continued to have symptoms related to the peroneal nerve in the left knee. Petitioner had a burning sensation that shot down his leg as well as some heel and Achilles type of pain. The right knee continued to bother him as well with limitation of range of motion and discomfort. Physical examination revealed stable knees bilaterally. Petitioner had a positive Tinel's at the peroneal nerve at the fibular head on the left side. He also had pain to palpation in this area, and Dr. Mall could pop the peroneal nerve over the fibular head. The right knee had some medial joint line tenderness and locking symptoms. Dr. Mall noted that it had been 10 months since the left knee total arthroplasty, and Petitioner had continued peroneal nerve symptoms. Petitioner's overall arthritis pain had improved substantially and he was getting quite a bit of benefit from the knee arthroplasty; however, he had some residual pain and symptoms related to the peroneal nerve given the fact that his knee was bent for a long period of time and then was able to get it fully straight following the surgery likely caused tensioning of the nerve. The tensioning of the nerve now produced popping over the end of the fibula. Dr. Mall recommended an open peroneal nerve debridement and decompression with possible vein wrapping around the nerve to protect it in its location. In terms of return to work, Dr. Mall thought there would be minimal time of work. In terms of the right knee arthroscopy and debridement as well as scar removal to improve motion and relieve Petitioner's symptoms. Dr. Mall noted that clearly both surgeries were causally connected to his work injuries as the right knee debridement and lysis of

adhesions was related to his two prior surgeries that were both work-related. In terms of the left knee, the recommended treatment of the peroneal nerve decompression was causally connected to his work accident given the fact at the length of time that it took to allow for surgical intervention to proceed causing his knee to get quite stiff and caused his peroneal nerve to tighten up. Following straightening the knee, the peroneal nerve was now aggravated and was the source of his current symptoms in the left knee. (PX 3)

On October 7, 2014, Dr. Lehman authored a report following review of additional medical records of Dr. Mall's. Dr. Lehman opined that the surgery recommended by Dr. Mall for the peroneal nerve should not be undertaken until an EMG/nerve conduction velocity test was conducted to better determine the function of the nerve such as if the nerve was intact, how much damage had occurred to the nerve and if the nerve was regenerating and healing. Dr. Lehman again opined that he did not believe the Petitioner's need or care for treatment was related to the August 20, 2013, work incident. (RX 7)

On November 25, 2014, the deposition of Dr. Nathan Mall was taken by Petitioner.[2] Dr. Mall acknowledged that his treatment of Petitioner's left knee pre-dated his August 20, 2013 accident as it began on March 29, 2013. Dr. Mall felt Petitioner's right knee was a little worse than his left knee at that time. Dr. Mall testified that prior to August 20, 3013 his treatment to Petitioner's left knee was conservative in nature -- injections, medications, therapy, and home exercises. Petitioner continued working full duty up until he saw him on August 21, 2013 after his work accident. His knee was extremely painful and had a mechanical lock to it. No new studies were ordered but he was given another cortisone injection to see if it would push the fragment free and restricted his duties because he would be limping around which would not be a great idea at a correctional facility. Petitioner's diagnosis was osteoarthritis of the left knee with a locked piece of bone/osteophyte in the knee. (PX 7, p. 12-13) Dr. Mall testified to the following:

> So clearly osteoarthritis doesn't creep up in a day -- let alone -- but also had been progressing over several years, and so the injury from that date didn't cause his arthritis, but it did somehow knock off a piece of bone or osteophyte that locked his knee up. At that point, he became severely symptomatic and had a severe aggravation of a preexisting arthritis, so in that situation, yes, his work injury of 8-20-13 did severely aggravate his underlying arthritis. (PX 7, p. 13)

Dr. Mall testified that he recommended an urgent request for a left knee total due to the following:

[2] The Arbitrator notes that included in PX 7 are some paper-clipped documents marked as PX 1 and PX 2, dated 11/26/14, and bearing initials different than those of the court reporter taking the deposition of Dr. Mall. These exhibits are not reference in Dr. Mall's deposition and have been ignored by the Arbitrator in reviewing Dr. Mall's deposition. It does appear that these exhibits are identical to ones found in Dr. Lehman's deposition of November 26, 2014 and may be duplicative of the ones found in RX 8.

> My feeling was that it would be sort of silly to try and go in and just take out that piece of bone, whether it be arthroscopically or an open procedure, as that's not going to alleviate his s symptoms completely. And so in order to completely cure or alleviate his symptoms, I felt that a total knee arthroplasty was warranted in this situation, and unfortunately, because his knee was still in a locked position, we had to do this somewhat urgently, kind of – as I said, forced our hand a little bit. (PX 7, pp. 14-15)

According to Dr. Mall, he received an approval letter on October 16th authorizing the total knee arthroplasty of the left knee. (PX 7, p. 17)

Dr. Mall testified that in April of 2014 Petitioner began experiencing symptoms of peroneal nerve problem. Dr. Mall testified that the peroneal nerve problem was related to the accident of August 20, 2013, because the knee replacement was related to the injury, and therefore this happened after the knee replacement. (PX 7, p. 20) Dr. Mall has recommended a peroneal nerve decompression. Dr. Mall said it would be fine to get an EMG but did not recommend one because "even if it showed there wasn't a nerve problem then it wouldn't still change my recommendations." (PX 7, p. 23) Dr. Mall last saw Petitioner in August of 2014 at which time he placed him on restrictions. (PX 7, p. 24)

Dr. Mall disagreed with Dr. Lehman's opinion that Petitioner's current condition was unrelated to the August 20, 2013 accident. Dr. Mall explained that Petitioner was being treated conservatively prior to August 20, 2013 and "there was nothing that occurred that required him to have surgery until 8-20-2013 when his knee locked up and we were unable to get it unlocked by injecting cortisone and numbing medicine in there and trying to move the knee around and get it unlocked,...." (PX 7, p. 28)

Dr. Mall did not yet consider Petitioner to be at maximum medical improvement as the peroneal nerve issue needed to be addressed. (PX 7, p. 29)

When asked if the delay in getting his initial left knee arthroscopy performed contributed to the current condition of Petitioner's left knee, Dr. Mall testified,

> Again, it's hard to know if it wouldn't have happened anyway just from the mild flexion contracture that he has with arthritis; however, I do lots of knee replacements and I've never had one of these happen before, this guy's case, and most people don't have their knee locked up before the surgery, and so that's what I'm attributing it to. (PX 7, pp. 30-31)

On direct examination Dr. Mall testified that what there was nothing that had occurred to Petitioner that required him to undergo left knee surgery until his August 20, 2013 accident in which his knee locked up. (PX 7, p. 28)

On cross-examination Dr. Mall denied that he ever indicated Petitioner needed a total knee replacement on March 29. 2013. He testified that what he meant in his office notes of that date was that when Petitioner would need surgery it would need to be a total knee replacement. (PX 7, pp. 36, 37)

Thereafter the following exchange followed:

Q. And on March 29th, 2013, were you recommending a left total knee arthroplasty?

A. No. We recommended an injection and performed an injection on that date.

Q. However, on Page Three, it says, 'I also think that a left knee injection would be beneficial for him while we are recommending a left total knee arthroplasty and while we are awaiting approval -- awaiting to get this approved. I do not think there is any other option for his left knee at this point; therefore, I would think that it's indicated for a total -- a left total knee arthroplasty.' So at that time, you were not recommending a left knee arthroplasty?

A. So we discussed the potential treatment option, as I do with multiple people that I see from private health insurance as well, and if it's a situation in which we have trouble getting approval for something, whether that's Work Comp or just through private health insurance, I have, like I said, three-- I have three people right now that I'm trying to get insurance approval for through private health insurance for cartilage transplants to their knee, and we're having difficulty doing that.

We've already recommended the treatment, but we've treated them conservatively in the meantime to try to relieve some of their symptoms while we're waiting approval, and at that point at which we get the approval, they get to decide at that point are they doing better and do they need to have the surgery, or do they not?

So we -- a lot of times we'll start the approval process for something just to go ahead and get the approval, and that doesn't necessarily mean that the surgery needs to take place in any immediate fashion. So that same thing happens with --

Q. And in this case -

A. Sorry. that same thing happens with Work Comp a lot as well, is that sometimes it'll take a long time to get approval for something, so I will recommend a procedure or at least starting the approval process for that, and if at the point we got approval for it he was being -- he was fine and was doing okay, then we wouldn't need to proceed with that.

Q. In this case, were you seeking approval through Workers' Compensation for his prior injury to his right knee claim?

A. We were seeking approval for his left total knee arthroplasty as a relation to the right knee, I believe, yes.

Q. And that was through a Workers' Compensation case?

A. Correct.

Q. Did you submit for his health insurance approval through his home (ph) group health insurance?

A. I don't believe so. I don't know for sure. (PX 7, pp. 38-40)

Dr. Mall agreed that as of April 26, 2013 Petitioner's pain in his left knee had returned and he was still seeking approval for Petitioner's left knee replacement through Workers' Compensation and his 2007 and 2010 injuries/cases. (PX 7, pp. 40-41)

Dr. Mall further acknowledged that Petitioner returned on May 31, 2013 for bilateral knee pain complaints and he again recommended a left total knee replacement. He also added that he gave Petitioner a cortisone injection that day in an effort to "continue to treat it conservatively until [he] ultimately decide[d] that [he] want[ed] to proceed with the total knee replacement." (PX 7, p. 43)

Dr. Mall re-examined Petitioner on July 30, 2013. He acknowledged on further cross-examination that he noted Petitioner had "left knee pain secondary to osteoarthritis, which is secondary to favoring his left knee over time. Due to all of the injuries to his right knee, he has had to place additional stress through the left knee. He did have a prior meniscectomy on his left knee; however, I do believe the fact that he had all of these right knee injuries did accelerate his process in terms of the left knee; therefore, I do think this is a work-related problem and that the right knee is clearly work-related, and his left knee arthritis and progression of his pain has been accelerated by his work and his prior injuries to the right knee." (PX 7, p. 46) Dr. Mall testified, "I think that his prior knee problems accelerated the left knee arthritis problem... and on July 30, 2013 [I] again recommended a left knee arthroplasty." (PX 7, p. 47)

Dr. Mall believed that Petitioner probably knocked something off his knee when he was running and then it floated around his knee until it finally locked. However, he acknowledged that anything was possible and the piece could have knocked off when he was standing or walking in the meal line serving meals. (PX 7, p. 49)

Finally, Dr. Mall was asked about his testimony in Petitioner's 10 WC 36315 case. The following exchange occurred:

Q. And at that point in the deposition [talking about the March 29, 2013 visit] you said, 'The left knee needed a total knee replacement. That's the only way to cure or alleviate his symptoms related to that knee. It's beyond the ability to do a knee arthroscopy. We know that knee arthroscopy in the setting of this severe osteoarthritis is not going to work, and there really is no reason to get an MRI of his knee either, given the fact that there's that much arthritis. The joint is basically destroyed at that point. Needs to have it replaced.' Is that how you felt about his left knee in March of 2013 when you first saw him?

A. Correct. ...[T]here's no other surgical treatment that I would recommend for [Petitioner's left] knee at that point; however, it was his -- at least at that point his decision to make in terms of when to have that procedure done. (PX 7, pp. 53-54)

Dr. Mall went on to testify that something clearly happened to Petitioner's knee on August 20, 2013 to change the condition of his knee. He probably knocked off an osteophyte or some sort of chunk when he was running down the stairs. It then locked a few minutes later. The following exchange then followed:

Q. On Page 31 of your deposition that was taken on October 8, 2013, you were asked, 'Now, we've just talked about the fact that you recommended surgery for both of [Petitioner's] knees prior to this new injury that happened in August of 2013, so what, if any, effect do you think this new injury had on his left knee condition?' Answer - 'It doesn't change the actual condition. It just increases severity of the symptoms. He was having symptoms up until this point, and I think that the treatment for this would have been the same regardless of whether or not he had this new injury or not, and we honestly would have probably already have done this surgery had he not -- waiting for the Worker's Compensation approval for this.' Is that answer different that the answer you're giving now?

A. I think it's the same. (PX 7, pp. 55-56)

Dr. Mall, however, went on to add that it's up to Petitioner when he wants to have the procedure done and prior to August 20, 2013 he could move his knee, work full duty and was doing that. It was only after the new injury that he was "forced" not to work and not be able to bend his knee. Dr. Mall testified that he would have been happy to continue to treat Petitioner conservatively as long as he wanted to be treated that way but when the knee locked up he had to "sort of push a little bit towards doing something more." (PX 7, p. 57)

Dr. Mall also acknowledged that at his earlier deposition in 2013 he testified that he though the August 2013 injury aggravated Petitioner's left knee condition, "given the fact that his symptoms are substantially worse now than they were." However, he didn't think that it significantly altered his treatment recommendations. (PX 7, p. 59)

Dr. Mall testified that he was not board-certified at the time he performed the left total knee arthroplasty on Petitioner. (PX 7, p. 60)

Dr. Mall is recommending a decompression of the peroneal nerve at the present time. (PX 7, p. 72)

Dr. Mall also testified that Petitioner told him that Dr. Lehman had told Petitioner that if the knee replacement was work-related, the nerve problem was also work-related. (PX 7, p. 78) He did not, however, recall if Petitioner told him Dr. Lehman said the knee replacement surgery was work-related. (PX 7, p. 79)

On November 26, 2014, the deposition of Dr. Richard Lehman was taken by Respondent. (RX 8) Dr. Lehman is a board-certified orthopedic surgeon with a subspecialty qualification in sports medicine who has been practicing since 1986. Dr. Lehman testified consistently with his reports at the time of his deposition and opined that Petitioner's left knee condition, including the need for the total knee arthroplasty, had no causal connection whatsoever to the injury of August 20, 2013. (RX6, RX7, RX8). Dr. Lehman instead opined that Petitioner's condition was entirely related to pre-existing degenerative osteoarthritis in Petitioner's left knee. (RX 8, p. 15)

Dr. Lehman testified that Petitioner had pre-existing degenerative arthritis with a recommendation of a total knee replacement five months prior to the accident of August 20, 2013, and Petitioner's knee could not get any worse since Petitioner was already a candidate for an arthroplasty. Dr. Lehman explained:

> Well, when your joint is completely worn out and you're bone on bone and an orthopedic surgeon tells you that there's nothing else to do for your knee, but replace it, there's really not much else you can do. So, if you're driving your car and your tire is completely flat and you're riding on the rims and you hit a bump, it doesn't really make any difference. The only thing you can do is to get a new tire anyway. So, there's no making it worse. There's nothing you can do to – If someone has already recommended replacing the whole joint, taking the whole joint out and putting a plastic and metal joint in, there's no way to make your joint any worse. So, you've already been recommended to have a complete replacement of the joint, and anything else you're going to do to the joint is not making it any worse. You're just basically waiting on the inevitable, and that is to replace the knee. There's not any arthroscopic procedure or any other injection or any other treatment that's available for someone who is bone on and bone and has endstage arthritis. So, there's really nothing to make worse. (RX 8, pp. 16-17)

Dr. Lehman agreed that Petitioner had a peroneal nerve issue and recommended evaluating the nerve using an EMG nerve velocity test to try to determine the etiology and pathology of the problems. Dr. Lehman explained that in his almost thirty years, he has probably performed a peroneal nerve decompression 8 times. He explained that it is a rare problem and it would be medical malpractice not to evaluate the nerve prior to operating on it. (RX 8)

On cross-examination, Dr. Lehman acknowledged that this recommendation would be directly related to the total knee arthroplasty. (RX 8, p. 38) He also testified that he found Petitioner to be an honest and forthcoming individual and did not have any reason to disbelieve his complaints or his history. (RX 8, pp. 29-30) Dr. Lehman also testified that an osteophyte becoming lodged in the knee can cause the knee to lock. (RX 8, pp. 31-32)

On cross-examination, Dr. Lehman was provided with a copy of the authorization given to Dr. Mall's office to perform the total knee arthroplasty. (RX 8, p. 39) He acknowledged that he had never seen or been provided with a copy of this document prior to his deposition. (RX 8, pp. 39-40) Dr. Lehman testified that he could not recall whether he offered to perform peroneal nerve surgery on Petitioner, and likewise could not recall if he told Petitioner that his employer would be responsible for the peroneal nerve surgery because it was a consequence of the original surgery, which was approved. (RX 8, pp. 40-41)

On further cross-examination, Dr. Lehman was presented with Petitioner's Exhibit 2, a document entitled "Settlement Agreement Between the Missouri State Board of Registration for the Healing Arts and Richard C. Lehman, M.D." (RX8, Petitioner's Exhibit 2) Dr. Lehman acknowledged that he was the Richard C. Lehman, M.D. identified in that document, and that the last page of the document contained his signature. In that document, Dr. Lehman stipulated to "documenting a physical examination without performing such physical exam, and then basing said documentation on information that was over 2 ½ years old." (RX 8, Pet. Ex. 2, p. 3) The stipulation indicates that Dr. Lehman agreed that such constituted unprofessional conduct in the performance of his functions and/or duties of his profession. (RX 8, Pet. Es. 2)

At the time of trial, Petitioner testified that as he was running down the stairs he felt his knee pop -- like the popping one hears with knuckles. He proceeded to the yard where the incident was taking place and escorted the inmate involved in the altercation upstairs to the medical area. Thereafter he proceeded to walk to the gallery for lunch. Petitioner then testified that as he was on his way back to the cell house, his left knee locked completely straight. Petitioner estimated that his knee locked up about thirty minutes after he felt the pop in his knee.

Petitioner further testified that he was seen by Dr. Mall thereafter and subsequently underwent a left total knee replacement. He did pretty well for a couple of months until he awoke one night with a shot of electricity going down his leg. When next seen by Dr. Mall, Petitioner told him about the event and Dr. Mall said that the nerve on the outside of his leg had been "redacted" due to the lack of use of his leg while waiting for his initial

surgery. During that time Petitioner couldn't bend his leg and the nerve "reduced." According to Petitioner Dr. Mall is recommending surgery for the nerve and Petitioner would like to proceed with it. He indicated that he still experiences pain in his left leg which feels like his foot "is in hot coals on the barbecue grill."

Petitioner acknowledged that he had previously been treating with Dr. Mall because of right knee pain stemming from previous work being done on that knee. Petitioner also testified that he had experienced some left knee pain for which Dr. Mall was also treating him. Petitioner testified that the only treatment Dr. Mall provided to him for his left knee prior to his work accident in 2013 were injections. Petitioner "could not recall" having any discussions with Dr. Mall about the possibility he might need a total knee replacement before his 2013 accident. Upon further questioning he indicated that the doctor might have discussed it with him. He acknowledged that his left knee was in pain "a lot of times" before August 20, 2013. He could, however, function, and was able to go to work and perform his job.

Petitioner further testified that he attended an examination with Dr. Lehman at the request of Respondent. Petitioner also testified that Dr. Lehman had a copy of his file and while going through it asked Petitioner if he had been hurt at work (to which he replied yes), if he had undergone a total knee replacement (again he said yes), and asked if it had been pre-approved (again, he said yes). Petitioner also testified that the doctor asked him what was going on with his leg to which he described his nerve pain and how he felt he had electricity shooting down his leg. According to Petitioner Dr. Lehman touched that nerve and he jumped and Petitioner said that was what he was feeling. Dr. Lehman told him that was common with a total knee replacement and since the knee replacement had been a pre-approved procedure the new procedure couldn't be denied because it was pursuant to the original injury. According to Petitioner Dr. Lehman wanted to schedule him for the surgery.

Petitioner further testified that after the examination with Dr. Lehman, he reviewed a copy of Dr. Lehman's reports. He indicated that the contents of the report were "completely different" than what he had told Petitioner during his examination. Petitioner testified that the State stopped all of his benefits and disputed his claim after receiving Dr. Lehman's report.

Petitioner testified that he is currently off work receiving no benefits. He recalled going back to work on a light duty basis near the end of February/beginning of March. Dr. Mall had him on light duty for 90 days and then he was taken off work again. The parties stipulated that Petitioner's restrictions were accommodated for a period of ninety (90) days, and the TTD being alleged would be less 90 days than indicated on the Request for Hearing form.

On cross-examination Petitioner acknowledged that he saw Dr. Mall for both of his knees beginning in March of 2013. He understood at that time that he had end-stage tricompartmental osteoarthritis in his knees; however, he did not recall if the doctor had recommended a total knee replacement for his left knee at that time. He further

acknowledged that as of July 30, 2013 he was waiting for approval for surgeries to both his knees, including a left total knee replacement. Petitioner also acknowledged that when he saw Dr. Mall on July 30, 2013 he showed him pictures of his left leg and knee which demonstrated significant swelling lasting 4-5 days and which made it difficult for him to go to work.

Petitioner acknowledged undergoing left knee surgery when he was 15. He also acknowledged that his left knee started giving him more problems after he injured his right knee in April of 2007 in a work-related injury at Tamms. He acknowledged extensive right knee surgery after that accident. He then re-injured his right knee in 2010 when the quadriceps tendon tore off the top of his knee. Petitioner also testified that he was aware that a decision had been rendered on September 2, 2014 denying additional treatment in another case.

Petitioner further acknowledged that when he was going down the stairs and felt his knee pop, he didn't slip on anything. He simply felt his knee pop. He also testified that in the thirty minutes that followed before his knee locked, he walked and climbed stairs.

Petitioner also testified that he did not know if Dr. Lehman had reviewed all of his records before seeing him in 2014. He acknowledged an examination with Dr. Lehman in 2013. He had no idea if Dr. Lehman was aware in July of 2014 that Dr. Mall had recommended a total knee replacement months before his August 2013 accident.

The Arbitrator concludes:

Petitioner's left knee osteoarthritis and medical treatment for same, including the need for a total knee arthroplasty, are not causally related to the accident of August 20, 2013.

The Arbitrator was not persuaded by either Petitioner's testimony or Dr. Mall's testimony regarding the reality of the situation prior to August 20, 2013 in regard to Petitioner's left knee. Both witnesses tried to down play whether a total knee replacement to Petitioner's left knee had really been recommended. Petitioner either couldn't recall or wasn't sure but, in the end, he acknowledged the doctor's notes could speak for themselves. Dr. Mall denied telling Petitioner he needed a left total knee replacement in March of 2013. (PX 7, p. 36) His records (which were not tendered by Petitioner but by Respondent) clearly show otherwise -- to wit, "I also think that a left knee injection would be beneficial for him while we are recommending a left total knee arthroplasty and while we are waiting to get this approved. I do not think there is any other option for his left knee at this point. Therefore, I would think that he is indicated for a left total knee arthroplasty." (RX 9, 3/29/13 o/n, p. 3)

Petitioner also testified that he was having no difficulties performing his job prior to August 20, 2013. That testimony is contradicted by Dr. Mall's office note of July 30, 2013 in which Petitioner showed the doctor photographs of his swollen left knee and told

him the swelling was making it "difficult for him to get to work." (RX 9, 7/30/13 o/n, p. 1)

Two doctors provided expert opinions regarding causation -- Dr. Mall and Dr. Lehman. The Arbitrator was not persuaded by the testimony of Dr. Mall. The medical records from Dr. Mall reveal that Petitioner had been suffering from this very condition for many years. Dr. Mall recommended a left total knee arthroplasty five months before Petitioner's August 20, 2013 accident. The medical records also reveal that Dr. Mall and Petitioner were awaiting workers' compensation approval for the left total knee arthroplasty for five months prior to the accident of August 20, 2013. Dr. Mall's testimony on direct examination was focused on downplaying the significance of events prior to August 20, 2013. The Arbitrator, in this instance, gives greater weight to the doctor's medical records themselves rather than the doctor's testimony on direct examination and she further acknowledges the many concessions he made on cross-examination regarding the status/condition of Petitioner's left knee prior to August 20, 2013 as well as his deposition testimony given in Petitioner's other case(s) involving his knee.

The Arbitrator believes the weight of the credible evidence shows that Petitioner's left knee was so deteriorated prior to August 20, 2013 that a total knee replacement had been recommended by Dr. Mall. Once approval was obtained, Petitioner was going to proceed. The Arbitrator is not persuaded by the doctor's testimony that his request for approval was simply to get the ball rolling to obtain approval and that, once given, Petitioner would decide if he wished to proceed. While a patient might always decide at the eleventh hour not to proceed with a procedure the overwhelming weight of the doctor's medical records herein, as well as his prior October 2013 deposition testimony, clearly indicates Petitioner was in need of a total knee replacement prior to his accident herein due to the condition of his knee at that time. As stated in the August 21, 2013 office note of Dr. Mall, "... the ultimate treatment for this will be to do the total knee replacement that we have been awaiting approval for." [Emphasis added.]

It is also worth noting Dr. Mall's comments in his September 3, 2013 office note in which he stated that he didn't think a knee arthroscopy was the way to proceed; rather, he felt Petitioner still needed an arthroplasty. He noted that while the arthroscopy would unlock Petitioner's knee it would give him no long lasting benefit -- "the treatment for his left knee that will cure and alleviate his symptoms is a left total knee arthroplasty." (PX 3)

While determining that Petitioner's current condition of ill-being in his left knee is not causally related to his August 20, 2013 accident, the Arbitrator does acknowledge that an exacerbation of Petitioner's symptoms and condition may have occurred; however, it would have been temporary in nature. The accident did not cause a change in the condition of Petitioner's knee. Indeed given the lapse in time between the pop in Petitioner's knee and the locking, there is some question as to whether the locking of Petitioner's knee was truly caused by the incident going down the stairs.Petitioner's work accident in August of 2013 didn't accelerate the need for a total knee replacement as the request for approval of same had already been pending prior to his accident.

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

While determining that Petitioner's current condition of ill-being in his left knee is not causally related to his August 20, 2013 accident, the Arbitrator does acknowledge that an exacerbation of Petitioner's symptoms and condition may have occurred; however, it would have been temporary in nature. The accident did not cause a change in the condition of Petitioner's knee. The accident did require Petitioner to incur some medical bills.

Consistent with her causation analysis Petitioner is awarded his medical bills from August 20, 2013 up through the day before his total knee replacement. This would include the following:

Dr. Mall -- office visits of 8/21/13, 9/3/13, and 10/2/13 ($465.00 + $175.00 + $175.00)

Southeast Missouri Hospital -- 8/20/13 ER visit ($1,186.67) The bill reflects a "0" balance as it has been paid by workers' compensation. (PX 1)

The collection notice from CACi in the amount of $227.00 is denied. No testimony was provided by Petitioner as to what this collection notice is for. While it references Southeast Missouri Hospital and a date of 8/20/13, the itemized bill from the hospital contains no reference to a charge in that amount or information as to what the charge represents.

All other charges found in PX 1 are denied consistent with the Arbitrator's causation analysis.

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

Consistent with her causation determination, the issue of prospective medical care is moot.

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

While determining that Petitioner's current condition of ill-being in his left knee is not causally related to his August 20, 2013 accident, the Arbitrator does acknowledge that an exacerbation of Petitioner's symptoms and condition may have occurred; however, it would have been temporary in nature. The accident did not cause a change in the condition of Petitioner's knee. The accident did require Petitioner to lose time from work.

Petitioner is awarded temporary total disability benefits of $771.17/week commencing August 21, 2013 through October 30, 2013, a period of 10 1/7 weeks. Thereafter, Petitioner's lost time was on account of his total knee replacement procedure which the Arbitrator has determined was not necessitated by the August 20, 2013 accident.

Issue (N): Is Respondent due any credit?

The parties stipulated that Respondent is due a credit for any medical bills paid by it or its group medical plan for which credit may be allowed under Section 8(j) of the Act and that Respondent should be credited for TTD paid in the sum of $22,044.30 and any amounts paid in non-occupational indemnity disability benefits for which credit may be allowed under Section 8(j) of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alicija Rafaj,

Petitioner,

vs.

NO: 11 WC 30622

15IWCC0768

Alexian Brothers Behavioral Health Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by Petitioner herein and notice given to all parties, the Commission after considering the issues of causation, medical expenses, and temporary total disability benefits, and being advised of the facts and law, modifies and corrects 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).

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent, and based on our complete review of the record we find that the Arbitrator correctly found that Petitioner's CRPS is not causally related to the May 16, 2011 accident.

Though we agree with the Arbitrator's findings, we believe his reasoning and explanation needs further amplification. Additionally, we find the following:

Firstly, despite Respondent's efforts at accommodation, Petitioner resigned her

accommodated position of employment on June 2, 2012. Petitioner was assigned work within her restrictions. Petitioner alleged that she felt unsafe because patients were on the other side of the door of the area she was assigned to work. She further alleged that she was unable to contact her supervisor while she was in that area. These allegations do not ring true when considered together with other assertions made by the Petitioner.

Secondly, Petitioner alleged that after she left her accommodated employment with the Respondent, she worked only 2 hours a day for her father. Petitioner's claims of 2 hours of work a day are completely contradicted by the employment records provided by her father. These records demonstrate that Rafaj had been working a minimum of 14.75 hours a week for her father since 2011. (RX4) In fact, by the employment records submitted by her father, Petitioner worked 67 hours during the two-week period of November 5, 2013 through November 21, 2013. (RX4) This is in complete contradiction to Petitioner's claim that she is unable to work more than 2 hours a day.

Thirdly, on October 19, 2011, Petitioner reported that she felt a pop with some pain in her wrist to Dr. Papierski. The report is rather suspect in light of the fact that she denied such an event when speaking to Dr. Neal.

While the records indicate that this event did not constitute an intervening event, it does bring Petitioner's credibility into question. Ultimately, Petitioner's contradicted claims render Petitioner's testimony not credible. Therefore, the Commission affirms the Arbitrator's finding that Petitioner's CRPS is not causally related to the May 16, 2011 accident.

The Commission does note, however, that Respondent stipulated to a third period of temporary total disability, from April 11, 2012 through May 23, 2012, per the Request for Hearing form and at hearing when the Arbitrator went over the stipulations of the parties. (AX1,T.6-7) The Commission finds that Respondent is bound to this stipulation and, as such, finds that Petitioner is entitled to temporary total disability benefits for this period.

Finally, the Commission notes that in the Order Section of the Arbitrator's Decision, the Arbitrator awarded temporary total disability benefits from August 18, 2011 through November 17, 2000. Based on the Request for Hearing form, the correct date is November 17, 2011. The Commission hereby corrects the decision to reflect the date of November 17, 2011.

One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $307.43 per week for a period of 19-6/7 weeks, from August 18, 2011 through November 17, 2011, from January 27, 2012 through January 30, 2012, and from April 11, 2012 through May 23, 2012, that being the period of temporary total incapacity for work under Section 8(b), and that as provided in Section 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

15IWCC0768

compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services that are related to Petitioner's TFCC complex tear and DeQuervain's syndrome only, as provided under Sections 8(a) and 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 shall be given a credit of $6,293.33 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for temporary partial disability benefits is denied, because Petitioner resigned from a job that was within her medical restrictions.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for the implementation of the spinal cord stimulator is denied.

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 $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: OCT 21 2015
MJB/ell
o-09/01/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

RAFAJ, ALICIJA
Employee/Petitioner

Case# **11WC030622**

ALEXIAN BROTHERS BEHAVIORAL HEALTH HOSPITAL
Employer/Respondent

15IWCC0768

On 11/17/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
DAVID M BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0075 POWER & CRONIN LTD
DANIEL J ARTMAN
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Alicija Rafaj
Employee/Petitioner

v.

Alexian Brothers Behavioral Health Hospital
Employer/Respondent

Case # **11** WC **30622**

15IWCC0768

An *Application for Adjustment 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 **July 29, 2014 and August 22, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 16, 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 regarding her TFCC complex tear and De Quervain's syndrome are the only current conditions of ill being of ill-being ***that are*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**23,979.28**; the average weekly wage was $**461.14**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **no** dependent children.

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

Respondent shall be given a credit of $**6293.33** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6293.33**.

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 $**307.43**/week for **20 1/7**th weeks, commencing **August 18, 2011** through **November 17, 2000**, and commencing **January 27, 2012** through **January 30, 2012**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **August 18, 2011** through **August 22, 2014**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $**6293.33** for temporary total disability benefits that have been paid.

Petitioner's claim for temporary partial disability benefits is denied, because Petitioner resigned from a job that was within her medical restrictions.

Respondent shall pay reasonable and necessary medical services that are related to Petitioner's TFCC complex tear and De Quervain's syndrome only, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner's claim for the implementation of the spinal cord stimulator is denied.

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

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

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

Signature of Arbitrator Milton Black

November 16, 2014
Date

NOV 17 2014

FACTS

Petitioner was employed by Respondent as a mental health counselor. On May 16, 2011, Petitioner was helping to restrain a patient, when she was kicked in the right hand and wrist area by the patient, and then while trying to restrain the same patient her hand and wrist was grabbed, twisted, turned, and pulled. She was seen in the emergency room and diagnosed with a wrist sprain. She continued to have pain and eventually began treating with MidAmerican Orthopedics. She underwent surgery of a TFCC complex repair in August 2011. Post-operatively she was returned to work with a restriction of no use of the right hand. Respondent accommodated that restriction from November 18, 2011 to April 11, 2012, when Petitioner underwent a second surgery in the form of De Quervain's release with partial tenosynovitis and release of the A1 pulley.

Petitioner was released to return to work with no use of the right hand and no driving of a vehicle due to her use of Neurotin. Respondent was able to accommodate the restrictions beginning on May 24, 2012 and provided transportation to and from work, so that Petitioner could work through a transitional work program. Petitioner worked one day and part of a second day, and then she resigned.

Petitioner testified that beginning in the summer of 2012, she began to have pain into her elbow and she was eventually referred by Dr. Papierski to Dr. Zaffer and Dr. Alzoobi. Dr. Alzoobi performed injections and had Petitioner undergo an MRI of her cervical spine and her right shoulder. In March 2013, she underwent an EMG, which was read to be normal. In August of 2013 Petitioner began to have pain into her neck and shoulder. She also had a second EMG in August 2013, which was read to show cervical radiculopathy. This is consistent with the MRI of the cervical spine, which demonstrated a herniated disc. The MRI of the right shoulder was normal. Petitioner testified that she had her first symptoms to her neck and right shoulder nearly 14 months after she last worked in any capacity for Respondent.

Petitioner was diagnosed with complex region pain syndrome as to her right hand and wrist. The medical records of Dr. Zaffer, Dr. Alzoobi, and the report and testimony of Dr. Glaser reflect that their diagnoses are based upon Petitioner's subjective complaints. Spinal cord stimulator implantion has been prescribed, and Petitioner has requested it.

Petitioner was examined by Dr. Richard Noren at Respondent's request. Dr. Noren testified that Petitioner did not have any objective findings of complex region pain syndrome. Dr. Noren testified that, for example, her nails were polished.

CAUSATION AND MEDICAL

Petitioner's TFCC complex tear and De Quervain's syndrome are undisputed. The causation dispute is regarding Petitioner's neck and shoulder, the claimed complex region pain syndrome, and the request for the implantation of a spinal cord stimulator. The Arbitrator has closely observed the testimony of Petitioner and has reviewed the deposition transcripts of Dr. Glaser and Dr. Noren. The Arbitrator finds that Petitioner has embellished her subjective symptoms. Dr. Glaser and Dr. Noren have both advocated for the respective parties that called them as witnesses. Dr. Noren, however, did testify to a lack of objective findings, such as polished fingernails, which are inconsistent with hypersensitivity.

Petitioner testified that she had her first symptoms to her neck and right shoulder nearly 14 months after she last worked in any capacity for Respondent. That sequence of events, in the context of all of the other evidence, is inconsistent with causal connection.

Based upon the foregoing, the Arbitrator finds that Petitioner's TFCC complex tear and De Quervain's syndrome are the only medical conditions that are causally related to the accident. All other past and prospective medical claims are denied.

TEMPORARY TOTAL DISABILITY AND TEMPORARY PARTIAL DISABILITY

Petitioner claims that she is entitled to temporary total disability benefits in addition to what she has already been paid, and she claims temporary partial disability benefits. However, Petitioner resigned from a job that was within her medical restrictions.

Therefore, Petitioner's claims for additional temporary total disability benefits and for temporary partial disability benefits are 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)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WILLIAMSON		☐ PTD/Fatal denied
	☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TAMMIE HOFFARD,

Petitioner,

vs. NO: 11 WC 39217

15IWCC0769

STATE OF ILLINOIS,
DU QUOIN IMPACT
INCARCERATION PROGRAM,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, prospective medical, notice, temporary total disability (TTD), and permanent partial disability (PPD), and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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 Commission finds that Tammie Hoffard sustained 10 percent loss of use of the left hand as a result of her work-related injuries. The Commission further modifies the PPD rate from $698.39 to $695.78, the maximum PPD rate pursuant to Section 8(b)4 of the Act. All else is affirmed and adopted.

According to Section 8.1(b) of the Act, for accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

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

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

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

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

The Commission adopts the Arbitrator's well-reasoned analysis of Section 8.1(b). The Commission notes, however, that Petitioner underwent left carpal tunnel release. She did not undergo surgery for her right carpal tunnel syndrome. Because of this, the Commission finds that Petitioner sustained 10% loss of use of the left hand, and affirms the award of 5% loss of use of the right hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 13, 2015, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $775.99 per week for a period of 1-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 30.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 10% loss of use of the left hand and 5% loss of use of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses under §8(a) of the Act and subject to the medical fee schedule. Respondent shall have a credit for all amounts paid through its group carrier, but shall indemnify and hold Petitioner harmless from any claims regarding payment of any amount

151IWCC0769

for which it is receiving this credit, pursuant to 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.

DATED: OCT 21 2015

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 8/24/15
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOFFARD, TAMMIE
Employee/Petitioner

Case# **11WC039217**

15IWCC0769

SOI/DuQUOIN IMPACT INCARCERATION PROGRAM
Employer/Respondent

On 1/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0969 THOMAS C RICH PC
MICHELLE M RICH
#6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 6M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

JAN 13 2015

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Tammie Hoffard
Employee/Petitioner

v.

State of Illinois/Du Quoin Impact Incarceration Program
Employer/Respondent

Case # 11 WC 39217

Consolidated cases: _____

15IWCC0769

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of Herrin, on **November 12, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

In the year preceding the injury, Petitioner earned **$60,527.00**; the average weekly wage was **$1,163.98**.

On the date of accident, Petitioner was **49** 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 the reasonable and necessary medical expenses as outlined in Petitioner's group exhibit. Respondent shall have credit for all amounts paid through its group carrier, but shall indemnify and hold Petitioner harmless from any claims regarding payment of any amount for which it is receiving this credit, pursuant to §8(j) of the Act.

Respondent is liable for the temporary total disability benefits of $775.99/week for 1 3/7 weeks as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $698.39/week for 20.5 weeks, because the injuries sustained caused the 5% loss of the left hand, as well as the 5% loss of the right hand, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

1/8/14
Date

JAN 13 2015

FACTS

At the time her injuries manifested, Petitioner was a forty-nine (49) year old correctional counselor for the State of Illinois at its Du Quoin Impact Incarceration Program facility. (T.10-11). Petitioner testified that this facility is similar to a military boot camp, and that the facility houses approximately 230 inmates. (T. 11). Petitioner indicated that she had worked at Du Quoin since 2010, and prior to 2010, she was employed at a number of other correctional facilities for the State of Illinois. (T.11). Petitioner also testified that she prepared a job description detailing all of the job titles as well as the duties she was required to perform in those positions with the State of Illinois in her thirty (30) years of employment. (T.13-14). This was admitted into evidence as Petitioner's Exhibit 8.

When asked to describe her job duties on a daily basis at Du Quoin, Petitioner testified:

> I do a call line, which basically just includes having the inmates come to the office and address whatever issues that they may have. Depending on the day, if we've had a recent intake I'll do an orientation class. If we have need for a parole school, I will do a parole school with the inmates that are soon to be graduating. It just kind of depends on the day. I do a lot of computer entry and also a lot of computer inquiry depending on what the issue is that the inmates have at the time. (T. 12-13).

When asked to describe how she would characterize her work for the State of Illinois over the past thirty (30) years, Petitioner testified that she would typically spend eighty to ninety (80-90) percent of her time performing clerical work, which included computer work and data entry, and that the remaining ten to twenty (10-20) percent of her job would involve hand writing reports. (T.22; PX8).

For the first five (5) years of her employment with the State of Illinois, beginning in 1984, Petitioner testified that her job required the use of a manual typewriter, which she testified was more difficult and required more force on her upper extremities, and that until approximately 2009, she was required to use an electric typewriter, which she also indicated required more force than a modern day keyboard would (T.23-24; T. 47, PX8).

On cross-examination, Petitioner was asked how often she ran a parole school, which she testified involved explaining to soon-to-be-graduated inmates how to complete various documents before their graduation. (T.42). Petitioner testified that she did not run a parole school each week, and would only hold these courses two to three (2-3) times per month. (T.42). On the several days per month that she ran a parole school, Petitioner acknowledged that she would typically spend less than 5-6 hours per day typing. (T.42).

At the time of trial, Respondent also submitted Respondent's Exhibit 15, which were medical records from Petitioner's primary care physician obtained by subpoena, into evidence. (RX15). Respondent's Exhibit 15 contains the results of a nerve conduction study performed on Petitioner's upper extremities at Neurology of Southern Illinois, which was dated April 25, 2005. Notably, at that time, the nerve conduction studies revealed no electrographic evidence of carpal tunnel syndrome. (RX15). Petitioner testified that she did recall undergoing this test in 2005

when presented with the medical records confirming same. (T.46). She further indicated that after this test was performed, she would simply have kept working to the best of her ability. (T.51).

Petitioner testified that in the course of performing her job duties for the State, she began to notice symptoms in her upper extremities, and specifically began to experience numbness and tingling, as well as pain in her wrist, thumb, index and middle fingers. (T.14). She indicated that she ultimately sought medical care and treatment for these symptoms with her primary care physician, and saw Ann Browning, a physician's assistant, on September 13, 2011 for these complaints. (T.15). Petitioner testified that her physician suspected carpal tunnel syndrome, and a nerve conduction study was recommended as a result. (T.15).

Specifically, the records reveal that Petitioner presented to her primary care physician's office on September 13, 2011 with complaints of bilateral hand pain at a level of seven out of ten (7 out of 10), left greater than right. (PX3, Dr. Karen Strack, 9/13/11). It was noted that Petitioner had difficulty buttoning buttons, opening bottles, and with any activity that required thumb and index grasp. It was also noted that Petitioner was employed with the Department of Corrections as a counselor, and she was required to perform "lots of keyboarding" in the course of her employment. *Id.* Ms. Browning's assessment was left hand pain, and recommended a nerve conduction study of Petitioner's bilateral upper extremities, carpal tunnel splints, non-steroidal anti-inflammatory medication, and that Petitioner consider an orthopedic consultation. *Id.*

Petitioner testified that she was ultimately referred to an orthopedic specialist, Dr. George Paletta, who discussed her job duties with her. (T.16-17). Petitioner acknowledged that according to a phone message from Dr. Strack's office, she was referred to Dr. Paletta by her attorney's office. (T.26-27).

On October 12, 2011, Petitioner presented to Dr. George Paletta, a board certified orthopedic surgeon. Dr. Paletta took the following history of Petitioner's complaints:

> This is the first visit for the 49-year-old right-hand dominant white female. She works as a correctional counselor. She works at DuQuoin Impact Incarceration Program. She is a counselor for up to 200 inmates. She states that her job involves a lot of typing and writing. She states that 90% of her job duties are typing either data inquiry or entry. She states the remaining 10% of the day would be forms completion. When I asked her what kind of counseling she does for the inmates, she states that basically all she does is type and write. She states that two days per week she holds orientation or parole class. She states that on the days that she is doing orientation or parole class, 80% of her time spent on the computer, 5% of the time spent completing the forms, and 15% of class participation or presentation. (PX5, Dr. George Paletta, 10/12/11).

Dr. Paletta also noted that Petitioner presented with bilateral wrist pain, as well as numbness and tingling, left greater than right, and pain in the region of the thenar eminence, which Dr. Paletta explained is the fleshy prominence at the base of the thumb. (PX5, Dr. Paletta,

10/12/11; PX12, Deposition of Dr. Paletta, p. 49). He indicated that she had been employed in her current position for approximately one year, but that she had worked for the State of Illinois since 1984 and has been in similar jobs throughout that time. (PX5, Dr. Paletta, 10/12/11). At that point, Dr. Paletta's impression was possible carpal tunnel syndrome bilaterally, and no evidence of De Quervain's syndrome. *Id.* He recommended that EMG/nerve conduction studies be performed on Petitioner's bilateral upper extremities, as well as cock-up splints and anti-inflammatory medication. Dr. Paletta also opined that based on his understanding of Petitioner's job description and job requirements, that her data entry and computer activity would be an aggravating factor in her potential carpal tunnel syndrome. *Id.* He also acknowledged that while her age and gender would serve as risk factors for peripheral compression neuropathies such as carpal tunnel syndrome, that she had no other identifiable systemic conditions that would increase her risk for carpal tunnel syndrome. *Id.* Dr. Paletta opined that Petitioner could continue to work full duty. *Id.*

On October 19, 2011, Dr. Paletta reviewed the results of Petitioner's nerve conduction studies, which were performed by Dr. Daniel Phillips, and demonstrated a moderate sensory and motor medial neuropathy at the level of the right carpal tunnel syndrome, with a more severe carpal tunnel noted on the left side. (PX4, Neurological and Electrodiagnostic Institute, 10/12/11; PX5, Dr. Paletta, 10/19/11). He also noted that the nerve conduction study showed no evidence of neuropathy at the level of the cubital tunnel. *Id.*

At that point, Dr. Paletta recommended continued conservative treatment, but that if Petitioner did not experience improvement in the next six to eight weeks, he would recommend carpal tunnel release, with the left side performed first. *Id.*

Petitioner returned to Dr. Paletta on January 9, 2012 with continued complaints of numbness and tingling in her hands, with the left worse than the right. As a result, Dr. Paletta recommended the following: "I had a discussion with the patient regarding treatment options. Option #1 is to continue symptomatic treatment. Option #2 is to consider surgical treatment with carpal tunnel release. The left is much more symptomatic than the right. As such, she wants to consider surgical treatment. I would recommend the left be done first." *Id.*

On January 19, 2012, Petitioner underwent a carpal tunnel release on the left side. Following surgery, Dr. Paletta noted improvement in her left-sided symptoms, but with some continued pain at the base of her left thumb. (PX5, Dr. Paletta, 2/3/12). At that point, Dr. Paletta indicated that he would not recommend right-sided surgery, as she continued to have minimal symptoms. *Id.* He advised her to follow up in six weeks' time. *Id.* Dr. Paletta returned Petitioner to work full duty as of February 3, 2012. *Id.*

Petitioner was last seen by Dr. Paletta on March 16, 2012. At that time, Dr. Paletta noted continued improvement in her left-sided symptoms, and reported that Petitioner had essentially complete relief of her carpal tunnel symptoms on that side. (PX5, Dr. Paletta 3/16/12). It was indicated that Petitioner did have some basal joint symptoms. *Id.* Dr. Paletta recommended that since Petitioner did have some symptoms related to de Quervain's and basal joint arthritis, he recommended use of a Cool Comfort splint as needed, and placed her at maximum medical improvement with regard to her bilateral carpal tunnel syndrome. *Id.* Specifically, Dr. Paletta

indicated that Petitioner's symptoms were relatively mild on the right, and he would recommend holding off on any right-sided surgery at that point. *Id.*

Dr. Paletta also testified by way of deposition on November 6, 2014, and his deposition transcript was admitted into evidence as Petitioner's Exhibit 12. Dr. Paletta testified that he is a board certified orthopedic surgeon with fellowship training in sports medicine whose practice is primarily confined to problems of the upper extremity, shoulder, elbow, hand and the knee. (PX12, p. 4). Dr. Paletta further testified that approximately thirty-five (35) of his practice involves caring for injured workers, and the remaining percentage of his practice involves treating commercially insured patients. (PX12, p. 5-6). A small percentage of Dr. Paletta's practice also involves performing independent medical evaluations for insurance companies, employers, attorneys' offices. *Id.* He indicated that he performs approximately 3-4 IMEs per week, and 50% of those were performed at the request of employers, and 50% at the request of an employee in workers' compensation cases. *Id.* at 6. Dr. Paletta also testified that he has performed IMEs at the request of the Respondent in this case, the State of Illinois. *Id.* at 6-7.

Dr. Paletta testified consistently with his records that Petitioner presented to him with complaints of bilateral hand pain, as well as numbness and tingling, and indicated that he discussed her employment with the State of Illinois with her at her first visit on October 12, 2011. *Id.* at 13-14. Dr. Paletta confirmed that at the time he first saw Petitioner, she provided him with a written job description, which was admitted into evidence at trial as Petitioner's Exhibit 8. *Id.* at 13-14. He reaffirmed his opinion that there was a causal connection between Petitioner's job duties and her bilateral carpal tunnel syndrome, and specifically testified:

> Well, she reported to me, again, this long history of spending 90 percent of her time typing and doing data entry, and I felt that that was over a long enough duration of time and hand-intensive enough that it would be a contributing factor. *Id.* at 17.

Additionally, Dr. Paletta also testified that in his opinion, Petitioner's left basal joint arthritis was aggravated by her work duties. *Id.* at 25.

Dr. Paletta also testified that a concept known as a latency period can be applicable to conditions like carpal tunnel syndrome. He specifically indicated that a latency period is defined as "a period of time that basically expires or occurs from exposure to something and the development of symptoms related to that exposure. So, in medicine, a good example is asbestos exposure. An individual may have exposure to asbestos, but it takes a long time to develop an asbestos-released lung condition, and that period of time from exposure to development of a related condition is considered a latency period. Smoking is another example. It takes a long time for people to develop lung cancer related to their smoking. It doesn't happen immediately at the time of exposure." *Id.* at 20-21. Dr. Paletta testified that a latency period is applicable "in syndromes or conditions that are considered cumulative repetitive trauma conditions, yes." There is a period of time that one has to experience those exposures before they will develop symptoms, so yes, it does as a concept apply." *Id.* at 21.

Dr. Paletta was also asked about Petitioner's use of a manual and electric typewriter, and was asked the following question: "In looking at the job description that Ms. Hoffard provided

you with, it looks like her work may have transitioned out of use of a typewriter. By her accounts, it appears in 2009. Even if she was performing less strenuous or less hand-intensive job duties beginning in 2009, would you have expected her carpal tunnel syndrome to not deelop or not become symptomatic necessarily?"

Dr. Paletta provided the following response:

> Well, it's certainly possible that it would not have been symptomatic at that point and that it became symptomatic after the transition from typewriter to non-typewriter, and as you said, it looks like that occurred in November of 2009, so two years before I saw her." *Id.* at 21-22.

He was then asked, "Any why would it be that, even if somebody was removed from some of the stressors, that they may still develop those conditions?"

Dr. Paletta then replied:

> Well, the nerve is—runs through a space called the carpal tunnel. It's a confined space, and increased pressure on that can affect the nerve and cause the symptoms. But this is something that occurs gradually over time, and there may have been enough damage up to that point that it was—I'll use the word irreversible—in the sense that even a transition from that more demanding work to the less demanding work wasn't going to reverse the process of the development of that condition. Simple as that. *Id.* at 22.

Dr. Paletta was also provided with the forms contained in Respondent's Exhibit 7, and asked if viewing these documents would change his opinion on causal connection in this case. Dr. Paletta testified:

> Well, I'm not exactly sure what these represent in terms of the volume of work that she has to do. These are forms that appear to require some data entry, and she's signed all of those forms, but I'm not sure if this represents an hour of work, a day of work, a week of work. It's unclear what—exactly how much this represents. So it did not result in a change in my opinion at this point. *Id.* at 26-27.

Petitioner testified that she agreed with Dr. Paletta's treatment notes and the job description he testified to during his deposition. (T.17). Petitioner indicated that Dr. Paletta recommended a nerve conduction study, and following the completion of the study, he had advised her those studies demonstrated the presence of carpal tunnel syndrome in both of her upper extremities, but that the findings were worse on her left side. (T.17-18). She indicated that she ultimately underwent surgery on her left side, but that her right hand was never operated on. (T.18-19).

Following her consultation with her primary care physician's office, Petitioner reported her injury to Respondent by completing an employee's first notice of injury form on September 18, 2011. (PX9). Petitioner also confirmed that she provided notice of her injuries on September

18, 2011, to her supervisor, Mr. Campanella. (T.21). When asked why she reported her injuries on September 18, 2011, Petitioner testified: "Because of her suspect [sic] that it was carpal tunnel, and I thought just to be protected I probably should." (T.21).

Petitioner also testified that she attended an independent medical examination with Dr. James Williams at the request of Respondent. She testified that she spoke with Dr. Williams about her job duties with the State of Illinois, and described to him the same job duties that she did to Dr. Paletta. (T.24-25). Petitioner credibly testified that she was honest with Dr. Williams about her job and the frequency with which she performed certain activities. (T.24-25).

Respondent also had Petitioner examined pursuant to Section 12 of the Act by Dr. James Williams, who produced two reports, which were admitted into evidence as Respondent's Exhibits 5 and 6. Dr. Williams initially examined Petitioner on January 18, 2012, at which time he obtained an in-person history from Petitioner with regard to her job duties. The history taken from Petitioner on pages 2-3 of his January 18, 2012 report appears to be identical to Petitioner's Exhibit 8, which Petitioner testified she authored. (RX5, p. 2-3). Dr. Williams also reviewed many other documents describing Petitioner's job duties, as evidenced in his report. (RX5). After review of all of the information provided to him by both Petitioner and Respondent, Dr. Williams opined:

> At this point, my current diagnosis is that Tammie has left thumb CMC joint arthritis as well as left and right carpal tunnel syndrome. From the job histories that Tammie has given me over the course of time it looks like she has done a lot of manual typewriter type work as well as completion of paperwork by hand. I note she is right hand dominant and Tammie states to me that her typing duties are now 90% of her day and other days it is 80% of her day. I do feel, in light of that, that her bilateral carpal tunnel syndrome could have been aggravated by her job duties of typing as it is greater than 6 hours per day as well as would her CMC joint arthritis. (RX5, p. 5-6). [Emphasis added].

Dr. Williams also noted: "I did find the patient to be honest and forthcoming. I did not find her to present any evidence of symptom magnification or malingering. She gave a good effort throughout the examination and all my opinions have been based upon a reasonable degree of medical and surgical certainty. I did review all the records with her and when there were discrepancies, I have noted those in my report." *Id.* at 6.

Subsequently, Respondent provided Dr. Williams with additional materials, and asked for a supplemental report, which was authored on November 1, 2012. In that report, which was admitted into evidence as Respondent's Exhibit 6, Dr. Williams opined, "in light of the information you have provided me, which are the forms filled out at DuQuoin by a Correctional Counselor II at the Du Quoin Impact Incarceration Program, it clearly illustrates the forms that are filled out." (RX6, p. 1). He continued:

> If indeed this is found to be correct that these are the forms which she fills out and indeed these are the signatures of which she has done, of which she is required to do, I obviously change my opinion; that does not appear

> to be very repetitive. It does not appear to be very time intensive and, obviously, it appears as through her typing is done intermittently. The only reason, obviously, I felt typing was an issue was due to the time as well as the fact she stated she used a manual typewriter, which obviously requires more force than does a regular typrwriter. Obviously, if this was the very infrequent typing of which she did though and the very infrequent writing of which she did, I do not feel her work duties would have been either aggravating or contributory to her problem. I feel more so that the CMC joint arthritis of which she had both on the left and right sides, as well as her hypertension, would have more likely been contributory than would her work duties.

Dr. Williams also testified by way of deposition, and his testimony was admitted into evidence as Respondent's Exhibit 14. Dr. Williams testified that he performs approximately 200 independent medical examinations on a yearly basis, and approximately 90% of those exams are at the request of employers in workers' compensation cases. (RX14, p. 35-36). Dr. Williams also estimated that he performs approximately half of his IMEs for the State of Illinois, which would equate to 100 IMEs. *Id.* at 36. Dr. Williams also confirmed that the concept of a latency period can occur in conditions like carpal tunnel syndrome and CMC joint arthritis, and that every individual's physiology is different and conditions may manifest themselves at different points in time. *Id.* at 40. He also testified that he believes Dr. Paletta is a very good physician. *Id.* at 42. Dr. Williams also acknowledged that the job description that Petitioner provided to him was identical to the one she provided to Dr. Paletta, and that in his January 18, 2012 report, he agreed with Dr. Paletta that her job duties for Respondent constituted an aggravating factor in the development of her carpal tunnel syndrome. *Id.* at 44.

With regard to the supplemental materials he was sent in anticipation of his supplemental report, Dr. Williams testified that he could not verify where or from whom these forms were obtained. *Id.* at 45-46. Dr. Williams also confirmed that he did not have any of Dr. Paletta's medical records with regard to Petitioner at the time of his deposition, and the only medical record of Dr. Paletta's that he was provided with were his October 12, 2011 and October 19, 2011 reports. *Id.* at 47-48. He further confirmed that he found Petitioner to be an honest and forthcoming individual when he saw her, and when asked:

Q: So if everything that Ms. Hoffard told you about her job duties is true isn't it correct that your opinion would be consistent with your first report which found that her carpal tunnel and CMC joint arthritis was aggravated by her job duties?

A: If indeed all that stuff is correct, yes.

Q: And just in your opinion, Doctor, who would know Ms. Hoffard's job the best?

A: I would hope Ms. Hoffard. *Id.* at 49-50.

Dr. Williams further acknowledged that Petitioner would be in the best position to describe the various forms he was provided with if in fact she was responsible for preparing them. *Id.* at 50-51.

At the time of trial, Respondent submitted several documents and forms into evidence as Respondent's Exhibit 7. (RX7). On direct examination, when Petitioner was asked to identify these forms, she testified that these "are some of the forms that I would do on a regular basis, depending on the circumstances. It's part of our forms procedure that we have at the boot camp." (T.26-27). When asked if the activity of simply filling out these forms was an accurate representation of what she is required to do throughout the day, she testified, "I don't believe they're inclusive. There are some other forms that I do that I don't believe were included in those." (T.27). Petitioner also testified that in addition to filling out these forms, she is also required to perform computer work and call lines with inmates. (T.27).

Following surgery, Petitioner testified that she has no further complaints with regard to her left hand. (T.28-29). With regard to her right hand, which was never treated surgically, Petitioner testified that her level of symptoms have remained the same, and she still experiences loss of range of motion, and occasional tingling. (T.29).

Respondent also called Clement Campanella, Petitioner's former supervisor, to testify at the time of trial. Mr. Campanella testified that he has known Petitioner for approximately four (4) years, and that they worked together during those years. (T.65). During cross-examination, the following dialogue took place:

Q: And is she [Petitioner] a good employee, in your opinion?

A: Yes, she was or is.

Q: Is she a hard worker?

A: Yes, she is.

Q: Is there anything—you were in the room when she testified in this case, correct?

A: That's correct.

Q: Was there anything that she described that was inaccurate, in your opinion?

A: Nothing came to mind, no.

Q: And I wrote this down, you testified earlier when you were talking about the job of a correctional counselor as Ms. Hoffard explained, would that indicate to you that she got the description of her job right?

A: I believe so. (T.65-66).

Mr. Campanella testified that when he worked as a correctional counselor supervisor at DuQuoin, in approximately 1997, he performed some of the same job duties that Petitioner would perform as a correctional counselor II, but acknowledged that correctional counselors had additional job duties that were previously Mr. Campanella also confirmed that he has never worked in any of the same positions as Petitioner throughout her tenure with the State of Illinois and was unable to testify about the details of those jobs. (T.66-68).

CONCLUSIONS OF LAW

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

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

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961. "The word 'accident' is not a technical legal term, and has been held to mean anything that happens without design, or an event which is unforeseen by the person to whom it happens...Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Comm.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254 (1919). Under Illinois law an injury need not be the sole factor, or even the primary factor of an injury, as long as it is **a** causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 205, 797 N.E.2d 665 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[*A*] Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (Ill. 2006).

In the repetitive trauma case of *Fierke*, the Appellate Court specifically applied the foregoing legal standard of causation specifically to a repetitive trauma case and noted that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Id.* at N.E.2d at 849. The Court specifically stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.*

The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All*

Steel, Inc. v. Indus. Comm'n, 582 N.E.2d 240 (1991) and *Edward Hines supra.* The Appellate Court in *Darling v. Indus. Comm'n* even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. *Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 195, 530 N.E.2d 1135, 1142 (1st Dist. 1988).

In 2009, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (Ill.App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in *City of Springfield v. Illinois Workers' Compensation Comm'n*, "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

Additionally, as the *Fierke* Court noted, employment need only be *a* factor in the total condition of ill-being. *Fierke supra.* If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 37 Ill.2d 123, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill.2d 234, 362 N.E.2d 339 (Ill. 1977). The same theory applies to cases in which the employee's pre-existing condition is aggravated by the repetitive nature of the employment. *Cassens Transport Co. Inc. v. Indus. Comm'n*, 262 Ill.App.3d 324, 633 N.E.2d 1344 (2nd Dist.1994).

Furthermore, in support of a finding of causal connection, the Arbitrator notes that the job duties performed by Petitioner, including computer keyboarding and data entry have been held to be compensable by the Commission in the very recent past. *See Lewis Bebout v. State of Illinois/Pinckneyville Correctional Center*, 14 IWCC 0167 (2014); *Toma Osman v. State of Illinois/Tamms Correctional Center*, 11 IWCC 0601 (2011); *Cynthia Jenkins v. State of Illinois/Southern Illinois University, Carbondale*, 14 IWCC 0335 (2014); *Nancy Rambo v. State of Illinois/Department of Transportation,* 12 IWCC 1020 (2012).

In this case, Dr. Paletta and Dr. Williams both opined that Petitioner suffered from bilateral carpal tunnel syndrome, as well as left CMC joint arthritis in her thumb. The Arbitrator finds it significant that both Dr. Paletta and Dr. Williams were provided with an identical job description from Petitioner, which indicated that 80-90% of her day involved keyboarding and typing, which would contribute to and aggravate her conditions. (PX10; RX14). Additionally, both physicians testified that Petitioner's prolonged use of a manual and electric typewriter over the course of many years caused her condition to become aggravated and worsen. The Arbitrator notes that both Dr. Paletta and Dr. Williams testified to the presence of a latency period and its applicability to cases involving peripheral compressive neuropathies such as carpal tunnel syndrome and basal joint arthritis, which explains why Petitioner's symptoms may not have manifested until after she had been exposed to more extreme repetitive forces from using a manual and electric typewriter.

The Arbitrator also finds Petitioner to be a credible witness who testified credibly on her own behalf regarding the details of her job duties, and also notes that her testimony was consistent with the job descriptions she prepared, as well as the testimony of Respondent's witness, Mr. Campanella. The Arbitrator also notes that despite Respondent's contention, the genesis of a referral to a physician is irrelevant, as attorneys are frequently and routinely involved in the referral process. *See Timothy Knop v. State of Illinois/Menard Correctional Center*, 14 IWCC 0303 (2014).

The Arbitrator also gives great weight to the fact that the Respondent's own expert, Dr. Williams, initially opined that Petitioner's cumulative job duties would be an aggravating factor in the development of her condition, and testified that if in fact Petitioner's job description to him was accurate, he would still find her work to be a contributing and aggravating factor in her conditions. The Arbitrator also assigns great weight to the testimony of Mr. Campanella, who testified credibly and without rebuttal that Petitioner was a hard worker, good employee, and that he agreed entirely with her description of her job duties for Respondent.

Issue (D): What was the date of the accident?

The manifestation date can be set as: **(a)** the date the employee actually became aware of the physical condition and its relation to work through medical consultation; **(b)** the date the employee requires medical treatment; **(c)** the date on which the employee can no longer perform work activities; or **(d)** when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

As the Appellate Court in *A.C. & S.* noted, the Supreme Court **deliberately** modified the standards for determining the date of injury for repetitive trauma cases in order provide protection for injured workers. *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 840-841 (Ill. App. 1st Dist., 1999). It has even been permissible to change the date of accident during litigation as long as doing so would not prejudice the employer. *See Steven Beal v. Town of Normal,* 06 IL.W.C. 25261, 10 I.W.C.C. 0380 (2010). "The purpose behind the Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work." *Durand*, 862 N.E.2d at 925.

The law also allows Petitioner to select a manifestation date that coincides with discovery of injury and its relation to work after medical consultation. See *Steven Beal v. Town of Normal,* 06 IL.W.C. 25261, 10 I.W.C.C. 0380 (2010); *see also White v Worker's Compensation Commission*, 374 Ill.App.3d 907, 873 N.E.2d 388, 392-393 (4th Dist. 2007) (holding Petitioner could select accident date); *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 841-842 (1st Dist. 1999).

In this case, Petitioner alleged a manifestation date of September 13, 2011, when her condition first required treatment, and as this was the date that she plainly recognized the injury

and its relation to work. The Supreme Court in *Durand* noted that it is common practice to 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. *Durand* citing *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 487 N.E.2d 356 (1985). Based upon said precedent, Petitioner has selected an appropriate manifestation date under the Act. The Arbitrator finds that Petitioner's injuries manifested on September 13, 2011.

Issue (E): Was timely notice of the accident given to Respondent?

The Act provides that notice may be given orally or in writing, regardless of the administrative procedures of the employer. 820 ILCS 305/6(c). The purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident, and to protect an employer from unjust or fraudulent claims. *Gano Electrical Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724, 727 (Ill. App. 4th Dist., 2004); *Thrall Car Manufacturing Co. v. Indus. Comm'n*, 64 Ill.2d 459, 356 N.E.2d 516 (1976). A claim is only barred if no notice whatsoever has been given. *Gano supra*. Because the legislature has mandated a liberal construction on the issue of notice, if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced. *Gano supra*; *Thrall supra*.

The evidence clearly shows that Petitioner provided notice of her injuries. Petitioner testified without rebuttal that she provided written notice following her September 13, 2011 appointment with her primary care physician's office, and Petitioner's Exhibit 9 confirms that Petitioner provided notice to her supervisor on September 18, 2011, only five (5) days subsequent to this appointment. Respondent's ability to investigate was in no way impacted, and Respondent has not alleged or proved prejudice. The Arbitrator therefore finds that Petitioner met the notice requirements of the Act.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? And;
Issue (K): What temporary benefits are in dispute? (TTD)

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n,* 294 Ill.App.3d 705, 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

Causal connection has been resolved in Petitioner's favor, and Respondent's Section 12 examiner, Dr. Williams, agreed that the treatment rendered to Petitioner was reasonable for her condition.

Respondent is therefore ordered to pay the medical expenses outlined in Petitioner's group exhibit. Respondent shall have credit for the amounts paid through its group carrier but

shall indemnify and hold Petitioner harmless from any claims pertaining to the payment of medical expenses for which it is receiving this credit.

Respondent is liable for 1 3/7 weeks of temporary total disability to Petitioner under 8(b) of the Act as she credibly testified that she was taken off work for a period of time following her left carpal tunnel surgery. This is also reflected and documented in Dr. Paletta's medical records.

Issue (L): What is the nature and extent of the injury?

The Arbitrator notes that Pursuant to §8.1(b) of the Act, the nature and extent of Petitioner's injuries is to be reached by evaluating 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 provides that "no single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator will use the remaining factors to evaluate Petitioner's permanent partial disability.

(ii) **Occupation**: Petitioner has returned full duty to her prior employment, but testified that she experiences occasional numbness and tingling as well as pain in the right hand.

(iii) **Age**: Petitioner was 49 years old at the time of her injury. She has diminished healing capacity as a result thereof.

(iv) **Earning Capacity**: Petitioner testified to several physical limitations as a result of her injury. While there is no direct evidence of reduced earning capacity contained in the record; based on the amount of typing and use of her upper extremities that Petitioner's job requires of her, it is reasonable to conclude that such repercussions will manifest in the near future. Accordingly, the Arbitrator places great weight on this factor.

(v) **Disability**: As a result of her injuries, Petitioner underwent a left carpal tunnel release, and was never surgically treated on the right side, despite positive Electrodiagnostic studies confirming the presence of carpal tunnel syndrome on the right. Petitioner testified that while she is essentially symptom free on the left following surgery, she still suffers from some residual symptoms on the right side, including occasional pain, numbness and tingling. (T.28-29). She was also diagnosed with CMC basal joint arthritis in her right thumb, which was treated conservatively.

Based upon the foregoing, Petitioner sustained serious and permanent injuries that resulted in the 5% loss of her left hand, and 5% loss of her right hand.

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

Elizabeth Green,
Petitioner,
vs.

NO: 13WC 2306

Eaton Corporation,
Respondent,

15IWCC0770

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, prospective 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 February 24, 2015, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: OCT 21 2015
o101515
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

GREEN, ELIZABETH
Employee/Petitioner

Case# **13WC002306**

EATON CORPORATION
Employer/Respondent

15IWCC0770

On 2/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0252 HARVEY & STUCKEL CHTD
J KEVIN WOLFE
101 S W ADAMS T SUITE 600
PEORIA, IL 61602

0771 FEATHERSTUN GAUMER POSTLEWAIT
DANIEL L GAUMER
225 N WATER ST SUITE 200
DECATUR, IL 62521

15IWCC0770

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Elizabeth Green
Employee/Petitioner
v.

Eaton Corporation
Employer/Respondent

Case # **13** WC **2306**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 23, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of alleged accident, **October 11, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**37,564.80**; the average weekly wage was $**722.40**.

On the date of alleged accident, Petitioner was **55** years of age, ***single*** with **0** dependent children.

ORDER

The Petitioner's claim for compensation is denied.

No benefits are awarded herein.

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

February 17, 2015
Date

13 WC 2306
ICArbDec19(b)

FEB 2 4 2015

FACTS:

On October 11, 2012 the Petitioner was employed by the Respondent as a fabrication operator, having been so employed for 19 years. The Petitioner testified in detail as to her job duties for the Respondent which included welding end plates and meter rings onto meter boxes and screwing together meter boxes. The Petitioner testified that the welding and screwing process required her to constantly grasp parts with her left hand and to pull and twist with her left hand to place and hold the parts that were being welded. The Petitioner testified that she would grab the parts with her hands and hold them in place while they were welded together by a welding machine that was activated with a foot pedal. The Petitioner testified that she worked eight or more hours each day and that she would weld approximately 1200 to 1400 pieces per day and screw together 120 to 150 boxes per day.

The Petitioner testified that in October of 2012 she began to notice aching in her left hand and pain in the fingers of her left hand as well as swelling of her left hand in the mornings. The Petitioner testified that she saw the Respondent's plant nurse and reported the swelling in her left hand and she then sought treatment with her primary care physician, Dr. Amir Wahab. The records of Dr. Wahab demonstrate that on October 15, 2012 he saw the Petitioner for complaints of left hand swelling and pain which reportedly began the previous week while the Petitioner was holding and gripping meter rings. Dr. Wahab recomended an EMG and he prescribed medications and work restrictions.

On November 2, 2012 the Petitioner was seen at the Respondent's on-site clinic where it was noted that there was a moderate amount of swelling in the left forearm, wrist and hand, as well as positive Tinel's and Phalen's signs. The assessment was "Left wrist pain – possible carpal tunnel syndrome" and the Petitioner's restrictions and medications were continued pending the EMG.

An EMG/NCV study was completed on the Petitioner's left upper extremity on November 20, 2012 and it was reported to demonstrate moderately severe ledft carpal tunnel syndrome.

The Petitioner was then referred to Dr. Christopher Wottowa whom she saw on September 19, 2013. Dr. Wottowa diagnosed the Petitioner as having left carpal tunnel syndrome and he indicated that she could either live with her symptoms or undergo a carpal tunnel release. Dr. Wottowa opined that, based upon the Petitioner's description of her job activities, and the "forceful" gripping that she did, her work activities "met the threshold for aggravation of carpal tunnel to a certain degree."

Dr. Wottowa's deposition testimony of June 6, 2014 was admitted into the record as Petitioner's Exhibit 1. Dr. Wottowa opined that, based upon the history and description provided to him by the Petitioner, the Petitioner's left carpal tunnel syndrome could have been aggravated by her work activities. Dr. Wottowa indicated that, in forming his opinion, it was his understanding that the Petitioner had to grasp metal parts and "squeeze these hard for periods of time." On cross examination, Dr. Wottowa acknowledged that he had never seen

or observed the actual performance of the Petitioner's job and that he had no specific information about the actual forces involved with performing the Petitioner's job.

The November 5, 2014 deposition testimony of Dr. Jeffrey Brower was admitted into the record as Respondent's Exhibit 1. Dr. Brower testified that he actually observed the performance of the Petitioner's job on approximately 6-8 occasions. Dr. Brower described the process of placing metal parts between the welding leads and then performing the actual welds by pushing a foot pedal that activated the welder. Dr. Brower testified that he observed no forceful gripping and no significant wrist deviation in terms of flexion or extension while the job was being performed. Based upon his observation of the performance of the Petitioner's job, Dr. Brower opined that the Petitioner's work activities for the Respondent did not cause or aggravate her left carpal tunnel symptoms. Dr. Brower opined that the Petitioner's carpal tunnel syndrome was not causally related to her work activities for the Respondent.

Rick Rigg, a supervisor in the Respondent's fabrication department, testified on behalf of the Respondent. Mr. Rigg testified that he has been employed by the Respondent for 37 years and that he is familiar with the job that the Petitioner performed for the Respondent. Mr. Rigg testified that he actually performed the Petitioner's job in the past and he described the process of welding end plates and meter rings in great detail. Mr. Rigg testified that the Petitioner is a good operator and that operators average about 1,000 meter rings per shift. He testified that in performing the job of welding end plates and meter rings the Petitioner would not have to grasp any parts with more force than it would be necessary to keep the part from falling out of her hand. Mr. Rigg testified that all the worker has to do is hold the part in place, balancing it on the bottom electrode of the welder, until the top electrode comes down and welds the pieces together.

The Petitioner testified that she presently continues to perform her regular job for the Respondent but she wears a compression sleeve and she performs no overtime work. The Petitioner testified that her condition has worsened since she last saw Dr. Wottowa and that she currently continues to experience pain in her left wrist as well as numbness and tingling which awakens her at night.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all the elements of her claim by a preponderance of the credible evidence. In the case of an alleged repetitive trauma injury, the injury and the the casual relation between the job activities and the condition of ill-being must be supported by competent, reliable, and persuasive medical evidence and

opinions. In the instant matter, Dr. Wottowa has opined that based upon the Petitioner's description of her job activities, and the "forceful" gripping that she did, her work activities "met the threshold for aggravation of carpal tunnel to a certain degree." Dr. Brower opined that the Petitioner's work activities for the Respondent did not cause or aggravate her left carpal tunnel symptoms and he opined that the Petitioner's carpal tunnel syndrome was not causally related to her work activities for the Respondent

The Arbitrator notes that Dr. Wottowa and Dr. Brower agreed that in order for repetitive activity to cause or aggravate carpal tunnel syndrome there must be evidence of forceful gripping with the hand held in a position of extreme flexion or extension. Dr. Brower actually observed the performance of the Petitioner's job and he testified that he observed no forceful gripping and no significant wrist deviation in terms of flexion or extension while the job was being performed. Dr. Wottowa admitted that he never observed the Petitioner's actual job activities and that he had no specific information about the actual forces involved with performing the Petitioner's job. Dr. Wottowa acknowledged that he was simply relying on the Petitioner's description of her job activities and her characterization that it required "forceful" gripping.

While the Arbitrator notes the opinions of Dr. Wottowa, the Arbitrator finds the opinions of Dr. Brower to be more reliable and persuasive in the instant matter. In so finding, the Arbitrator finds it significant that Dr. Brower actually observed the performance of the Petitioner's job while Dr. Wottowa merely relied on the Petitioner's description of her job activities and her characterization of the "forceful" gripping that was required.

Based upon the forgoing, and having considered the totality of the evidence presented at hearing, the Arbitrator finds that the Petitioner failed to prove accidental injuries arising out of and in the course of her employment on October 11, 2012 and failed to prove that her current condition of ill-being is causally related to her work activities for the Respondent. The Petitioner's claim for compensation is, therefore, denied. Determination of the remaining disputed issues is moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marie Baumgartner,
Petitioner,
vs.

NO: 12WC 20878

Hy-Vee Food Stores,
Respondent,

15IWCC0771

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, 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 March 24, 2015, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: OCT 21 2015
o101515
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BAUMGARTNER, MARIE
Employee/Petitioner

Case# **12WC020878**

15IWCC0771

HY-VEE FOOD STORES
Employer/Respondent

On 3/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0358 QUINN JOHNSTON HENDERSON ETAL
CHRISTOPHER CRAFORD
227 N E JEFFERSON ST
PEORIA, IL 61602

15IWCC0771

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARIE BAUMGARTNER,
Employee/Petitioner

v.

HY-VEE FOOD STORES,
Employer/Respondent

Case # 12 WC 20878

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 **Quincy**, on **3/4/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/5/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$18,164.12**; the average weekly wage was **$349.31**.

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

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that she sustained an acute reaction to the inhalation of floral spray paint that arose out of and in the course of her employment by respondent on 5/5/12. The petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

3/19/15
Date

MAR 24 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 62 year old floral shop assistant, alleges she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/5/12. Petitioner worked in the floral shop in respondent's Broadway shop as a floral shop assistant from 2000-2005, and then moved to the Harrison store, where she worked on the date of the alleged accident. Prior to working for respondent petitioner took floral enrichment classes at John Wood Community College.

Petitioner's duties in the floral department include taking orders, processing incoming flowers, and making arrangements. This included chopping the bottoms off the stems, arranging the flowers, and using floral spray paint and green glow on the flowers when necessary. She testified that she made sprays for caskets, easel flowers for funerals, and helped with weddings, proms and homecomings. Petitioner testified that she would use the floral spray paint outside, in the cooler, or at the counter. She stated that the first time she used the floral spray paint she got a headache but did not realize it was from the spray paint. She further testified that if she spray painted corsages while sitting at the tall table in the cooler she would experience respiratory problems. She stated that she would keep a trash can nearby in case she got nauseous. When she took a break she felt better. However, when she would come back she would feel bad again and she would have heart palpations.

On 5/5/12, the alleged date of injury, petitioner testified that she used the floral spray paint that day, and two days before, prepping for a wedding. She testified that when she used the floral spray paint she could not breath and panicked, and ran to her car to get her inhaler. When she got outside she felt better. Petitioner testified that she then reentered the cooler and told the floral manager, Lorie, that it smelled worse.

A week later, on 5/12/12 petitioner presented to Dr. Ernest Wallace. She gave a history of an onset of chest congestion on 5/8/12 when she was exposed to spray pain at work 5/5/12. She reported trouble with this in the past, but this time her inhaler did not work She complained of shortness of breath and using an inhaler. She also complained of weakness, and that her chest felt tight. Petitioner had been on an inhaler well before this date. She was given one when she was diagnosed with sleep apnea in 2008. Petitioner was examined. Her oxygen levels were okay, she had no wheezing in her lungs, she was moving air well, her heart sounds were regular, and she had no murmurs, rubs or gallops. Dr. Wallace could not rule out PE or an angina type issue. She was referred to Blessing Hospital emergency room. She reported chest tightness after inhaling fumes at work. Her chest discomfort was found to be of an unknown origin. She was discharged on 5/13/12.

On 5/18/12 petitioner was seen by Certified Nurse Practitioner (CNP), Stumpf complaining of a cough and shortness of breath. Petitioner reported that she believed the source of her problems was spray paint at work. She stated that respondent has been using the same spray paint for 11 years, and about 2 1/2 years ago she began

having difficulty with tightness in her chest and wheezes whenever the spray paint was used. She stated that she was given an inhaler to use and her problem was stable until the past weekend. Petitioner denied any symptoms outside of spray paint exposure. She denied any symptoms at home, outdoors, in the car, or in the grocery store. She was examined and assessed with a cough and shortness of breath. The labs and x-rays from the hospitalization were reviewed and they could not explain why she was able to tolerate the paint exposure for 9 years and now has sensitivity. They believed there may be an anxiety component. She was given a note for a mask at work when spray paint was being used. Petitioner testified that the store manager, Steve Labs, told her she could not use the mask in the flower shop.

On 5/21/12 she told CNP that she had shortness of breath with exertion, and uses a CPAP at home. Petitioner reported a lot of stress at home, that included a fire in her home, the fact that her son is waiting for a kidney transplant, her daughter's marriage, and some work issues. It was noted that petitioner has stage II colon carcinoma.

On 5/22/12 Lorie, respondent's floral manager, drafted a letter to petitioner. She wrote "Marie, you took these masks off of shelf, If you are going to use them you need to pay for them. Otherwise please put them back on shelf."

On 6/8/12 petitioner returned to CNP Stumpf. She was assessed with cough, anxiety and vitamin D deficiency. She was again told to work further away from the floral department and possible noxious fumes. On 6/25/12 she saw Dr. Flanagan. She reported episodes of dyspnea that she attributed to exposure to spray paint that is used on the flowers at work. She stated that her symptoms were primarily inspiratory, and involve the sensation of having trouble taking a deep breath in, and a cough. She stated that at work they moved her to cash registers at the other end of the store from the florist section, but she still senses the paint in the air. She also felt that she had been more prone to sinus infections and bronchitis and believed she had bronchitis at that time and was frustrated no one had given her antibiotic. She was assessed with dyspnea. Her symptoms were thought to be related to vocal cord dysfunction, but asthma could not be ruled out. She was told that post nasal drip, acid reflux, and anxiety or stress can contribute to the symptoms. She was told to reconsider using vitamin B12 for her anxiety and depression and to follow up with her mental health professional. She was also diagnosed with rhinosinusitis symptoms.

On 7/23/12 petitioner returned to Dr. Flanagan. She was most concerned about her hoarseness. Dr. Flanagan recommended an evaluation by otolaryngology. He was of the opinion that the possibility of pesticides rather than paint and dyes may be causing her symptoms. He told petitioner that pesticides can cause hoarseness. He believed this was a more plausible cause for some of her symptoms than the paint and dyes.

On 8/1/12 petitioner followed-up with Dr. Flanagan. At this visit petitioner gave a history that after her exposure to spray paint on or about 5/5/12 she noticed her voice had changed after her "reaction". Petitioner complained that she still feels irritated by the sprays at work and does not feel like her voice has recovered completely. Dr. Flanagan was of the opinion that petitioner's voice had a fairly normal sound to it. His impression was chronic irritation in the larnyx, mild laryngitis, possibly related to some recent fumes and intermittent gastroesophageal reflux. He also noted some aging changes in the larnyx. He was also of the opinion that no specific ear, nose, or throat treatment was required.

On 8/7/12 petitioner presented to Dr. Arndt, and reported that at work that evening she pulled a plastic sack and a piece of the plastic sack from the where the handle is punched out, became airborne and she aspirated it into her throat. She complained of a foreign body sensation, which is persistent in its location in the hypopharynx. She denied any airway difficulty. She was referred to the emergency room at Blessing Hospital. Petitioner's respiration was clear and non-labored. She denied any shortness of breath or trouble breathing. She said she could feel tickling in her throat. Dr. Smith examined petitioner and told her that there was no piece of plastic in her throat.

On 9/12/12 Labs moved petitioner from the floral shop to the express lanes. She stated that she was feeling better at this time. Petitioner testified that she was moved from the floral shop to the express lanes because Labs would not let her wear a mask.

On 9/12/12 petitioner presented to Dr. Ruth. She stated that she felt better, her voice was stronger, and she did not have any nasal or throat complaints. She stated that she had been moved from the area of fumes at work and this helped. Mild bowing of the vocal cords was noted. She was released from care and instructed to return as needed.

On 6/14/13 petitioner presented to Dr. Moore with complaints of nasal congestion, head congestion, postnasal drip and drainage, and coughing with a little bit of wheezing, and thick green secretions with a cough. On 6/27/13 she presented to Dr. Evans and reported that she could not take a deep breath, and felt like there was something in her chest. This was determined to be anxiety.

On 9/11/13 petitioner was examined by Dr. Jeffrey Coe, at the request of petitioner's attorney, Jason Carroll. In addition to his examination Dr. Coe reviewed a number of petitioner's medical records. However, what records Dr. Coe actually reviewed is unknown since he did not identify them in his report. Petitioner reported that after the alleged injury on 5/5/12 she continued to experience episodes of chest heaviness and shortness of breath, particularly with exposure to any type of inhaled irritant. She reported that she was

maintained on bronchodialating medication to be used on an as needed basis with occasional oxygen supplementation. She stated that she developed "panic attacks" in association with her chest symptoms. Petitioner reported that she continues to experience episodic shortness of breath in association with some generalized fatigue and weakness. She stated that her lungs are "sensitive" to strong smells (perfumes, cleaning agents, smoke or dust). She stated that she continues to experience occasional "panic attacks" when she becomes short of breath.

An examination revealed that petitioner was not in respiratory distress, her chest was clear to ausculation, and her cardiovacular examination was within normal limits without abnormal heart rate or rhythm. Dr. Coe was of the opinion that petitioner suffered an exposure to inhaled respiratory irritants (spray paint - a mixture of solvent, paint pigment and propellants) through uncontrolled exposures in her workplace at Hy-Vee Stores. He was of the opinion of the respiratory irritant exposure caused significant acute respiratory symptoms including irritation of eyes, nose and throat and airway irritation with shortness of breath and chest heaviness. He was further of the opinion that petitioner's symptoms generally improved with removal from exposure. Dr. Coe was of the opinion that petitioner's symptoms became worse over time, ultimately requiring emergency room evaluation, admission and diagnostic testing in May of 2012. He was of the opinion that the Blessing Hospital evaluation found no evidence of significant cardiovascular abnormalities leading to a diagnosis of bronchspasm due to occupational exposure to spray. Dr. Coe was of the opinion that away from spray paint or other inhaled irritant exposure, he found petitioner's chest to be clear, as would be anticipated in an individual with irritant-induced bronchospasm. Dr. Coe opined that there is a causal relationship between the repeated inhalation exposure suffered by petitioner at respondent's place of business of 5/5/12, and her current respiratory symptoms of hypersensitivity and bronchospasm. He further opined that petitioner's irritant exposures at work, with consistent respiratory tract reactions (shortness of breath, wheezing, coughing) require work restrictions with limitation of exposure to respiratory irritants such as spray paint.

On 10/1/13 petitioner presented to Dr. Djuric, a psychiatrist. She complained of panic attacks starting in May. She described them as shortness of breath, nausea, weakness, and low energy. She reported that she had previously been treated in psychiatry and had a good response. She reported some stressors at work, and the fact that her son needs a renal transplant for the third time. Dr. Djuric noted that she had a history of depression and anxiety and was hospitalized many times, with the most recent being in March of 2010. Dr. Djuric's impression was generalized anxiety disorder; major depressive disorder, recurrent, in remission; borderline personality disorder; diabetes, history of colon cancer, sleep apnea, and hypertension; and job, and a son needing a renal transplant. Petitioner continued with psychiatric follow-up as recently as 9/11/14.

On 4/30/14 petitioner underwent a Section 12 examination performed by Dr. Myron Jacobs, at the request of the respondent. Petitioner gave a history of spray painting flowers 2-3 days a week, and more frequently on specialty days. She reported that after 2005 or 2006 the frequency increased when she was moved to respondent's new location. She reported that she would become short of breath when painting, especially in the cooler, which was a small and enclosed space. She stated that she was seen by a pulmonary physician, Dr. Nassery, who had diagnosed her with sleep apnea and prescribed a CPAP, which she has used since then. Petitioner was also given an inhaler in 2008 by Dr. Nassery's nurse practitioner. Petitioner reported that after moving away from spray painting, she was becoming significantly better. However, she stated that she was short of breath walking less than one block or climbing one flight of stairs. She reported that she hears noise intermittently in her chest. Petitioner reported that she sleeps with a nasal CPAP for 8 hours a night. She reported that she quit spray painting in 2012 and has not had any more acute episodes. She reported that when she was exposed to spray paint she had acute symptoms that included shortness of breath, cough, headache, substernal chest tightness, a sensation of racing of the heart and sometimes experienced nausea.

Following an examination and other pulmonary and treadmill tests, Dr. Jacobs was of the opinion that petitioner was significantly deconditioned. He noted that there was no abnormal pulmonary or cardiac response to excercises. He noted that the spirometry showed no development of asthma. He noted that petitioner stopped the treadmill test because she was short of breath without cardiac limitation to exercise. Dr. Jacobs was of the opinion that petitioner was exposed to the smell of spray paint at work and that she developed irritant symptoms in response to that. He was also of the opinion that she developed irritant symptoms in response to that. His impression was that petitioner has no permanent impairment or disability as a result of her exposure. Dr. Jacobs was of the opinion that the majority of her respiratory symptoms are now related to her body habitus (121 pounds, 5'3") and deconditioning. He also noted that she has sleep apnea related to her body habitus which is unrelated to any spray paint. Dr. Jacobs opined that petitioner can return to full duty work, but not spray flowers with paint or use strong chemicals. Dr. Jacobs opined that petitioner has transient worsening of her respiratory status because of irritant particles and/or obnoxious smell from the spray paint. He opined that there is no permanent damage.

On 7/14/14 petitioner began working part-time.

On 8/20/14 the evidence deposition of Dr. Myron Jacobs, with a specialty in pulmonary medicine, was taken on behalf of respondent. Dr. Jacobs testified that his work with occupational medicine is exclusively limited to inhalation injuries. Dr. Jacobs testified that people with sleep apnea can experience symptoms that included breathlessness, a sensation of mucous and drippage into the throat, a little cough, a little phlegm,

shortness of breath, and lack of energy. He was of the opinion that obese people work harder to accomplish the same task as others who are not obese, and frequently these people will get breathless. Dr. Jacobs described petitioner as being obese. Dr. Jacobs opined that petitioner's main heart pump was not working normally due to her longstanding obesity and hypertension, and this can contribute to a sensation of breathlessness, and substernal chest discomfort and a feeling of not feeling right in the chest. Dr. Jacobs noted that petitioner showed no development of asthma. Dr. Jacobs testified that the work restriction of trying to avoid spray painting was based only on the petitioner's history that it bothered her. He testified that there was nothing objectively that supported this restriction. Dr. Jacobs was of the opinion that if petitioner would lose about 25 pounds she would breathe easier.

On cross examination, Dr. Jacobs testified that petitioner's symptoms when using the spray paint became worse over time ultimately requiring her emergency room evaluation in May 2012. He also agreed that the Blessing Hospital visit showed no evidence of significant cardiovascular abnormalities. Dr. Jacobs was of the opinion that in the absence of a reduction in the FEV1, and in an absence of wheezing, the use of the term bronchospasm would be a mischaracterization. Dr. Jacobs was of the opinion that each exposure to spray paint in each instance was a transient exposure.

On 8/21/14 petitioner gave her two weeks notice to respondent. Officially, petitioner's last day of work was 9/8/14, but petitioner stopped working on 8/21/14 when she gave respondent her resignation letter.

In 2008 petitioner was diagnosed with sleep apnea and got a CPAP machine. On 5/29/09 petitioner presented to Dr. Arndt with complaints of chest congestion and left inguinal hernia. On 10/19/09 petitioner presented to Dr. Wallace with chest pain. She was sent to the emergency room. On 10/22/09 petitioner presented to Dr. Evans following an emergency room visit. Dr. Evans noted that petitioner had a major component of pleurisy. On 1/29/10 petitioner was examined by Dr. Wallace. She was diagnosed with acute bronchitis and acute sinusitis.

On 2/1/10 petitioner reported to Dr. Biggs that she was concerned about recurring symptoms if she is over-worked with preparation for the upcoming Valentine's holiday. She noted that she was working 5 hours a day, 6 days a week, with restrictions on lifting over 15 pounds, pushing over 25 pounds or working in one position longer than 60 minutes. She reported that recently she had been dealing with URI for which she was seen and treated with Abx and an inhaler after being told of concerns for walking pneumonia and her diabetes.

Prior to the alleged accident date petitioner had been seen by Dr. Moore on 1/10/12 for chest discomfort that radiated into her back and bilateral shoulders since the day prior. She also complained of weakness in her

legs, some shortness of breath, and an irregular heartbeat that comes and goes. She was assessed with chest pain and sent to the emergency room. There she reported that she was chronically short of breath. She was admitted to rule out myocardial infarction. No evidence of this condition was found.

On 1/19/12 she returned to Dr. Moore. She reported that her house caught fire the night before and she twisted her ankle and right side. Petitioner testified that she stayed in her house after the fire was put out. She had no complaints related to any smoke inhalation. Her lungs were clear.

On 1/26/12 petitioner presented to Dr. Deriam. He noted a history of chest pain and premature ventricular contractions, as well as diabetes, sleep apnea, hypertension, hyperlipidemia, and anxiety. She also reported a lot of muscle and joint problems. She was assessed with diabetes mellitus type II, hyperlipidemia, hypertension, mitral valve regurgitation, sleep apnea, and ventricular premature beats. Dr. Derian met petitioner when she was in the hospital with chest pain and a chronic history of PVCs.

Currently, petitioner testified that she has no headaches or nausea. She testified that she has panic attacks when she sprays PAM or cologne, when she gets the Hy-Vee, and when she goes into big buildings. Petitioner is not alleging that her panic attacks are related to her alleged injury on 5/5/12. Petitioner testified that on 3/4/15, the date of this trial, she experienced 5 panic attacks. Petitioner is still treating for her panic attacks, but is not still treating for her headaches and nausea.

Petitioner testified that although she believed the spray paint was the cause of her respiratory problems, she did not show the ingredient label of the spray paint to anyone.

Steve, Labs, store manager of respondent's Harrison store in Quincy, was called as a witness on behalf of respondent. Labs testified that petitioner was a good employee but had a history of a lot of absences. Labs testified that the spraying of flowers can be done in front of customers, outside, or in the cooler. He stated that the ceiling in the store is 50 feet high, and there is ventilation in the cooler. He testified that there is no policy in place in place on where spray painting of flowers takes place. Labs testified that spray paint for flowers is not the same as regular spray paint.

Labs testified that following the alleged injury petitioner was offered a mask, and she refused to use it. He denied that he told her she could not wear a mask. Labs admitted that he told petitioner to purchase a mask herself on the day she returned, but when she did not purchase one, he put one in the floral department for her to wear. Labs never saw petitioner wear a mask. Labs agreed that he moved petitioner from the floral department to the express lane, which was about 50 feet from the floral department, after her alleged injury. Labs testified

that he never received any complaints from customers regarding the floral department, including the coloring of flowers with spray paint.

Labs testified that in addition to her complaints regarding spray paint in the floral department she also complained of the smell coming from the smoker grill bbq that was outside the store in July of 2012.

Labs testified that while petitioner was working at the Harrison store she filed 10 requests for leave of absence.

Lorie Minor, respondent's floral shop manager, testified on behalf of respondent. Minor worked with respondent in the floral department for 8-9 years. She testified that during this period they always spray painted flowers. Minor testified that petitioner was a good employee, but was absent a lot for different reasons.

Minor testified that on 5/5/12 she was spraying flowers at 7:15 am. When petitioner arrived at 8:00 am she told Minor that she could smell spray paint. Minor testified that her practice is to spray flowers outside when it is warm, and in the cooler when it is cold outside. She testified that they do not spray flowers in front of the customers. She testified that petitioner sprayed flowers outside around the time of the injury.

Minor testified that there is ventilation in the cooler. She stated that there are blowers in the cooler that are always operational. Minor never saw petitioner wear a mask while working in the floral department. She testified that she never told petitioner she could not wear a mask. Minor testified that the express lane where petitioner worked was 50 feet from the floral department. Minor testified that petitioner never complained of any cleaning products. Minor never saw petitioner vomit at work.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner alleges that on 5/5/12 she sustained an acute reaction to the inhalation of floral spray paint used in the respondent's floral department. Petitioner alleges this incident arose out of and in the course of her employment by respondent.

Petitioner testified that on 5/5/12, and two days prior, she used the floral spray paint prepping for a wedding. She testified that when she used the floral spray paint she could not breath and panicked, and ran to her car to get her inhaler. When she got outside she felt better. Minor testified that on 5/5/12 she was spraying flowers at 7:15 am, and when petitioner arrived at 8:00 am she told Minor that she could smell spray paint.

Petitioner did not seek any treatment for this alleged accident until one week later. When she presented for treatment on 5/12/12 she reported that she experienced chest congestion on 5/8/12 after she was exposed to spray paint at work on 5/5/12. She reported that her inhaler did not work. On examination petitioner's levels

were okay, and no wheezing was noted in her lungs. Petitioner was moving air well, her heart sounds were regular, and she had no murmurs, rubs or gallops. Petitioner was sent to Blessing Hospital at that time. She reported chest tightness after inhaling fumes at work. However, her chest discomfort was found to be of an unknown origin. The doctors could not explain why she was able to tolerate the paint exposure for 9 years and now had sensitivity. They believed there may be an anxiety component and she should consider treatment.

On 5/18/12 petitioner again presented for treatment to CNP Stumpf. She complained of a cough and shortness of breath. She reported that the source of her problem was spray paint at work. She stated that she had been using the spray paint for 11 years, and about 2.5 years ago began having difficulty with tightness in her chest and wheezing whenever the spray paint was used. She stated that her problem was stable until past weekend, which would have been May 12th and 13th of 2012, and not 5/5/12, as petitioner claimed.

Petitioner reported on 5/21/12 that she has had a CPAP machine at home that she has used 8 hours a day since 2008. She also reported a lot of stress at home, that included a fire in her home in January of 2012, the fact that her son was waiting for a kidney transplant, her daughter's marriage, and some work issues.

When petitioner presented to Dr. Flanagan he was of the opinion that the possibility of pesticide rather than paint and dyes could be causing her symptoms, and cause her hoarseness. He also told her that post nasal drip, acid reflux, and anxiety and stress can contribute to the symptoms. Dr. Flanagan noted aging changes in the larynx.

On 6/14/13 when petitioner presented to Dr. Moore and stated that she could not take a breath and felt that something was in her chest. Dr. Moore told her she was told that she was suffering from anxiety.

Petitioner's attorney, Jason Carroll, had petitioner examined by Dr. Coe. Dr. Coe did not identify what medical records of petitioner's he reviewed. Based on his report, it does not appear that Dr. Coe was aware that petitioner had been using a CPAP machine since 2008, and had a long history of anxiety. As a result, the arbitrator finds Dr. Coe's opinion, that petitioner suffered an exposure to inhaled respiratory irritants (spray paint - a mixture of solvent, paint pigment and propellants) through uncontrolled exposures in her workplace, and this caused significant acute respiratory symptoms including irritation of eyes, nose and throat and airway irritation with shortness of breath and chest heaviness, is not supported by the credible evidence since petitioner did not seek any treatment until one week after the alleged accident. Additionally, the credible medical records support a finding that petitioner had no evidence of any respiratory problems at that time. The arbitrator also finds petitioner's history that she inhaled spray paint through uncontrolled exposures in her workplace on 5/5/12 less than persuasive since Minor testified that flowers were only sprayed outside, or in the cooler which had a

ventilation system. The arbitrator also questions whether petitioner even spray painted any flowers on 5/5/12 given Minor's testimony that petitioner came in an hour after she had sprayed flowers outside and told her she smelled spray pain. The arbitrator finds it very significant that Dr. Coe was unaware that petitioner had sleep apnea and used a CPAP machine every night since 2008, and Dr. Jacobs was of the opinion that people with sleep apnea can experience symptoms that include breathlessness, a sensation of mucous and drippage into the throat, a little phlegm, shortness of breath and lack of energy. All of which petitioner had experienced.

Petitioner testified that after she quit spray painting in 2012 she has not had any more acute episodes. The arbitrator finds this claim is also not supported by the credible medical evidence. On 6/14/13 petitioner presented with complaints that included post nasal drip, drainage, coughing, and a little bit of wheezing. On 6/27/13 she could not take a deep breath, and felt like there was something in her chest. This was determined to be anxiety related.

On 10/1/13 she presented to Dr. Djuric, a psychiatrist, and complained of panic attacks associated with shortness of breath, nausea, weakness and low energy. She also reported that she had been treated by a psychiatrist in the past with good results. Petitioner is not claiming her panic attacks are related to her work injury. Petitioner was diagnosed with a generalized anxiety disorder, major depressive disorder, borderline personality disorder, diabetes, history of colon cancer, sleep apnea and hypertension.

The credible medical records show that when petitioner was diagnosed in 2008 with sleep apnea by Dr. Nassery and was given a CPAP machine, she was also prescribed an inhaler for this condition. There is no credible evidence that petitioner was given an inhaler in response to her complaints regarding the inhalation of spray paint fumes.

Despite petitioner's claim that she would become short of breath whenever she spray painted the flowers while working for respondent, at no time before 5/12/12 did petitioner ever seek any treatment for these alleged symptoms. The arbitrator also finds it significant that petitioner never provided any healthcare provider with a label regarding what ingredients were in the floral spray paint.

In addition to petitioner's sleep apnea, Dr. Jacobs attributed petitioner's pulmonary problems to her significant deconditioning. He noted that petitioner had no abnormal pulmonary or cardiac response to exercise, and that her spirometry showed no development of asthma. He was of the opinion that she stopped the treadmill test because she was short of breath without cardiac limitation to exercise. Dr. Jacobs was also of the opinion that the majority of petitioner's respiratory symptoms were related to her body habitus and deconditioning. Dr. Jacobs was of the opinion that petitioner's main heart pump was not working normally due to her longstanding

obesity and hypertension, and this can contribute to a sensation of breathlessness, substernal chest discomfort, and a feeling of not feeling right in the chest. He noted that his opinions that petitioner should avoid exposure to spray paint was based solely on her history that it bothered her, and that there was nothing objectively that supported the restrictions he recommended. Dr. Jacobs found it significant that when petitioner was admitted to Blessing Hospital on 5/12/12 there was no evidence of any significant cardiovascular abnormalities, reduction in the FEV1, and an absence of wheezing. Therefore a diagnosis of bronchspasm would be a mischaracterization.

Petitioner's credible medical records support a finding that petitioner had been diagnosed with anxiety prior to the alleged injury on 5/5/12. One example to support this is the medical records of Dr. Deriam on 1/26/12. Dr. Deriam noted that petitioner had a history of prior chest pain, premature ventricular contractions, diabetes, sleep apnea, hypertension, hyperlipidemia and anxiety.

The arbitrator finds it significant that following this alleged acute reaction to the inhalation of floral spray paint the petitioner did not seek any treatment until one week following the incident, and when she did present she gave a history of an onset of chest congestion on 5/8/12, three days after she was allegedly exposed to spray paint at work on 5/5/12. Although petitioner complained of shortness of breath, weakness and tightness in her chest when she presented for treatment on 5/12/12, these complaints were not supported by any findings on examination. Her oxygen levels were okay, she had no wheezing in her lungs, she was moving air well, her heart sounds were regular, and she had no murmurs, rubs or gallops. The arbitrator also finds it significant that prior to this date petitioner had a significant medical history including sleep apnea, premature ventricular contractions and anxiety that had been known to cause petitioner chest discomfort, wheezing, and irregular heartbeats, and other symptoms similar to those she was alleging she experienced on 5/5/12.

Given the fact that petitioner did not present for treatment on 5/5/12, the date of the alleged acute reaction to the inhalation of floral spray paint, or over the next 6 days; that no accident reports completed by petitioner for an alleged injury on 5/5/12 were offered into evidence; that differing histories exist with respect to whether or not petitioner even used floral spray paint on 5/5/12; that when petitioner presented for treatment on 5/12/12 she reported that she did not experience chest congestion until 5/8/12, after she was exposed to spray paint at work on 5/5/12; that her subjective symptoms on 5/12/12 were not corroborated by the objective examination performed on 5/12/12; that the symptoms petitioner presented with on 5/12/12 were similar to those petitioner had presented with in the past, and were found to be causally related to her preexisting sleep apnea and anxiety conditions; and that no healthcare provider even knew what ingredients were in the floral spray paint petitioner alleges caused her symptoms, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an acute reaction to the inhalation of floral spray paint that arose out of and

in the course of her employment by respondent on 5/5/12. The arbitrator finds petitioner's claim speculative at best.

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 BENEFITS ARE IN DISPUTE?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an acute reaction to the inhalation of floral spray paint that arose out of and in the course of her employment by respondent on 5/5/12, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cheryl Hicks,

Petitioner,

vs.

NO: 14 WC 5126

15IWCC0772

University of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's finding that Petitioner sustained accidental injuries arising out of and in the course her employment on January 22, 2014. Petitioner testified to slipping on water or urine on the floor in the restroom stall and falling into the toilet, sustaining right wrist and right upper extremity injuries. Petitioner gave a consistent history of what happened to the emergency room shortly after the January 22, 2014 occurrence and to Employee Health Services on January 28, 2014, as well as to Oak Park Medical Center's Dr. Foreman and Dr. Freedberg. Slipping on water on a restroom floor on Respondent's premises is considered a "defect."

The Commission also affirms the Arbitrator's finding of causal connection, based on the chain of events and Dr. Freedberg's opinion. In his records, Dr. Freedberg opined that a causal relationship exists between the accidental injuries Petitioner sustained on January 22, 2014 and her current condition of ill-being.

The Commission modifies the Arbitrator's Decision regarding the issue of extent of temporary total disability. While the emergency room records do not mention work status, the Commission finds Petitioner was not able to work at that time. At the emergency room, a right thumb spica splint was placed and she was given a sling to use. Emergency room personnel told Petitioner to follow-up with Employee Health Services, which she did on January 28, 2014. Employee Health Services released Petitioner to return to work with restrictions of no right arm use on that date. Respondent could accommodate those restrictions. Petitioner refused work that fell within her restrictions and failed to meet her burden to show that she could not work. The Commission finds Petitioner was temporarily totally disabled from January 23, 2014 through January 27, 2014, a period of 5/7 weeks.

On January 28, 2014, Employee Health Services released Petitioner to return to work with restrictions of no right arm use. Also on January 28, 2014, Petitioner was seen by Dr. Kasbekar at the Oak Park Medical Center, who also released her to return to work as tolerated with restrictions of seated duties only, no use of right arm/hand. Petitioner returned to Employee Health Services on January 29, 2014 and was authorized off work through February 3, 2014. On January 30, 2014, Dr. Foreman authorized Petitioner off work. On February 13, 2014, Dr. Freedberg authorized Petitioner off work. On March 6, 2014, Dr. Kasbekar noted, "Due to financial necessity, patient was provided a 3/7/14 Help @ Home return to work note for part-time/light duties work, such as: light laundry, light cooking, and light cleaning." This appears to be a light duty return to work release. The Commission finds Petitioner was temporarily totally disabled again from January 29, 2014 through March 7, 2014, a period of 5-3/7 weeks.

On March 19, 2014, Dr. Foreman authorized Petitioner off work. On April 17, 2014, Dr. Foreman noted that Petitioner had plateaued with treatment under his direction. On May 27, 2014, Dr. Freedberg had Petitioner remain off work. The arbitration hearing was held on July 9, 2014. The Commission finds Petitioner was temporarily totally disabled again from March 19, 2014 through July 9, 2014, a period of 16 weeks. The total period of temporary total disability is 22-1/7 weeks.

Regarding prospective medical care, Dr. Foreman noted that Petitioner had plateaued with treatment under his direction. Dr. Freedberg on May 27, 2014 recommended cryotherapy as needed, a home exercise program was recommended and ordered and physical therapy was recommended and ordered at AMCI. Petitioner was to follow-up with Dr. Freedberg 4 weeks after the May 27, 2014 visit. Petitioner is not a surgical candidate as per Dr. Freedberg. The Commission affirms the Arbitrator's finding that Petitioner is entitled to prospective medical care as prescribed by Dr. Freedberg and Respondent is ordered to authorize and pay for such treatment.

The Commission affirms the Arbitrator's finding that Petitioner is entitled to $29,376.16 for reasonable and necessary medical expenses under §8(a) of the Act and that Respondent is entitled to §8(j) credit of $8,032.00 for payments made through the group health plan. The Commission corrects the clerical error on Page 7 under Section J, where the Arbitrator noted the date of work accident as July 15, 2013, to reflect the accident date of January 22, 2014. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $376.06 per week for a period of 22-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $29,376.16 for under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to prospective medical care and orders Respondent to authorize and pay for treatment prescribed by Dr. Freedberg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $8,032.00 under §8(j) of the 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 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.

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

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: OCT 2 1 2015
MB/maw
o09/03/15
43

Mario Basurto

Stephen J. Mathis

David L. Gore

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

HICKS, CHERYL
Employee/Petitioner

Case# 14WC005126

15IWCC0772

UNIVERSITY OF ILLINOIS
Employer/Respondent

On 12/2/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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0075 POWER & CRONIN LTD
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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

DEC 2 - 2014

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

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

15IWCC0772

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

Cheryl Hicks
Employee/Petitioner

v.

University of Illinois
Employer/Respondent

Case # **14 WC 05126**

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 **Svetlana Kelmanson**, Arbitrator of the Commission, in the city of **Chicago**, on **July 9, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 15IWCC0772

On the date of accident, **January 22, 2014,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, the Petitioner earned $29,332.68; the average weekly wage was $564.09.

On the date of accident, Petitioner was 44 years of age, ***single*** with 0 children under 18.

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

Respondent shall be given a credit of $0.00 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 $8,032.00 under Section 8(j) of the Act.

ORDER DAH 12/2/14

Respondent shall pay Petitioner temporary total disability benefits of $376.06/week for 24 weeks, commencing **January 23, 2014** through **July 9, 2014**, as provided in Section 8(b) of the Act.

Respondent shall pay medical bills submitted pursuant to the fee schedule (see attached).

Respondent shall pay prospective medical expenses (see attached).

In no instance shall this determination 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.

David A. Kane
Signature of arbitrator

DAH 12/2/14

December 2, 2014
Date

ICArbDec19(b)

DEC 2 - 2014

15IWCC0772

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION 19(b) DECISION

Cheryl Hicks, Petitioner,	)	
v.	)	Case No. 14 WC 5126
State of Illinois, Department of Human Services, Respondent.	)	

PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

This case has been re-assigned to Arbitrator David A. Kane for issuance of a Decision, after a transcript of proceedings was provided to the Arbitrator.

On Wednesday, January 22, 2014, Petitioner, Cheryl Hicks, was actively employed by the University of Illinois at Chicago Hospital (hereinafter "UIC"). Petitioner testified that at the time of her injury, she worked at UIC as a concierge/greeter for approximately 3 months. Her job duties entailed greeting visitors. Petitioner testified that she worked primarily from a work station in the lobby, although she occasionally had to assist in the transportation of patients. Petitioner testified that there was a public restroom directly adjacent to her work station as well as another public restroom she could use if the close restroom was too busy. Petitioner

testified that there were no designated employee restrooms available, and that all of the employees used the same public restrooms petitioner used.

Petitioner testified that prior to January 22, 2014, she was in a stable, healthy condition. Petitioner testified that she did not have a history of right arm and shoulder pain.

On January 22, 2014, petitioner testified that she worked her normal shift beginning at 1:00 pm. At some time approximately 2-3 hours into her shift petitioner testified that she had to use the restroom. Petitioner testified that she entered the restroom directly adjacent to her workstation. There was an elderly woman in the restroom as well. Petitioner testified that she entered one of the stalls in the bathroom and then slipped and fell hitting her right arm on the toilet and injuring herself. Petitioner testified that there was liquid on the floor. Petitioner testified that when she was on the ground she saw water coming out of the base of the toilet. Moreover, Petitioner testified that her clothes were wet after she got up.

Following the accident in question, Petitioner testified that she made her way back to her work station and then went to the emergency room at UIC approximately 10-15 minutes afterword. Petitioner testified that she told the ER staff what occurred and changed out of her dirty smelly clothes and into scrubs. Petitioner testified that she threw away her clothes because they were ruined.

Petitioner testified that she is currently treating with Dr. Howard Freedberg, and she is currently off work per Dr. Freedberg's orders.

Respondent called one witness, Mr. Luis Rodriguez. Mr. Rodriguez is the assistant director of patient services at UIC. Respondent offered no evidence disputing whether there was liquid on the floor in the bathroom.

CONCLUSIONS OF LAW

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

In support of the Arbitrator's finding on these issues, the Arbitrator finds that there is sufficient evidence to conclude that Petitioner sustained a work related accident that arose out of and in the course of her employment.

In order for a claimant to recover, he must demonstrate that his injuries arose out of and in the course of his employment. "In the course of" refers to time, place, and circumstances of the injury. *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 44 (1987). In this case, there is no dispute as to whether Petitioner's injury occurred in the course of her employment. Indeed, Petitioner's injuries occurred on Respondent's premises in the bathroom adjacent to her workstation. Rather, the crux of the dispute is whether her injury "arose out of" her employment.

For an injury to "arise out of" the 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 accidental injury. *Jewel Co., Inc. v. Industrial Comm'n*, 57 Ill.2d 38, 40 (1974). Illinois courts categorize the risks to which an employee may be exposed into three general groups: (1) risks distinctly associated with the employment; (2)

risks personal to the employee; and (3) neutral risks that have no particular employment or personal characteristics. *Baldwin v. Illinois Workers' Compensation Com'n*, 409 Ill.App.3d 472, 478 (4 Dist. 2011)

Employment risks are those that are inherent in one's employment. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill.App.3d 347, 352 (5th Dist. 2000). Employment risks, which include the obvious kinds of industrial injuries and occupational diseases, are universally compensated. *Id.* In the context of injuries arising from defects, employment risks may include injuries arising from defects at the employer's premises. *Id.* Personal risks include exposure to elements that cause nonoccupational diseases and personal defects or weaknesses. *Id.* Injuries 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. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1014 (1st Dist. 2011).

In this case, there was no evidence presented to suggest that any nonoccupational disease, personal defect or weakness contributed to Petitioner's fall. Accordingly, this case does not involve a personal risk. However, Petitioner's injury could be characterized as either a risk distinctly associated with the employment or a neutral risk that exposed Petitioner to a risk to a greater degree than the general public.

In finding that Petitioner suffered an accident on January 22, 2014, Arbitrator finds that Petitioner was a credible witness. Her testimony is

consistent with the contemporaneous medical evidence and she testified consistently and without hesitation regarding the circumstances of her claim. First, Petitioner credibly testified that the only restrooms available for her use were the two restrooms, one directly adjacent to her workstation and another farther down in the lobby. She testified credibly that she had no pre-existing issues to her right arm and was in a stable healthy condition on her date of injury. She credibly testified as to the mechanism of injury, stating that she slipped and fell on water in the bathroom and injured her right upper extremity on the toilet.

Respondent's sole witness testified that bathroom in which Petitioner injured herself was open to the general public so as to intimate that she was at no greater risk than the general public. However, this issue was addressed perfectly in *King v. Holy Cross Hospital*, 2003 WL 1957258 (Ill. Indus. Com'n). *King* is directly on point and ultimately is dispositive on this issue. In *King*, Petitioner slipped and fell on a wet floor in the woman's restroom as she attempted to stand up from the commode. In *King*, as in the underlying case, the restrooms were open to employees as well as the general public.

Additionally, the underlying cases that *King* analyzed explained that there was evidence entered to refute petitioner's testimony that the floor was wet. However, in our case, as in *King*, Petitioner's testimony that the floor was wet was unrefuted. According to the Arbitrator, it is not unusual for bathroom areas to be wet, particularly in the area of the commode. More importantly, the Arbitrator held that respondent cannot avoid liability merely

because the accident occurred in a bathroom that is also used by the general public.

The Arbitrator finds Petitioner suffered and accident that arose out of and in the course of her employment with Respondent on January 22, 2014.

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

In support of the Arbitrator's finding on accident, the Arbitrator finds that Petitioner's condition of ill-being is causally related to her January 22, 2014, accident. Prior to the incident, Petitioner was 44 years old and in good health. Petitioner testified credibly that she never had any issues with her right arm and all of her current symptoms are the result of her work accident on January 22, 2014.

There is no dispute that Petitioner suffered an injury to her right arm. Following the accident, Petitioner was treated by Dr. Michael Foreman and then subsequently Dr. Howard Freedberg, who had Petitioner off work as of the date of trial. (Pet. Ex. 4). Both Dr. Foreman and Dr. Freedberg attributed her condition of ill-being to her January 22, 2014 incident. (Pet. Ex. 3; Pet. Ex. 4).

Based upon all the evidence the Arbitrator finds the Petitioner's present condition is causally related to his injury.

(J) Were the medical services that were provided to Petitioner reasonable and necessary?

In support of the Arbitrator's finding on the outstanding medical bills, the Arbitrator finds that Petitioner's medical treatment to be reasonable, necessary and related to her work accident on July 15, 2013. Based on the facts indicated above, the Arbitrator awards payment of the bills, pursuant to the fee schedule for the reasons indicated above. The following bills are:

1.	University of Illinois Hospital	$11,315.60
2.	Oak Park Medical Center	$8,650.00
3.	Archer Open MRI	$5,875.00
4.	Prescription Partners	$2,147.56
5.	Suburban Orthopedics	$1,388.00
	Total:	**$29,376.16**

(K) Is Petitioner entitled to prospective medical care?

The Arbitrator finds that Petitioner is entitled to prospective medical care. As discussed above, Petitioner is not at MMI as Dr. Freedberg has prescribed medical treatment that has not yet been provided to Petitioner. (Pet. Ex. 4).

As Petitioner suffered a compensable work accident and her present condition is causally related to her work accident, and medical treatment that has been prescribed by Dr. Freedberg has not been authorized, Petitioner is entitled and Respondent is liable to approve and pay for treatment prescribed by Dr. Freedberg.

(L) What temporary total disability benefits are in dispute?

In support of the Arbitrator's finding on TTD, the Arbitrator finds that Petitioner is entitled to TTD from January 23, 2014, the day after the accident, through the date of trial, July 9, 2014. . Since *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Com'n*, 236 Ill.2d 132, 923 N.E.2d 266 Ill., 2010 and its progeny, in regard to the question of whether or not TTD is owed, the Court has ruled that the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that they continue to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits. *Interstate Scaffolding Inc.*, 236 Ill.2nd 132 at 149.

Ms. Hicks was given restrictions on January 22, 2014, at the UIC Emergency Room indicating she was not to use her right arm. On January 30, 2014, Ms. Hicks was under the care of Dr. Michael Foreman. Dr. Foreman determined Ms. Hicks was medically unable to work until he referred her to a Dr. Howard Freedberg. Dr. Freedburg initially evaluated Ms. Hicks on February 20, 2014, and also determined she was medically unable to work. Dr. Freedberg has not yet released Ms. Hicks to go back to work in any capacity, thus Ms. Hicks is entitled to TTD through the date of trial as well as prospective TTD until she is released to go back to work. As Petitioner had not achieved maximum medical improvement as of the date of trial, the Arbitrator finds that the entire period of TTD is owed for the reasons set forth above.

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Kirkland,
Petitioner,

vs.

NO: 10 WC 16332

State of Illinois/
Menard Correctional Center,
Respondent,

15IWCC0773

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, extent of temporary total disability, nature and extent of permanent disability and credit and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Arbitrator's Decision finding that Petitioner failed to prove he was entitled to temporary total disability benefits from June 7, 2012 through March 4, 2013 and vacates the TTD award of the Arbitrator. Since January 9, 2012, Petitioner had remained on restrictions with no accommodation by Respondent. The prior arbitration hearing was held on June 7, 2012. In the prior Decision, Arbitrator Luskin found the restrictions to be temporary and that Petitioner had not yet reached maximum medical improvement due to Dr. Miller's referral. On Review, the Commission affirmed this finding. During the permanency hearing on September 26, 2014, it was learned that Petitioner remained off work from June 7, 2012 until he was released to return to work at full duty by Dr. Tung on March 4, 2013. The medical records indicate that during this time period, Petitioner did not treat. Petitioner also did not pursue the referral Dr. Miller had given him on January 9, 2012. In order to be entitled to temporary total disability benefits, Petitioner needed to prove that he did not work and could not work for the claimed period. It is Petitioner's burden to show that he could not work. This is done by treating and being authorized off work, which Petitioner did not do. Therefore, Petitioner has not met this burden. Furthermore, on cross-examination, Petitioner testified that as of June 2012, he was

off work because he had permanent restrictions. Permanent restrictions imply that Petitioner had reached maximum medical improvement. Petitioner did not look for work during this period, which may have entitled him to vocational rehabilitation and maintenance, he did not treat and did not pursue the referral from Dr. Miller.

Regarding nature and extent of permanent disability and credit, Petitioner sustained a stretch/traction incident which caused a long thoracic nerve injury and he had serratus anterior muscle dysfunction due to the long thoracic neuropathy, along with scapular winging. He was diagnosed with long thoracic nerve neurapraxia. It appears that the patient's neurapraxia is resulting in scapular winging. The long thoracic nerve goes through the brachial plexus and is primarily a motor nerve with no sensory function. Generally long thoracic nerve injuries get better with time. The long thoracic nerve does course along the posterior aspect of the shoulder. A portion of the brachial plexus descends to the back part of the shoulder. Therefore, this is a loss to the body as a whole under §8(d)2, rather than a scheduled loss to the arm under §8(e). There is no credit for the prior arm settlement as this is a §8(d)2 injury. The shoulder was never intended to be defined as a "member" under §8(e). See *Will County Forest Preserve Distict v. Illinois Workers' Compensation Commission*, 970 N.E.2d 16 (2012). The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award of TTD benefits from June 7, 2012 through March 4, 2013 is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $633.84 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 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.

DATED: OCT 21 2015
MB/maw
o9/10/15
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KIRKLAND, MICHAEL
Employee/Petitioner

Case# **10WC016332**

15IWCC0773

STATE OF ILLINOIS/MENARD CORR CTR
Employer/Respondent

On 1/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 THOMAS C RICH PC
#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
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60627-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JAN 5 - 2015

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

15IWCC0773

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

Michael Kirkland
Employee/Petitioner

v.

State of Illinois/Menard Corr. Ctr.
Employer/Respondent

Case # **10** WC **16332**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville/Herrin**, on **9/26/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **3/11/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**54,932.50**; the average weekly wage was $**1,056.40**.

On the date of accident, Petitioner was **39** 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 $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

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

ORDER

Respondent shall pay Petitioner additional temporary total disability benefits of $704.27/week for 38 6/7 weeks, commencing 6/7/12 through 3/5/13, as provided in §8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $633.84/week for 37.5 weeks, because the injuries sustained caused the 7.5% loss of the person as a whole, as provided in §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.

Ed Lee
Signature of Arbitrator KM

12/18/14
Date

JAN 5 - 2015

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

15IWCC0773

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHAEL KIRKLAND
Employee/Petitioner

v. Case # 10 WC 16332

STATE OF ILLINOIS/MENARD CORR. CTR.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

This matter previously came to hearing on Petitioner's 19(b) Petition for benefits pursuant to §19(b) and §8(a) of the Act before Arbitrator Luskin on June 7, 2012. On August 7, 2012, findings favorable to Petitioner were filed with the Commission and Respondent requested review. On November 21, 2013, the Commission affirmed the Arbitrator's findings and award of benefits in its Decision and Opinion on Review. A copy of said Decision and Opinion was admitted into the record and the findings therein are hereby incorporated by reference.

Following the hearing on June 7, 2012, Petitioner saw Dr. Thomas Tung of Washington University on March 4, 2013. (PX3). Petitioner reported improvement but noted weakness with certain movements and resistance. *Id.* Dr. Tung noted that Petitioner had problems abducting his shoulder in forward flexion. *Id.* He stated:

> This gentleman clearly has residual functional deficit in his serratus anterior muscle, most likely due to a traction injury to his long thoracic nerve from the incident in March of 2010. By multiple EMGs that have been obtained, there does seem to have been some recovery of his muscle, but not enough to improve his winging.

Petitioner's chief complaint was weakness. Dr. Tung believed this was a chronic, permanent problem. *Id.* He wanted to release Petitioner with restrictions of no lifting over 50 pounds, but Petitioner asked for a full duty release because he needed to work.

Petitioner testified at Arbitration that despite the improvement from conservative care for his long thoracic nerve injury, he continues to experience weakness, stiffness and loss of range of motion. Petitioner experiences soreness, but only after significant use of his arm. His

employment, hobbies, and activities of daily living have been adversely affected by his limitations. He takes over-the-counter medication for his symptoms.

CONCLUSION

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner remained temporarily and totally disabled from the date of the prior hearing on June 7, 2012, until his release by Dr. Tung on March 4, 2013. (PX3). Petitioner is therefore entitled to additional temporary total disability benefits of $704.27/week for a period of 38 6/7 weeks.

Issue (L): What is the nature and extent of the injury?

As a result of the work accident on March 11, 2010, Petitioner sustained a long thoracic nerve injury. Despite conservative care, Petitioner continues to suffer from weakness, stiffness and loss of range of motion. Petitioner also experiences soreness after significant use of his arm. His work and non-work related activities have been adversely affected by his injury. He takes over the counter medication for his symptoms. But for his effort to return to work, he would have permanent restrictions. The Arbitrator therefore finds that Petitioner sustained serious and permanent injury that resulted in the 7.5% loss of his body as a whole.

Issue (N): Is the Respondent due any credit?

Pursuant to Killiann, 148 Ill. App. 3d at 978 and Kustwin v Kraft, 14 IWCC 281 the Respondent is not entitled to a credit.

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

Daniel O'Malley,
Petitioner,

vs.

NO: 14 WC 14373

15IWCC0774

Installation Specialists, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability and additional compensation and attorneys' 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. 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 Arbitrator noted in her decision that Petitioner in his proposed decision indicated that he was withdrawing his request for additional compensation under §19(l) but was still seeking relief under §§19(k) and 16 of the Act. The proposed decision was not contained in the file and Petitioner did not mark §19(l) on the Petition for Review form, but the Commission notes that Petitioner sought additional compensation under §19(l) on the Request for Hearing form and is requesting the same in his Statement of Exceptions. As such, the Commission has reviewed the claim and has found that the Petitioner preserved the issue of whether additional compensation under §19(l) is warranted. Having reviewed the entire record, the Commission finds that in addition to affirming the Arbitrator's decision the Commission further finds that Petitioner is not entitled to additional compensation under §19(l) of the Illinois Workers' Compensation Act.

15IWCC0774

The Commission notes that the Arbitrator acknowledged that the parties stipulated to a work accident on April 18, 2014 and the Arbitrator found that said accident resulted in a right foot contusion superimposed on a pre-existing chronic right foot condition which brought about the need for Emergency Room care and two days of rest/seated duty. Yet, the Arbitrator further stated that based on her credibility and causation findings, she is omitting the standard §19(b) remand language. The Commission finds that these two statements are internally inconsistent. As such the Commission strikes the Arbitrator's holding that the claim is not to be remanded and the Commission remands the claim for further proceedings.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 10, 2015, with the exceptions noted above, 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 in the amount of $12,824.02 paid, 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: OCT 2 1 2015

Mario Basurto

MB/jm

O: 9/24/15

David L. Gore

43

Stephan Mathis

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

O'MALLEY, DANIEL
Employee/Petitioner

Case# **14WC014373**

15IWCC0774

INSTALLATION SPECIALISTS INC
Employer/Respondent

On 3/10/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

3047 COPLAN & CRANE LTD
BLAKE M VANCE
1111 WESTGATE ST
OAK PARK, IL 60301

0532 HOLECEK & ASSOCIATES
CARTER ESTERLING
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

15IWCC0774

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)

Daniel O'Malley
Employee/Petitioner

v.

Installation Specialists, Inc.
Employer/Respondent

Case # **14** WC **14373**

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 **February 23, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **April 18, 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.

Respondent stipulated that Petitioner sustained an accident arising out of and in the course of his employment on April 18, 2014. Respondent also stipulated to receiving timely notice of this accident. Arb Exh 1.

For the reasons set forth in the attached decision, the Arbitrator finds that the stipulated accident of April 18, 2014 resulted in a right foot contusion (superimposed on a pre-existing chronic right foot condition) which brought about the need for Emergency Room care and two days of rest/seated duty. See the decision for the Arbitrator's other credibility- and causation-related findings.

In the year preceding the injury, Petitioner earned $**9,772.01**; the average weekly wage was $**521.10**.

On the date of accident, Petitioner was **24** years of age, ***single (engaged)*** with **1** dependent child.

Respondent ***has in part*** paid causally related, reasonable and necessary medical services.

Respondent shall be given a credit of $**12,824.02** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**12,824.02**.

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

ORDERS

At the hearing, Respondent disputed liability for medical expenses only with respect to treatment rendered after December 23, 2014. Arb Exh 1. Based on Arb Exh 1, the Arbitrator awards Petitioner two bills relating to treatment rendered prior to December 23, 2014, namely a $265.00 bill from Illinois Emergency Medicine Specialists relating to physician services rendered on April 18, 2014 and a $225.00 bill from Achieve Orthopedic Rehabilitation Institute for physical therapy provided on July 23, 2014. The Arbitrator awards these two bills subject to the fee schedule. The Arbitrator declines to award the $904.00 bill from Pain & Rehab Specialists for treatment rendered by Dr. Glaser on January 21, 2015 and February 16, 2015.

Based on the credibility- and causation-related findings set forth in the attached decision, the Arbitrator denies Petitioner's claim for additional relief in the form of TTD from 1/2/15 – 2/23/15 and prospective care. The Arbitrator also declines to award any Section 19(k) penalties or Section 16 attorney fees.

Based on the credibility- and causation-related findings set forth in the attached decision, the Arbitrator omits the standard 19(b) remand language.

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

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

3/10/15
Date

MAR 10 2015

Daniel O'Malley v. Installation Specialists, Inc.
14 WC 14373

Arbitrator's Findings of Fact

Petitioner testified he began working for Respondent in January 2014. He was a first-year apprentice carpenter.

Respondent stipulated that Petitioner sustained an accident at work on April 18, 2014. Arb Exh 1. The controversy in the case centers on Petitioner's pre-accident state of health.

Petitioner acknowledged being involved in a motor vehicle accident on December 15, 2011. Petitioner testified this accident consisted of him hydroplaning and driving into a light pole. Petitioner denied striking any other structures. Petitioner testified he injured only his right ankle in this accident. He sustained a "skier" type of fracture to the ankle. He saw an ankle surgeon after undergoing Emergency Room care and began taking pain medication. He subsequently came under the care of Dr. Johnson, a pain physician in Evansville, Indiana. In January 2014, he switched to a different pain physician, Dr. Glaser, after moving to the Chicago area.

Petitioner's testimony concerning the circumstances and aftereffects of the 2011 motor vehicle accident is radically different from the account set forth in the November 24, 2014 report of Dr. Levin, Respondent's Section 12 examiner:

> "[Petitioner] does state that he had a previous injury in 2011 where he was driving under the influence of alcohol and drove through a house in Indiana at 110 miles per hour. At that time, he fractured all of his ribs and had two collapsed lungs. He states that he was pronounced dead at the scene, but after 2 minutes they did CPR and resuscitated him. He reports that he had a full recovery but did have right ankle reconstruction in 2011."

RX 1.

At the hearing, Petitioner acknowledged experiencing right ankle pain on a constant basis right up to the time of the April 18, 2014 work accident but indicated he was able to manage the pain by using medications, including Opana and Oxycodone. He testified his right ankle pain caused him to limp a little, especially after first getting out of bed in the morning, but did not prevent him from being able to carry a 90-pound tool bag and perform physical work for Respondent.

Here again, Petitioner's testimony is at odds with Dr. Levin's account: "He has been treated in the past for right ankle and foot complaints since 2011 but states that he was fully recovered with the use of medications and having no symptoms prior to April 18, 2014."

Petitioner acknowledged experiencing back pain prior to the April 18, 2014 work accident but testified this pain was episodic and transient. He recalled only two specific incidents of such pain, with the first occurring in July of 2013, after he fell into a trench while working for his brother and the second occurring in January 2014, after he slept on a hard floor. He insisted that the pain he experienced on these two occasions was confined to the right lower side of his back. He acknowledged experiencing pain in his right lower extremity but indicated this pain radiated up from his right ankle.

Emergency Room records dated July 11, 2013 reflect that Petitioner complained of pain in his lower and mid back and right ankle, along with tingling in his right leg, due to tripping over a trench and falling five feet, landing on his back. The records also reflect that Petitioner complained of right-sided back pain radiating to his right knee. Petitioner provided a history of his prior right ankle surgery. Petitioner was diagnosed with a back contusion and foot sprain. At discharge, he was instructed to stay off work and follow up with Dr. Vucicevic. PX 2, p. B194. At the hearing, Petitioner testified he had no recollection of this physician. He denied seeking follow-up care other than his ongoing pain management.

A prescription monitoring chart in PX 1 reflects that between January 2013 and late November 2013, Petitioner filled numerous prescriptions for Morphine sulfate, Opana, Oxycodone and Oxymorphone prescribed by Drs. Duggal, Johnson, Gruft and Tolentino. PX 1, A33-35. No records from these physicians are in evidence. The same chart reflects that Dr. Kayali also prescribed Zolpidem on various dates between November 23, 2013 and April 17, 2014. Dr. Kayali's records are not in evidence.

The only pre-accident pain management treatment records in evidence are those of Dr. Glaser. Dr. Glaser's initial note of January 6, 2014 reflects that Petitioner complained of right ankle/foot pain and right lower back pain of two years' duration secondary to a motor vehicle accident of December 2011. Dr. Glaser described Petitioner's pain as radiating to the right knee. He also described Petitioner's lower back and right knee pain as "secondary to antalgic gait," referencing the prior right ankle surgery. He noted that Petitioner was currently taking Oxymorphone 40 mg tid and Oxycodone 30 mg 4 times per day. He indicated that Petitioner rated his worst pain at 9/10, his least intense pain at 5/10 and his average pain at 7/10. He also noted that Petitioner described the pain as interfering with his sleep four nights per week. He indicated that Petitioner had previously undergone an ankle injection, physical therapy and acupuncture, with the therapy and acupuncture providing no relief.

On lumbar spine examination, Dr. Glaser noted mild tenderness in the right mid region facets and moderate tenderness in the right lower region facets. On right leg examination, he noted allodynia, hyperalgesia, hyperpathia, mild hypersensitivity to light touch and loss of skin folds.

Dr. Glaser obtained a drug screening, which was positive for Oxycodone and opiates. PX 1, p. A29.

Dr. Glaser diagnosed neuropathic pain and complex regional pain syndrome of the lower limb. He renewed the existing Oxymorphone and Oxycodone prescriptions and instructed Petitioner to return in two weeks.

Petitioner testified he completed a pain diagram each time he visited Dr. Glaser. The pain diagram dated January 6, 2014 reflects that Petitioner circled the right lower back, right knee and right ankle and rated his current pain at 8/10. PX 1, p. A28.

Petitioner returned to Dr. Glaser on January 24, 2014, with the doctor describing Petitioner's symptoms as unchanged.

Dr. Glaser's next note, dated February 7, 2014, reflects that Petitioner reported working full-time and described his right ankle/foot pain as unchanged. The note also reflects that the doctor "discussed the importance of pursuing interventional treatment" but that Petitioner was "not financially in a position to pursue this at this time." The doctor indicated that Petitioner's current medications included Neurontin, Oxymorphone and Oxycodone.

A document in Dr. Glaser's chart reflects that, on February 7, 2014, he prescribed a lumbar paravertebral sympathetic nerve block, to be administered on the right side. A handwritten note on this document reflects that Petitioner indicated he wanted to be advised of the price of this procedure before he would schedule it. PX 1, p. A36.

Petitioner saw Dr. Glaser again on March 10, 2014. The doctor indicated Petitioner was working full time "with the aid of his pain medications." He also indicated that Petitioner "must sit or lie down approximately twice per day to control pain."

On April 2, 2014, about two weeks before the work accident, Petitioner saw Sharon Koys, PA-C, Dr. Glaser's assistant. Koys note reflects a new diagnosis of "facet synd w/o myelop, lumbar." PX 1, p. A6. Koys noted that Petitioner's right ankle pain had increased in terms of intensity and duration since March 10, 2014 and that the "ratio of good days to bad days" had decreased. Koys also noted that Petitioner was taking Neurontin only intermittently due to mild stomach upset and requested an increase in his Opana ER dosage. She also noted that Petitioner was "considering interventional procedures in the future when he can afford it." Koys described Petitioner as using "breakthrough pain medications the majority of the day." She indicated that Petitioner rated his current pain level at 8/10. She renewed Petitioner's medications and directed him to restart Neurontin. PX 1, p. A7.

A prescription monitoring print-out in PX 1 reflects that Petitioner obtained Zolpidem from Dr. Kayali in January, February, March and April 2014 (during the same period Petitioner

was obtaining Oxycodone and Oxymorphone from Dr. Glaser), with the last Zolpidem prescription filled on April 17, 2014, the day before the work accident. PX 1, p. A30.

Petitioner testified that, on April 18, 2014, he was unloading and moving boxes of office furniture. Each box was about 7 feet long and weighed 200 to 250 pounds. Petitioner testified he had to lift each box by himself, place it on a dolly, move it to the room where it would later be installed and lift it again. The dolly had wheels and was made of wood and metal. Petitioner testified he transferred and lifted several boxes without incident. As he lifted the last box, the box fell onto him, trapping him against the dolly, with the dolly rolling onto his "bad" right ankle. Petitioner testified he fell backward when this happened, striking his mid to low back against the dolly.

Petitioner testified he felt "extraordinary" pain in his lower back and right ankle immediately after the accident. He was alone when the accident occurred. An electrician who was working in another area heard the box fall and came to his aid. The electrician managed to move the box off of Petitioner. Petitioner informed his supervisor (notice is not in dispute) and then called his fiancée to ask her to come pick him up. After his fiancée arrived, she drove him to the Emergency Room at Adventist Hinsdale Hospital.

The Adventist Hinsdale Hospital Emergency Room records of April 18, 2014 reflect an arrival time of 7:20 PM. Emergency Room personnel noted a complaint of right ankle pain secondary to a large box falling and landing on Petitioner's right foot at work. They also noted that Petitioner reported falling backward, hitting his mid to lower back on a metal dolly, after being struck by the box. They indicated Petitioner denied pain in any body part other than his right ankle.

On right foot and ankle examination, the Emergency Room physician noted moderate tenderness to palpation to the dorsum of the right foot, mild lateral malleoli tenderness, no ligament laxity, no ecchymosis or laceration, minimal edema and intact sensation. There is no indication that the physician examined any body part other than the right foot and ankle.

The Emergency Room physician ordered right foot and ankle X-rays. The interpreting radiologist noted no acute fractures or dislocations.

Petitioner was diagnosed with a right foot contusion. At discharge, he was instructed to use crutches (which Petitioner indicated he already had) and apply ice to his right foot and ankle. He was given a slip restricting him to 100% seated work for two days. PX 2, p. B132.

Petitioner saw Dr. Glaser on April 21, 2014, three days after the accident. Petitioner testified that April 21st was a Monday and the first day he could get in to see a doctor.

Dr. Glaser's note of April 21, 2014 sets forth the following history:

"Last Friday, a 300 lb box fell on him and his back hit the dolly.

> He went to the ER and he hurt his right ankle and his lower back. His right ankle pain is severely exacerbated from 7 to 9. He immediately had the onset of back pain. He is not noting radicular pain. He is using his usual dose of opioids and he did not increase his medications. He did not take pain medications from the ER."

On lumbar spine examination, Dr. Glaser noted moderate tenderness in the left and right mid region facets and marked tenderness in the left and right lower region facets. He indicated he "added a new problem of 'facet synd w/o myelop, lumbar." He also indicated he discussed "the causes of [Petitioner's] new lower back pain" and the "exacerbation of his neuropathic leg pain." He took Petitioner off work and directed him to return in two weeks. PX 1, pp. A4-5.

Petitioner returned to Dr. Glaser on May 6, 2014. The doctor noted that Petitioner's ankle pain had returned to baseline but that his lower and mid back pain was unchanged. He described Petitioner as having to sit or lie down most of the day to control pain. He prescribed physical therapy and instructed Petitioner to return in two weeks. PX 1, pp. A2-3.

Petitioner saw Dr. Glaser again on May 28, 2014. The doctor described Petitioner's pain as unchanged. He emphasized the importance of physical therapy. He kept Petitioner off work and instructed him to return in two weeks.

Petitioner underwent an initial evaluation at Achieve Manual Physical Therapy on June 3, 2014. The evaluating therapist noted that Petitioner reported "being hurt at work while lifting a 600-lb. box from the floor." The therapist also noted that Petitioner had been seeing Dr. Glaser for his ankle prior to this injury and that Petitioner was off work. PX 3, p. 1.

Petitioner began attending therapy thereafter.

Petitioner returned to Dr. Glaser on June 11, 2014 and reported increased back pain secondary to therapy and a new complaint of left ankle pain secondary to his antalgic gait. On left lower extremity evaluation, Dr. Glaser noted some pain over the medial ankle with range of motion and palpation. Dr. Glaser recommended continued therapy. PX 1, p. A66.

On July 2, 2014, Dr. Glaser noted that Petitioner reported mild improvement after attending twelve therapy sessions. He recommended additional therapy. PX 1, pp. A63-64.

On July 15, 2014, a utilization review representative, Debra Ziemann [hereafter "Ziemann"], sent Dr. Glaser a letter approving eighteen additional therapy sessions. PX 1, p. A117. Petitioner saw Dr. Glaser the following day, with the doctor noting Petitioner was going to restart therapy. PX 1, p. A61. On July 23, 28 and 31, 2014, as well as August 8, 2014, the therapist indicated that Petitioner described his lower back as doing "okay." On August 11, 2014, the therapist indicated that Petitioner reported that "in the mornings his back or his

ankle hurt so bad that it is hard for him to walk." PX 3, p. C43. The last therapy note is dated August 15, 2014.

Petitioner returned to Dr. Glaser on August 27, 2014, with the doctor indicating that Petitioner's back and ankle pain had increased since his last visit of July 16, 2014. The doctor prescribed a lumbar spine MRI and directed Petitioner to remain off work. PX 1, pp. A59-60.

Ziemann sent Dr. Glaser a letter on September 2, 2014, indicating that the MRI had been approved. PX 1, p. A116.

The MRI, performed on September 5, 2014, was negative other than at the L5-S1 level, where the radiologist noted an early or mild degeneration of the intervertebral disc with a left paramedian posterior disc protrusion measuring up to 6 millimeters and contacting the left S1 nerve root in the subarticular recess. The radiologist also noted mild degenerative facet arthrosis with a minimal left facet joint effusion at L5-S1. PX 1, p. A86.

On September 12, 2014, Dr. Glaser prescribed right facet joint injections at L3-L4, L4-L5 and L5-S1. He instructed Petitioner to remain off work. PX 1, pp. A94-96.

On September 21, 2014, Dr. Smucker issued a records review report on behalf of Respondent. Dr. Smucker is associated with the Orthopedic Center of Illinois.

In his report, Dr. Smucker indicated he reviewed a variety of treatment records (including Emergency Room records, Dr. Glaser's records and therapy notes), along with a union carpenter job description and an incident report of April 28, 2014 prepared by Petitioner's foreman, Eric Strom. [The Arbitrator notes that this incident report is not in evidence. According to Dr. Smucker, Strom indicated that, on April 18, 2014, Petitioner, who had been working alone, reported experiencing a back spasm and twisting his ankle after trying to lift a cabinet overhead and dropping the cabinet. Strom described the cabinet as 14 x 14 inches and weighing "only about 50 to 70 pounds."]

Dr. Smucker found Petitioner's ongoing back and right leg complaints to be "entirely consistent with his pre-existing difficulties for which he was being treated prior to the" April 18, 2014 work accident. Dr. Smucker indicated that treatment for Petitioner's pre-accident condition "by way of lumbar sympathetic block was not being done because [Petitioner] could not afford that treatment." He also noted that, before the work accident, Petitioner was "being managed chronically on high-dose narcotic medications." He found it "interesting" that Petitioner's foreman described the cabinet as weighing possibly up to 70 pounds while Petitioner claimed at various times that the object he lifted weighed 300 or 600 pounds. He also found it "interesting" that the lumbar spine MRI "showed a leftward disc protrusion while [Petitioner's] complaints of leg pain have been on the right side."

Dr. Smucker found Petitioner to have returned to his pre-accident status. He recommended no additional care in connection with the April 18, 2014 incident. He did not

think that Petitioner would be able to resume the job he was performing for Respondent, citing Petitioner's chronic usage of high-dose narcotics and describing Petitioner as "very invested in being 'injured.'" In response to a question as to when Petitioner would be able to resume full duty, he stated: "This individual, as he is not working and probably does not want to work, will likely not return to work any time soon and possibly not ever." He clarified that his opinions as to Petitioner's work capacity had nothing to do with the April 18, 2014 incident. RX 3.

On October 24, 2014, Petitioner went to the Emergency Room at Adventist Hinsdale Hospital and requested a refill of his Oxycodone. Petitioner reported that his regularly prescribed Oxycodone had been stolen from his car the day before and that he was concerned about withdrawal. Emergency Room personnel contacted Dr. Glaser's office via telephone and, at discharge, advised Petitioner to keep his scheduled appointment with the doctor. On October 27, 2014, Dr. Glaser noted the reported theft and advised Petitioner to "keep his medication secure." The doctor indicated he anticipated receiving the police report soon. PX 1, p. A54.

On November 5, 2014, Petitioner went to the Emergency Room at Adventist Hinsdale Hospital and indicated he had been diagnosed with a kidney stone at St. Joseph's Hospital two days earlier. [No records from St. Joseph's Hospital are in evidence.] Petitioner indicated he was not deriving any pain relief from his regularly prescribed Oxycodone. He requested stronger pain medication. He was given an injection of Dilaudid. A CT scan of the abdomen confirmed the presence of an obstructive stone. Petitioner was instructed to follow up with Dr. Fakouri.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Levin on November 24, 2014. Dr. Levin is associated with Barrington Orthopedic Specialists.

Dr. Levin's report of November 24, 2014 sets forth the following account of the work accident:

> "He reports an injury that occurred at work on April 18, 2014, when he had to lift an overhead box that weighed 600 pounds of cabinets. The box was laying flat on the ground and he had to lift it up from the ground and, as he did this, it fell forward on him and he fell backwards. At that time, he hit a dolly with his low back and it rolled over his right foot and right ankle. An electrician came to help him up and he had severe low back pain and difficulty bearing weight."

Dr. Levin indicated that Petitioner acknowledged undergoing right ankle care in the past but described himself as "fully recovered" and "having no symptoms" prior to work accident. Dr. Levin also indicated that Petitioner denied ever having low back pain or undergoing low back care before the accident.

Dr. Levin described Petitioner as exhibiting an "exaggerated non-physiologic gait." He indicated that Petitioner stated he was unable to perform a Trendelenburg test. He noted that Petitioner complained of right knee and right leg pain and flexed his right knee only to 100 degrees. On lumbar spine examination, he noted that Petitioner complained of diffuse discomfort over the lumbar paraspinal muscles. He also noted that Petitioner "will only forward flex and touch his fingers to his upper thigh level and extend to neutral." He documented a 6-centimeter dorsolateral scar on Petitioner's right ankle.

Dr. Levin obtained X-rays of the right foot, right ankle and lumbar spine. He described the right ankle films as showing a "chronic deformity of the talus with arthritic changes over the talocalcaneal joint from what appeared to a chronic talus fracture." He described the lumbar spine films as normal.

Dr. Levin interpreted Petitioner's lumbar spine MRI film as showing a "chronic degenerative disc change at L5-S1" and a "posterior protrusion of the disc to the left side up against the left S1 nerve root, but not on the right side."

Dr. Levin indicated he reviewed Emergency Room records from July 11, 2013 and April 18, 2014 along with certain records from Dr. Glaser, therapy notes, Dr. Smucker's records review and a description of a union carpenter job.

Dr. Levin described the treatment records as "in direct conflict with" Petitioner's history. Based in part on the treatment note of April 2, 2014, he found "no evidence that there has been any new injury or change in [Petitioner's] condition caused by the alleged work injury of April 18, 2014." He went on to state that "the treatment recommended now is the same treatment that [Petitioner] required prior to April 18, 2014." He found Petitioner to be at maximum medical improvement from the alleged work accident. PX 4, pp. D1-6. RX 1.

On November 25, 2014, Dr. Glaser noted that Petitioner had "not heard from the police yet" but was "keeping his medications secured." He also noted the recent IME. He refilled the medications and instructed Petitioner to return to him in one month. PX 4, pp. A51-52.

In a supplemental report dated December 22, 2014, Dr. Levin found Petitioner capable of resuming full duty. PX 4, p. D7. RX 2.

On December 26, 2014, Dr. Glaser noted an increase in Petitioner's right ankle/foot, bilateral lower back and right knee pain. He also noted that Petitioner reported developing left knee pain due to his altered gait. He again instructed Petitioner to "keep the meds secured." He "discussed the risk of accidental poisoning in great detail." He instructed Petitioner to return after the IME results became available. PX 1, p. A50.

On January 5, 2015, Dr. Glaser indicated he reviewed Dr. Levin's report. He responded to the doctor as follows:

"The IME doctor ignores the fact that [Petitioner] did not record lower back pain on his pain diagrams at all at the visits just prior to the accident at work. He also ignores the fact that [Petitioner] never had dorsal spine pain, just mild episodic right greater than left myofascial lower back pain from his antalgic gait prior to the work accident. The IME doctor is wrong in his conclusions."

PX 1, pp. A47-48.

Petitioner returned to Dr. Glaser on January 21, 2015. The doctor described Petitioner's lumbar spine, dorsal spine and lower extremity pain as unchanged. He indicated Petitioner provided him with the July 11, 2013 Emergency Room records. After reviewing these records, he addressed causation as follows:

"The fact that the patient had transient pain in similar areas years ago following a fall is inconsequential. Obviously, he suffered myofascial strain or a sprain as his symptoms were self limited. His current symptoms have well defined causes and are unrelated to his fall in 2013."

Petitioner saw Dr. Glaser again on February 16, 2015, a few days before the hearing. On that date, the doctor noted that Petitioner's low back and right ankle pain had increased and that Petitioner was "definitely getting tolerant to the opioids." On examination, he noted an antalgic gait, favoring the right, limited and painful extension and a report of calf pain with right straight leg raising.

Dr. Glaser described Petitioner as "suffering unnecessarily secondary to denial of medically necessary care." He added Opana to Petitioner's medications and again recommended the right lumbar facet injections. PX 1, pp. A121-123.

Petitioner testified he wants to undergo the recommended injections so that he can wean off his current pain medications. At several points in the hearing, he emphatically stated, "I must get off these medications."

Under cross-examination, Petitioner testified he could not recall whether he started taking Neurontin on April 2, 2014. He also could not recall whether Dr. Glaser recommended any interventional procedure on that date. Even if the doctor did prescribe a procedure on that date, he would not have been able to afford it. He would disagree with Dr. Glaser's note of April 21, 2014 if that note states he had no radiating pain. His back pain was "extraordinary" on that date. Since the work accident, he has woken up due to 10/10 pain almost every night. His pain level gets this high despite the prescriptions he is taking. When he wakes up, his fiancée

has to help him get from the bed to the bathroom so he can take medication. Dr. Glaser has never suggested he undergo an orthopedic consultation. He wants to go with whatever Dr. Glaser recommends. He would like to avoid surgery since he is only 24 years old.

Petitioner testified that, on some occasions, he can walk for only 20 minutes before having to take a break. On other occasions, he can walk for an hour or an hour and a half. He does not currently have a driver's license. His fiancée drove him to the Commission for the hearing. The drive took 35 minutes. They stopped once along the way.

Petitioner testified he is sometimes able to lift his 20-month-old son, who currently weighs 20 or 21 pounds. He experiences pain when he lifts his son but he sometimes has to do it. His fiancée is 8 months pregnant. They obtain help from family members who live nearby. He does not perform any home exercises. Dr. Glaser recommended home exercises earlier, when he was experiencing only right ankle pain. He doubts he could perform any exercises when his pain level is 10/10. He would have to take medication and wait for his pain to lessen before attempting any exercises. His ankle gets warmer than the rest of his body. His ankle swells a little but he is able to wear socks and shoes.

Petitioner denied telling Dr. Levin that the box he lifted weighed 600 pounds. There is no way he could lift 600 pounds and he would not have said the box weighed this much. He did not recall telling Dr. Levin he saw Dr. Williamson. It may be that Dr. Williamson was associated with Dr. Johnson, his previous pain physician.

On redirect, Petitioner testified he did not file a workers' compensation claim in connection with the July 2013 trench incident. He was able to work and was not subject to any restrictions before the April 18, 2014 work accident. The episodes of back pain he experienced after the trench incident and in January 2014 cleared up. Dr. Glaser contemplated performing an ankle injection before the April 18, 2014 accident but he (Petitioner) would not have been able to pay for this. Dr. Glaser wants to address his back first and his ankle later. The "extraordinary" pain he is now experiencing is in his back, not his ankle.

Under re-cross, Petitioner testified he would disagree with Dr. Glaser's note of April 2, 2014 if that note reflects a diagnosis of a back condition. If a therapist at Achieve said he described his back as "okay" in August 2014, he would disagree with the therapy note.

On further redirect, Petitioner testified that if he used the term "okay" when talking with the physical therapist, he might have meant he was experiencing 9/10 rather than 10/10 pain.

Petitioner's fiancée, Amy Dombrowski, also testified. Dombrowski testified she does not work. On April 18, 2014, she drove Petitioner to work. Petitioner was fine when she dropped him off at work that day. He grabbed his tool bag when he got out of the car. She drove back to Petitioner's jobsite later the same day and saw a guy helping Petitioner walk and holding Petitioner's tool bag for him. They drove straight to the Emergency Room at that time.

When they were en route to the Emergency Room, Petitioner complained of both his ankle and his back. Petitioner indicated he could not put pressure on his ankle. At the Emergency Room, Petitioner continued to complain of both body parts but complained more about his back. Petitioner has had sleeping issues since the accident. He wakes up at night and tells her his back is hurting. She did not notice Petitioner limping before the accident.

Under cross-examination, Dombrowski testified that Petitioner had no pain-related sleeping issues before the work accident. She discussed her testimony with Petitioner before the hearing but she and Petitioner did not agree on any set answers. She is not sure how often Petitioner wakes up at night.

No witnesses testified on behalf of Respondent.

In addition to the exhibits previously discussed, Petitioner offered into evidence a wage statement reflecting the number of regular and overtime hours he worked for Respondent during the fifteen weeks between January 4, 2014 and April 18, 2014. During six of the fifteen weeks, Petitioner worked fewer than twenty-five regular hours. He worked overtime in all but two weeks. His overtime hours are not enumerated. PX 6.

Petitioner also offered into evidence bills from three providers. PX 5. At the hearing, Respondent disputed liability only with respect to medical bills incurred after December 23, 2014. Two of the bills relate to treatment rendered before that date.

Petitioner also offered into evidence the petition for penalties and fees he filed on January 16, 2015. The petition alleges that Respondent stopped authorizing treatment on October 28, 2014 and last paid temporary total disability benefits on January 2, 2015. PX 7.

Arbitrator's Credibility Assessment

Simply put, Petitioner was not credible. He had a perfect recollection of certain events, such as the work accident, but grew hazy when it was convenient for him to do so. His testimony concerning the 2011 motor vehicle accident is wildly at odds with the account he provided to Dr. Levin. The Arbitrator is unable to conclude that Dr. Levin manufactured that account. Petitioner testified he had only two episodes of transient back pain prior to the work accident yet his pain physician, Dr. Glaser, noted a two-year history of persistent, right-sided low back pain at the initial visit of January 6, 2014. Petitioner acknowledged seeing a different pain physician, Dr. Johnson, prior to seeing Dr. Glaser but made no mention of the other physicians from whom he obtained narcotic pain medication in 2013. He did not offer any of these physicians' records into evidence. Based on the persistent back complaints Dr. Glaser recorded on January 6, 2014, the Arbitrator is unable to assume that the pain management Petitioner underwent in 2013 was confined to his ankle. Petitioner testified Dr. Glaser recommended an ankle injection prior to the work accident but the doctor's records clearly show he recommended a right-sided lumbar block on February 7, 2014. Petitioner testified he experienced "extraordinary" back pain after the accident but the Emergency Room records

reflect Petitioner denied pain in any body part other than his right ankle. PX 2, p. B113. The discharge diagnosis was right ankle contusion.

Petitioner was prone to exaggeration, as evidenced by Dr. Levin's report and the therapy evaluation, both of which state that Petitioner reported lifting a 600-pound box. Petitioner denied telling Dr. Levin this weight but the fact that it appears in a second record increases the likelihood that Petitioner said this. Dr. Levin described Petitioner's gait as "exaggerated" and "non-physiologic."

Dr. Glaser's post-accident records show a pattern of Petitioner reporting increased pain and pain in new body parts, including his left ankle and left knee.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his work accident of April 18, 2014 and his claimed current conditions of ill-being?

Respondent did not place accident in dispute. Arb Exh 1. The Arbitrator finds that the stipulated accident of April 18, 2014 caused a right foot contusion (superimposed on a pre-existing, chronic right foot condition) which required Emergency Room care and two days of rest. PX 2. The Arbitrator further finds that the accident did not result in any other change in Petitioner's pre-existing chronic pain conditions or give rise to the need for additional care beyond that which Petitioner was already undergoing. The pre-accident prescription records show that Petitioner obtained narcotic pain medication on a regular basis from several physicians between January and late November 2013. Petitioner failed to offer the records of these physicians into evidence. The same records show that Petitioner obtained Zolpidem from Dr. Kayali between November 23, 2013 and April 17, 2014. Dr. Kayali's records are not in evidence. Petitioner testified that his 2011 motor vehicle accident involved only his right ankle but the history he provided to Dr. Levin calls that testimony into question. Dr. Levin indicated that Petitioner described the accident as near-fatal and involving his torso as well as his right ankle. Petitioner claimed to have suffered only two brief episodes of back pain before the work accident but that claim is undermined by Dr. Glaser's initial note of January 6, 2014. In that note, Dr. Glaser indicated that Petitioner reported a two-year history of right lower back pain. When Dr. Glaser later expressed criticism of Dr. Levin's conclusions, he appeared to have conveniently forgotten this history, since he indicated Petitioner had "just mild episodic right greater than left" back pain before the work accident. There is no evidence indicating Dr. Glaser reviewed Petitioner's pre-accident records from Drs. Johnson, Duggal, Tolentino, Gruft, Kayali and perhaps Williamson. The Arbitrator finds Dr. Glaser's causation-related opinions unpersuasive. The Arbitrator also notes that the post-accident lumbar spine MRI, which showed left-sided pathology, does not correlate with Petitioner's right-sided complaints.

Is Petitioner entitled to medical expenses?

Petitioner claims three unpaid medical bills. One of these bills relates to physician services provided at the Emergency Room on the date of accident. The other two bills relate to physical therapy rendered on July 23, 2014 and visits to Dr. Glaser on January 21 and February 16, 2015.

On the Request for Hearing form, Respondent stated it was disputing liability only with respect to treatment rendered after December 23, 2014. Arb Exh 1. Based on Walker v. Industrial Commission , 345 Ill.App.3d 1084, 1088 (2004), the Arbitrator views this statement as a binding stipulation rendering Respondent liable for treatment rendered through December 23, 2014. The Arbitrator thus awards Petitioner the Illinois Emergency Medicine Specialists bill of $265.00 (DOS 4/18/14) and the Achieve Orthopedic Rehabilitation Institute bill of $225.00 (DOS 7/23/14), subject to the fee schedule. Based on the foregoing credibility- and causation-related findings, the Arbitrator declines to award the Pain & Rehab Specialists (Dr. Glaser) bill of $904.00 for treatment rendered after December 23, 2014.

Is Petitioner entitled to additional temporary total disability benefits?

The parties agree that Respondent paid $12,824.02 in temporary total disability benefits before the hearing. Petitioner claims additional benefits from January 2, 2015 through the hearing of February 23, 2015. Respondent claims that no additional benefits are owed. Arb Exh 1.

Based on the foregoing credibility- and causation-related findings, the Arbitrator declines to award additional temporary total disability benefits from January 2, 2015 through February 23, 2015.

Is Petitioner entitled to prospective care?

Based on the foregoing credibility- and causation-related findings, the Arbitrator declines to award prospective care.

Is Respondent liable for Section 19(k) penalties and Section 16 attorney fees?

In his proposed decision, Petitioner indicated he was withdrawing his request for Section 19(l) penalties but still requesting relief under Sections 19(k) and 16.

Based on the foregoing credibility- and causation-related findings, and noting the various medical and temporary total disability payments made by Respondent, the Arbitrator declines to award any Section 19(k) penalties or Section 16 attorney fees in this case.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDDIE ANDREWS,

Petitioner,

vs. NO: 13 WC 24044

15IWCC0775

AGENCY FOR COMMUNITY TRANSIT,

Respondent.

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, temporary total disability (TTD), and permanent partial disability (PPD) and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Eddie Andrews failed to establish that he sustained a repetitive trauma injury arising out of and in the course of his employment on or about June 14, 2013.

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.

This matter was consolidated at trial with case 07 WC 51356. In that case, the Commission adopted the arbitrator's findings of facts and modified the Decision with respect to TTD only. Those findings, as they relate to Petitioner's condition and work history prior to his employment with Agency for Community Transit (ACT) are incorporated by reference herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. According to the Application for Adjustment of Claim filed July 25, 2013, Petitioner was a 47 year old, married male with 2 dependants under the age of 18. The Petitioner alleged injury/aggravation to the bilateral hands, wrists, and elbows while working for ACT. The manifestation date was listed as June 14, 2013.

2. Petitioner underwent an EMG/NCV on August 3, 2009 that revealed bilateral median and ulnar sensory neuropathies at the wrist. PX.4. Dr. Hillard Scott diagnosed Petitioner with bilateral carpal tunnel on August 11, 2009. Petitioner testified that he was never completely free of hand pain after leaving his employment with Cerro Copper. T.67.

3. Petitioner was hired as a Transit Bus Driver for ACT on September 8, 2009. T.34. He worked 30 hours a week for the first two and a half years and then worked 25 hours per week thereafter. Mr. Andrews testified that the bus steering wheel was larger than a car steering wheel and sat flat. T.15. He would drive the bus with his arms and hands extended straight out and with his elbows at the middle of his chest. T.64.

4. Mr. Andrews began to feel a shooting pain go up his arms that progressively got worse after he started working for ACT. T.29. He also started to experience elbow pain while working for ACT. He would have to shake his hands to gain some relief. *Id.*

5. Ms. Rhonda Webel is the HR manager for ACT. She testified that ACT received the Application for Adjustment of Claim on July 18, 2013. Ms. Webel testified that she was not aware of the Petitioner having any issues. T.92.

6. Petitioner was seen by Dr. Nathan Mall on June 3, 2013 on referral from his attorney for pain in the bilateral wrists and hands that had been present for some time. Mr. Andrews reported that he did manual work for a long period of time that required twisting of objects and loading the wrists with repetitive movements for 10 to 12 hours. Petitioner was experiencing an increased difficulty with opening objects and he had a severe decrease in grip strength as well as problems with his hands going numb while driving. Dr. Mall noted that the nerve conduction study from several years prior revealed bilateral carpal tunnel. The wrist splints were no longer helping. Examination revealed a positive bilateral flexion compression test at the wrist. He had mild tenderness to palpation along the wrists and a mild positive Tinel's of the wrist bilaterally. He had a mildly positive flexion compression test at the elbow. The assessment was bilateral carpal tunnel and possible bilateral cubital tunnel. PX.7. Dr. Mall recommended surgery.

7. Petitioner underwent and EMG/NCV with Dr. Daniel Phillips on June 14, 2013. The test revealed moderate-to-severe bilateral sensory motor median neuropathies across the carpal tunnel. There were moderate ulnar neuropathies across the right elbow with partial sensory axonal loss. There were mild demyelinative ulnar neuropathies across the left elbow. PX.7.

8. Mr. Andrews presented for follow-up with Dr. Mall on June 14, 2013. Dr. Mall noted the EMG revealed significant bilateral carpal and cubital tunnel syndrome. Petitioner's blood pressure was 160/110. Dr. Mall opined that Petitioner's current symptoms and his development of carpal and cubital tunnel was causally related to his work injury that occurred in 2008 and 2009 while working for Cerro Copper. PX.7.

9. Petitioner completed an event report with ACT on June 30, 2013. Per the report, Petitioner would experience pain while driving. His pain had been present for several months. His condition would ache when he turned or grabbed the steering wheel. There was no specific date of injury. RX.3.

10. ACT obtained a records review from Dr. R. Evan Crandall on December 3, 2013. He diagnosed Mr. Andrews with bilateral carpal tunnel and bilateral ulnar neuropathy at the elbows. Dr. Crandall stated that Petitioner's job duties at Cerro Copper were hand intensive and he had sufficient years of service to have adequate exposure to repetitive work. He stated that the evidence supported that his condition began around 2007, which was prior to becoming a bus driver. Petitioner's bus driving position was not hand intensive and would not be able to cause the condition of carpal tunnel or ulnar neuropathy. Dr. Crandall opined that Petitioner's diagnosis was not related to his job duties at ACT, as his condition pre-existed his employment with ACT. His condition was related to his job duties while employed at Cerro Copper. RX.2.

11. Petitioner was seen by Dr. Mall on January 3, 2014. Dr. Mall again recommended carpal and cubital tunnel release. Petitioner's blood pressure was 147/105. Petitioner provided Dr. Mall with Dr. Crandall's report. Dr. Mall reviewed the report and disagreed with Dr. Crandall's opinions. Dr. Mall was of the opinion that driving a bus could place a person at an increased risk for carpal tunnel. PX.7.

12. Dr. Mall performed right carpal tunnel release and right cubital tunnel decompression and transposition on May 13, 2014. He performed left carpal tunnel release and left cubital tunnel decompression and transposition on July 3, 2014. PX.10.

13. Dr. Mall was subsequently deposed on January 14, 2014. At the time of his deposition, Dr. Mall was not board certified, only board eligible. PX.12. pg.4. He diagnosed Mr. Andrews with bilateral carpal tunnel syndrome and signs and symptoms of cubital tunnel syndrome. PX.12. pg.9. Dr. Mall noted that most people with this diagnosis have problems while driving. PX.12. pg.13. Most people drive with their wrist flexed at a certain degree; therefore, he disagreed with Dr. Crandall and stated that driving a bus can cause carpal and cubital tunnel. Dr. Mall opined that Petitioner's job duties as a bus driver for ACT clearly aggravated his carpal and cubital tunnel syndrome. Dr. Mall testified that the Department of Labor published its top 20 occupations for the development of carpal tunnel syndrome, and a bus driver was listed as 11 out of 20. PX.12. pg.26. Dr. Mall opined that carpal tunnel can be aggravated by driving.

14. Dr. Mall further opined that the Petitioner's carpal tunnel syndrome was related to Petitioner's employment with Cerro Copper. His opinion was based on the job description provided to him and his review of the medical records. Dr. Mall thought Mr. Andrews had cubital tunnel while at Cerro Copper, but it was not well documented. PX.12. pg.22.

15. Dr. Crandall was deposed on February 5, 2014. He is a board certified plastic surgeon. Dr. Crandall performed a records review on behalf of ACT and authored a report on December 3, 2013. He diagnosed Mr. Andrews with bilateral carpal tunnel syndrome and bilateral ulnar neuropathy of the elbow. RX.1. pg.7. He opined that Petitioner's job duties with ACT did not aggravate or cause his condition. *Id.* His opinion was based on the fact that the medical records showed that Petitioner's condition was present prior to working for ACT. Dr. Crandall's opinion was further premised upon his belief that driving a bus would not cause or aggravate carpal tunnel or ulnar neuropathy. His condition was related to his employment with Cerro Copper. *Id.* He recommended bilateral ulnar nerve transposition and bilateral carpal tunnel release. The need for surgery, however, was due to his work at Cerro Copper as his job duties there were hand intensive. He further opined that driving a bus does not expose the driver to vibration sufficient enough to cause carpal tunnel. RX.1. pg.37.

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)

An employee who alleges injury from repetitive trauma must still meet the same standard of proof as other claimants alleging accidental injury. *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47, 556 N.E.2d 261, 264, 144 Ill. Dec. 794 (1989). The employee must show that the injury is work related and not the result of a normal degenerative aging process. *Peoria County Belwood Nursing Home v. Industrial Com.*, 115 Ill. 2d 524, 505 N.E.2d 1026, 1987 Ill. LEXIS 161, 106 Ill. Dec. 235 (Ill. 1987). An injury is considered "accidental" even though it develops gradually over a period of time as a result of repetitive trauma, without requiring complete dysfunction, if it is caused by the performance of claimant's job. *Peoria County Belwood Nursing Home v. Industrial Comm'n* (1987), 115 Ill. 2d 524, 529-30, 505 N.E.2d 1026, 1028, 106 Ill. Dec. 235.

The Commission finds that Mr. Andrews failed to prove that his job duties with ACT were repetitive in nature, or required any forceful activity. The Petitioner worked as a part-time

bus driver. The Petitioner offered scant details of his job duties other than the steering wheel laid flat and was twice the size of a normal steering wheel. His arms and hands were extended straight out and his elbows at the middle of his chest. The Commission notes that the Petitioner offered no testimony as to the condition of the bus, whether the bus had power steering, the number of stops he had to make, or the condition of the road over which he drove. Mr. Andrews offered no testimony as to the frequency and duration of any of his job duties.

Further, the Commission finds the Arbitrator's finding that "the way Petitioner is seated while driving basically requires Petitioner to lean over the wheel when gripping it, putting pressure on his wrists, elbows, and upper extremities in order for him to turn the wheel" is not supported by the evidence. While the Petitioner may have demonstrated to the Arbitrator how he drove the bus, the record is devoid of any testimony or evidence that pressure was put on his wrist, elbows or upper extremity in order for him to turn the wheel.

The Commission finds no evidence to support that Mr. Andrews' condition was the result of his bus driving duties. The evidence demonstrates that the Petitioner was diagnosed with bilateral carpal tunnel prior to his employment with ACT. The Commission adopts the opinion of Dr. Crandall in support of its finding. Dr. Crandall opined that bus driving was not hand intensive and would not be able to cause the condition of carpal tunnel or ulnar neuropathy. The Commission finds Dr. Crandall's opinion more persuasive than Dr. Mall's opinion. The Commission notes that Dr. Mall, on June 14, 2013, originally opined that Petitioner's condition was related to his employment with Cerro Copper. It was not until January 3, 2014, that Dr. Mall opined that driving a bus could place a person at an increased risk for carpal tunnel. The Commission is not persuaded by the second opinion. Dr. Mall changed his opinion only after he reviewed Dr. Crandall's opinion, which was critical of his recommendations.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 5, 2015, is hereby reversed for the reasons stated above.

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: OCT 2 2 2015
MJB/tdm
O: 8-24-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANDREWS, EDDIE
Employee/Petitioner

Case# **13WC024044**

07WC051356

AGENCY FOR COMMUNITY TRANSIT
Employer/Respondent

15IWCC0775

On 1/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1239 KOLKER LAW OFFICES
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BELLEVILLE, IL 62223

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

☐ 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

Eddie Andrews
Employee/Petitioner

v.

Agency for Community Transit
Employer/Respondent

Case # 13 WC 24044

Consolidated cases: 07 WC 51356

15IWCC0775

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lee**, Arbitrator of the Commission, in the city of **Belleville, Illinois**, on **September 29, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0775

FINDINGS

On **6/14/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**19,943.61**; the average weekly wage was $**383.53**.

On the date of accident, Petitioner was **47** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services listed in Petitioner's Exhibit 15 of Dr. Mall/Regeneration Orthopedics, NEI of St. Louis, Mercy Imaging, Kansas Brace System, Timberlake Surgery Center, Premier Anesthesia, KS Medical, Injured Workers Pharmacy, and ProRehab, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $319.00/week for 5 & 3/7 weeks, commencing 5/13/14 through 6/2/14, and 7/3/14 through 7/21/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $319.00/week for 88.875 weeks, because the injuries sustained caused the 13% loss of the Right Arm, 12% loss of the Left Arm, 6.5% loss of the Right Hand (15% minus credit of 8.5% from 07WC51356), and 6% loss of the Left Hand (12.5% minus credit of 6.5% from 07WC51356), 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

12/12/14
Date

JAN 5 - 2015

State of Illinois)
)SS
County of St. Clair)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

EDDIE ANDREWS
Employee/Petitioner

v.

Case# 13-WC-24044
07-WC-51356

AGENCY FOR COMMUNITY TRANSIT
Employer/Respondent

15IWCC0775

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that since 2009 he has worked for Agency for Community Transit driving a bus, and he testified that the steering wheel for these buses actually comes up from the floor and is flat in front of the driver. The steering wheel is at least twice the size of a regular car steering wheel. Petitioner initially worked approximately 30 hours per week during the first year and a half to two years at ACT, but after that has worked approximately 25 hours per week.

Prior to working for ACT, Petitioner worked from Cerro Copper from 1991 through 2007. He typically worked 50 to 70 hours a week doing various jobs that involved the use of many hand tools including hacksaws, jackhammers, hammers, grinders, nail guns, cleaning tools, and reamers which involved constantly working your wrist. This involved a lot of twisting, turning, tugging, and pulling.

What Petitioner did mainly depended on what job he was assigned to. Petitioner was mainly a laborer, but he had a lot of different jobs. In addition to using hand tools, he also capped and packed copper to put on skids, and worked on machines that required a lot of hand motion. Petitioner was also required to put copper in a vice, oil them, and then plug them to put into a machine to make them a different size. Petitioner also worked on a redraw job that entailed lifting railroad ties, sliding them across a floor, cutting wood with saws, and using a nail gun to set up a trailer to copper could be transported.

The last job Petitioner did before he stopped working for Cerro Copper as the ANM machine. This required a lot of twisting with the wrist, a lot of turning, a lot of pulling and plugging, a lot of hammering, and a lot of lifting heavy weights. This is the job he did in the last two to three years working for Cerro Copper. During the last year he was employed at Cerro, he was laid off sporadically, and was ultimately laid off permanently in August of 2007. Petitioner noticed that while working for Cerro Copper, his hands and wrists would ache. He first noticed this aching in the last couple of years of employment with Cerro, although he did not know what it was.

After Petitioner was laid off, he want to school for heating and cooling. This was a 14 month course, four days a week, four hours a day. This schooling consisted mainly of writing, a lot of videos, and in-class work. It also involved approximately two hours of hands-on work. This involved watching the instructor do a certain task, watch the other class members do the task, and then Petitioner would do the task. Petitioner testified that

only 15-20 minutes of his school day involved him personally doing hands-on work. He testified that during this time he was in school his upper extremities did not hurt as much.

After he was laid off from Cerro Copper, Petitioner went to his family doctor, Dr. Eckert to get a check-up because his insurance was expiring, and that is when he had a test for carpal tunnel using a Neurometrix. This was done in August of 2007. (PX 1) The test results were abnormal, and the findings were of unclear significance.

Petitioner was later referred to Dr. Glogovac by his family doctor, and Petitioner was also sent to Midwest Occupational Medicine by Cerro Copper. (PX 2, PX 3) Dr. Glogovac stated that Petitioner had what appeared to be an aberrant form of carpal tunnel, and Dr. Glogovac recommended that Petitioner wear night splints. (PX 2) After seeing Dr. Glogovac, Petitioner was sent to Midwest Occupational Medicine. (PX 3) The doctor at Midwest Occupational saw Petitioner on a couple of occasions, and the doctor noted that it was still unclear exactly what condition Petitioner was suffering from. It was also noted that Petitioner was not even sure what was causing his hand and wrist problems or whether it was related to his work at Cerro. (PX 3)

Prior to being seen by Dr. Glogovac and Midwest Occupational, Petitioner was sent to Dr. VanRyn. Dr. VanRyn issued a report dated January 7, 2008. In that report, Dr. VanRyn outlined Petitioner's job duties, specifically the ANM machine Petitioner referred to at trial. (PX 15) Dr. VanRyn noted that Petitioner's symptoms were the worst in the last couple years of working at Cerro Copper, which Petitioner also testified to at trial. Further, Dr. VanRyn indicated in his note that Petitioner said his pain got better after he stopped working at Cerro. (PX 15) Again, Petitioner testified in accordance with this a trial. Ultimately, Dr. VanRyn diagnosed Petitioner with a scapholunate instability, and opined that Petitioner's condition was related to his work at Cerro Copper. (PX 15)

Petitioner was also sent to Dr. Rotman for an IME requested by Respondent, Cerro Copper. Dr. Rotman opined that Petitioner did not have scapholunate instability, he did not have carpal tunnel, and Dr. Rotman stated Petitioner did not need any further medical treatment. Dr. Rotman also testified through deposition. Of note, Dr. Rotman indicated he never saw the nerve conduction that was done at Christian Hospital.

Just before Petitioner started working for the Agency for Community Transit, Petitioner presented to his new family doctor, Dr. Hillard Scott, with continued complaints of problems with his wrists. (PX 4) Dr. Hillard Scott referred Petitioner for a nerve conduction study, which was done at Christian Hospital on August 3, 2009. (PX 5) This test showed bilateral median and ulnar neuropathies at the wrist. Petitioner started working for ACT shortly after this test was performed. Petitioner testified that his condition became worse after he started driving a bus. His pain returned and he also began having pain going up his arms. Over time it got worse and worse.

Petitioner testified that he did not have any problems with his elbows until he started working for ACT, and that after he started working for ACT he would have to shake out his hands to try and get some relief while he was driving. This was something he never had to do while working at Cerro Copper. After Petitioner had been working for ACT for some time, he presented to Dr. Beatty. Dr. Beatty opined that Petitioner had carpal tunnel syndrome, and recommended a repeat nerve conduction study. He testified through a deposition that the cause of Petitioner's carpal tunnel was Petitioner's work at Cerro Copper. He also testified that he was not aware of any other risk factors the Petitioner had that would cause carpal tunnel.

On June 3, 2013, Petitioner presented to Dr. Mall with continued complaints of problems with his hands and wrists. Dr. Mall noted the Petitioner's history of work at Cerro Copper, and also noted that Petitioner was having problems with his hands going numb while driving. Dr. Mall diagnosed Petitioner with carpal tunnel syndrome, and possible cubital tunnel syndrome, and Dr. Mall recommended a new nerve conduction study.

The nerve conduction study was done on June 14, 2013, and it showed moderate to severe bilateral sensory motor nerve neuropathies across the carpal tunnels. It also showed moderate ulnar neuropathy across the right elbow and mild ulnar neuropathy across the left elbow. Following his review of the nerve conduction study, Dr. Mall diagnosed Petitioner with bilateral carpal and cubital tunnel, and Dr. Mall recommended surgery. Dr. Mall later testified through deposition that the work Petitioner did at Cerro Copper was a factor in Petitioner's current condition, and Dr. Mall also testified that the Petitioner's work at ACT at least aggravated Petitioner's condition, which led to the need for the surgery being recommended by Dr. Mall.

Respondent, ACT, obtained a records review report from Dr. Crandall dated December 3, 2013, and Dr. Crandall opined that Petitioner did have carpal and cubital tunnel, however, Dr. Crandall stated the conditions and need for surgery were related to Petitioner's work with Cerro Copper, and not related to Petitioner's work with ACT. Dr. Crandall stated that driving a bus was not hand intensive.

Petitioner underwent surgery on his right upper extremity on May 13, 2014, and his left upper extremity on July 3, 2014. Following the first surgery, Dr. Mall referred Petitioner to ProRehab for right upper extremity therapy. The Petitioner testified that he was off work a couple of weeks after each surgery, and that after the surgeries he feels much better. He testified that he doesn't have to shake out his hands while driving anymore.

On cross-examination, Petitioner agreed that he was periodically laid off in 2007 before being laid off permanently. Petitioner reiterated that the pain in his hands started in the last two or three years working for Cerro Copper, and when he first went to see the doctor he was not having any pain in his elbows. Petitioner also stated that when he saw Dr. Hillard Scott in 2009, he had not worked for Cerro for over two years.

Regarding the trade school Petitioner went to, he stated it was for a period of 14 months, and he did use hand tools. Petitioner further testified that no doctor before Dr. Mall recommended surgery. After Petitioner started working for ACT is when his hands got worse again, and he started having problems in his elbows. The shaking of the hands out while driving a bus was different than before, too.

On redirect, Petitioner stated that other than the few periods in 2006 and 2007, he was never laid off from Cerro. Petitioner further testified that the last couple of years at Cerro where his pain got worse was when he was working on the ANM machine. He also clarified that the only time he used hand tools in trade school was during the lab part, which was a very small part of his day.

On further cross-examination, Petitioner again stated he did not have any pain in his elbows while working at Cerro. Petitioner still works for ACT, and the amount of hours he works varies depending on bids. Petitioner could not recall the first conversation he had with Dr. Mall, and whether Petitioner thought the bus driving was causing problems in his elbows.

Petitioner testified that outside his work he watches TV, goes out to dinner, and doesn't do any sports or bowling. Petitioner also has a resale shop where he occasionally rings people out, but he has his sons do the heavy work. Most of the time Petitioner is driving a bus, so the shop is run by his sons, and he sometimes mows the lawn and shovels snow.

On redirect, Petitioner again testified that his elbow problems started when he was working for ACT. He also testified that his hands didn't hurt as much after he stopped working for Cerro and before he started working for ACT. Petitioner stated that the resale shop is mostly run by his wife and kids. Petitioner again confirmed that surgery was not recommended prior to him seeing Dr. Mall.

Respondent, Cerro Copper, called Joseph Grana, the manufacturing support manager, as a witness at trial. He testified that he first received the Application for Adjustment of Claim in this in early to mid November.

Respondent, ACT called Rhonda Webel as a witness at trial. She is the Human Resources Manager for ACT. She confirmed she received Petitioner's Application for Adjustment of Claim on July 18th.

CONCLUSIONS OF LAW

1. The Arbitrator finds Petitioner suffered repetitive trauma injuries to his bilateral hands and arms arising out of and in the course of his employment with Agency for Community Transit, with a manifestation date of June 14, 2013. Petitioner testified regarding his job duties while working for Agency Community Transit. Petitioner has worked for ACT since 2009, and his job duties have always consisted of driving a bus. When he first started, he was working approximately 30 hours a week, and he did this for approximately one and a half to two years. Since that time, he was worked approximately 25 hours per week.

Petitioner testified that the steering wheel for the bus is twice as large as a regular car steering wheel, and it comes up from the floor of the bus. The way the Petitioner is seated while driving basically requires Petitioner to lean over the wheel when gripping it, putting pressure on his wrists, elbows, and upper extremities in order to turn the wheel. The Petitioner stated that after he stopped working for Cerro Copper, his condition got better, but after he started working for ACT, his condition again got worse, and he also started having problems into his elbows, which he did not have before. He also had to shake out his hands while driving the bus, which he did not have to do before.

Based on the medical records in evidence, and the Petitioner's testimony, the Petitioner's condition got progressively worse while working for ACT, which led to the need for surgery. The Arbitrator therefore finds the opinions of Dr. Mall more credible than those of Dr. Crandall, and the opinions of Dr. Mall, along with the Petitioner's testimony show that at the very least Petitioner's condition was aggravated by the work Petitioner does while working for ACT.

2. Given a manifestation date June 14, 2013, the Arbitrator finds notice was proper in this case. Petitioner's Application for Adjustment of Claim was mailed to Respondent on July 16, 2013, and filed with the Commission on July 25, 2013. Further, Respondent's witness, Rhonda Webel, testified that she received the Application for Adjustment of Claim on July 18, 2013. The day the Application was sent to Respondent, the day it was filed with the Commission, and the day it was received by the Respondent are all within 45 days of the injury pursuant to Section 6(c) of the Act.

3. For the reasons enumerated above, the Arbitrator finds a causal connection between Petitioner's accident of June 14, 2013, and his current condition of ill-being.

4. For the reasons enumerated above, the Arbitrator finds Respondent liable for the medical treatment and accompanying medical bills contained in Petitioner's Exhibit 15 of Dr. Mall/Regeneration Orthopedics, NEI of St. Louis, Mercy Imaging, Kansas Brace System, Timberlake Surgery Center, Premier Anesthesia, KS Medical, Injured Workers Pharmacy, and ProRehab. This treatment and the corresponding bills were both reasonable and necessary. Respondent is not liable for any other medical bills contained in Petitioner's Exhibit 15.

5. Respondent is liable for temporary total disability benefits of $319.00 a week from May 13, 2014 through June 2, 2014, and July 3, 2014 through July 21, 2014, representing 5 and 3/7ths weeks, as provided in Section 8(b) of the Act.

6. The Arbitrator finds that Petitioner suffered 13% loss of the Right Arm and 12% loss of the Left Arm. Further, after taking into account Respondent's credit of 8.5% of right hand and 6.5 % of the left hand for claim

07WC51356, the Arbitrator finds Petitioner suffered 6.5% (15% minus 8.5% credit) loss of the Right Hand and 6% (12.5% minus 6% credit) loss of the Left Hand.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDDIE ANDREWS,

Petitioner,

vs. NO: 07 WC 51356

CERRO COPPER,

15IWCC0776

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, causal connection, notice, manifestation date, and permanent partial disability (PPD) and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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 modifies the Decision of the Arbitrator and finds Petitioner is entitled to temporary total disability (TTD) benefits from May 13, 2014 through June 2, 2014, and July 3, 2014 through July 21, 2014, representing 5-3/7 weeks. All else is affirmed and adopted.

This matter was consolidated at trial with case 13 WC 24044 and two separate Decisions have been issued. The Commission has reversed the Decision of the Arbitrator in case 13 WC 24044 finding Petitioner failed to prove a repetitive trauma injury arising out of and in the course of his employment with Agency for Community Transit.

The Petitioner underwent right carpal and cubital tunnel release on May 13, 2014 and left carpal and cubital tunnel release on July 3, 2014. The Commission adopts the Arbitrator's Decision finding Petitioner's bilateral carpal tunnel syndrome arose out of and in the course of

his employment with Respondent, Cerro Copper. Consequently, the Commission finds that Respondent, Cerro Copper, is liable for TTD benefits from May 13, 2014 through June 2, 2014, and July 3, 2014 through July 21, 2014, representing the period during which Mr. Andrews was temporarily and totally disabled from work.

The Commission notes that Respondent, Cerro Copper, is liable for the TTD benefits only and not the surgery bills as Dr. Mall exceeded Petitioner's choice of two physicians. In that respect, the Arbitrator's award of medical expenses is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 5, 2015 is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $472.14 per week for a period of 5-3/7 weeks, May 13, 2014 through June 2, 2014, and July 3, 2014 through July 21, 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 $424.93 per week for a period of 30.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 8.5 percent loss of use of the right hand and 6.5 percent loss of use of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $3,562.40 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.

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 $19,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 22 2015

MJB/tdm
O: 8-24-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANDREWS, EDDIE
Employee/Petitioner

Case# **07WC051356**

13WC024044

CERRO COPPER
Employer/Respondent

15IWCC0776

On 1/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1239 KOLKER LAW OFFICES
DANIEL G BROOMBAUGH
9423 W MAIN ST
BELLEVILLE, IL 62223

0507 RUSIN & MACIOROWSKI LTD
TED POWERS
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

☐ 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

Eddie Andrews
Employee/Petitioner

v.

Cerro Copper
Employer/Respondent

Case # 07 WC 51356

Consolidated cases: 13 WC 24044

15IWCC0776

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lee**, Arbitrator of the Commission, in the city of **Belleville, Illinois**, on **September 29, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **Two Choices of Physicians, 8(j) Credit**

FINDINGS

On **1/07/08**, 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 $**18,573.58**; the average weekly wage was $**884.45**.

On the date of accident, Petitioner was **41** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services contained in Petitioner's Exhibit 15 of Dr. Eckert/Chambers Medical, Dr. Glogovac, Midwest Occupational, Dr. Hillard Scott, Christian Hospital, and St. Louis Neurological Institute, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $424.93/week for 30.75 weeks, because the injuries sustained caused the 8.5% loss of the Right Hand and 6.5% loss of the Left Hand, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

12/12/14
Date

JAN 5 - 2015

State of Illinois)
)SS
County of St. Clair)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

EDDIE ANDREWS
Employee/Petitioner

v.

Case# 07-WC-51356
13-WC-24044

CERRO COPPER
Employer/Respondent

15IWCC0176

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that since 2009 he has worked for Agency for Community Transit driving a bus, and he testified that the steering wheel for these buses actually comes up from the floor and is flat in front of the driver. The steering wheel is at least twice the size of a regular car steering wheel. Petitioner initially worked approximately 30 hours per week during the first year and a half to two years at ACT, but after that has worked approximately 25 hours per week.

Prior to working for ACT, Petitioner worked from Cerro Copper from 1991 through 2007. He typically worked 50 to 70 hours a week doing various jobs that involved the use of many hand tools including hacksaws, jackhammers, hammers, grinders, nail guns, cleaning tools, and reamers which involved constantly working your wrist. This involved a lot of twisting, turning, tugging, and pulling.

What Petitioner did mainly depended on what job he was assigned to. Petitioner was mainly a laborer, but he had a lot of different jobs. In addition to using hand tools, he also capped and packed copper to put on skids, and worked on machines that required a lot of hand motion. Petitioner was also required to put copper in a vice, oil them, and then plug them to put into a machine to make them a different size. Petitioner also worked on a redraw job that entailed lifting railroad ties, sliding them across a floor, cutting wood with saws, and using a nail gun to set up a trailer to copper could be transported.

The last job Petitioner did before he stopped working for Cerro Copper as the ANM machine. This required a lot of twisting with the wrist, a lot of turning, a lot of pulling and plugging, a lot of hammering, and a lot of lifting heavy weights. This is the job he did in the last two to three years working for Cerro Copper. During the last year he was employed at Cerro, he was laid off sporadically, and was ultimately laid off permanently in August of 2007. Petitioner noticed that while working for Cerro Copper, his hands and wrists would ache. He first noticed this aching in the last couple of years of employment with Cerro, although he did not know what it was.

After Petitioner was laid off, he want to school for heating and cooling. This was a 14 month course, four days a week, four hours a day. This schooling consisted mainly of writing, a lot of videos, and in-class work. It also involved approximately two hours of hands-on work. This involved watching the instructor do a certain task, watch the other class members do the task, and then Petitioner would do the task. Petitioner testified that

only 15-20 minutes of his school day involved him personally doing hands-on work. He testified that during this time he was in school his upper extremities did not hurt as much.

After he was laid off from Cerro Copper, Petitioner went to his family doctor, Dr. Eckert to get a check-up because his insurance was expiring, and that is when he had a test for carpal tunnel using a Neurometrix. This was done in August of 2007. (PX 1) The test results were abnormal, and the findings were of unclear significance.

Petitioner was later referred to Dr. Glogovac by his family doctor, and Petitioner was also sent to Midwest Occupational Medicine by Cerro Copper. (PX 2, PX 3) Dr. Glogovac stated that Petitioner had what appeared to be an aberrant form of carpal tunnel, and Dr. Glogovac recommended that Petitioner wear night splints. (PX 2) After seeing Dr. Glogovac, Petitioner was sent to Midwest Occupational Medicine. (PX 3) The doctor at Midwest Occupational saw Petitioner on a couple of occasions, and the doctor noted that it was still unclear exactly what condition Petitioner was suffering from. It was also noted that Petitioner was not even sure what was causing his hand and wrist problems or whether it was related to his work at Cerro. (PX 3)

Prior to being seen by Dr. Glogovac and Midwest Occupational, Petitioner was sent to Dr. VanRyn. Dr. VanRyn issued a report dated January 7, 2008. In that report, Dr. VanRyn outlined Petitioner's job duties, specifically the ANM machine Petitioner referred to at trial. (PX 15) Dr. VanRyn noted that Petitioner's symptoms were the worst in the last couple years of working at Cerro Copper, which Petitioner also testified to at trial. Further, Dr. VanRyn indicated in his note that Petitioner said his pain got better after he stopped working at Cerro. (PX 15) Again, Petitioner testified in accordance with this a trial. Ultimately, Dr. VanRyn diagnosed Petitioner with a scapholunate instability, and opined that Petitioner's condition was related to his work at Cerro Copper. (PX 15)

Petitioner was also sent to Dr. Rotman for an IME requested by Respondent, Cerro Copper. Dr. Rotman opined that Petitioner did not have scapholunate instability, he did not have carpal tunnel, and Dr. Rotman stated Petitioner did not need any further medical treatment. Dr. Rotman also testified through deposition. Of note, Dr. Rotman indicated he never saw the nerve conduction that was done at Christian Hospital.

Just before Petitioner started working for the Agency for Community Transit, Petitioner presented to his new family doctor, Dr. Hillard Scott, with continued complaints of problems with his wrists. (PX 4) Dr. Hillard Scott referred Petitioner for a nerve conduction study, which was done at Christian Hospital on August 3, 2009. (PX 5) This test showed bilateral median and ulnar neuropathies at the wrist. Petitioner started working for ACT shortly after this test was performed. Petitioner testified that his condition became worse after he started driving a bus. His pain returned and he also began having pain going up his arms. Over time it got worse and worse.

Petitioner testified that he did not have any problems with his elbows until he started working for ACT, and that after he started working for ACT he would have to shake out his hands to try and get some relief while he was driving. This was something he never had to do while working at Cerro Copper. After Petitioner had been working for ACT for some time, he presented to Dr. Beatty. Dr. Beatty opined that Petitioner had carpal tunnel syndrome, and recommended a repeat nerve conduction study. He testified through a deposition that the cause of Petitioner's carpal tunnel was Petitioner's work at Cerro Copper. He also testified that he was not aware of any other risk factors the Petitioner had that would cause carpal tunnel.

On June 3, 2013, Petitioner presented to Dr. Mall with continued complaints of problems with his hands and wrists. Dr. Mall noted the Petitioner's history of work at Cerro Copper, and also noted that Petitioner was having problems with his hands going numb while driving. Dr. Mall diagnosed Petitioner with carpal tunnel syndrome, and possible cubital tunnel syndrome, and Dr. Mall recommended a new nerve conduction study.

15IWCC0976

The nerve conduction study was done on June 14, 2013, and it showed moderate to severe bilateral sensory motor nerve neuropathies across the carpal tunnels. It also showed moderate ulnar neuropathy across the right elbow and mild ulnar neuropathy across the left elbow. Following his review of the nerve conduction study, Dr. Mall diagnosed Petitioner with bilateral carpal and cubital tunnel, and Dr. Mall recommended surgery. Dr. Mall later testified through deposition that the work Petitioner did at Cerro Copper was a factor in Petitioner's current condition, and Dr. Mall also testified that the Petitioner's work at ACT at least aggravated Petitioner's condition, which led to the need for the surgery being recommended by Dr. Mall.

Respondent, ACT, obtained a records review report from Dr. Crandall dated December 3, 2013, and Dr. Crandall opined that Petitioner did have carpal and cubital tunnel, however, Dr. Crandall stated the conditions and need for surgery were related to Petitioner's work with Cerro Copper, and not related to Petitioner's work with ACT. Dr. Crandall stated that driving a bus was not hand intensive.

Petitioner underwent surgery on his right upper extremity on May 13, 2014, and his left upper extremity on July 3, 2014. Following the first surgery, Dr. Mall referred Petitioner to ProRehab for right upper extremity therapy. The Petitioner testified that he was off work a couple of weeks after each surgery, and that after the surgeries he feels much better. He testified that he doesn't have to shake out his hands while driving anymore.

On cross-examination, Petitioner agreed that he was periodically laid off in 2007 before being laid off permanently. Petitioner reiterated that the pain in his hands started in the last two or three years working for Cerro Copper, and when he first went to see the doctor he was not having any pain in his elbows. Petitioner also stated that when he saw Dr. Hillard Scott in 2009, he had not worked for Cerro for over two years.

Regarding the trade school Petitioner went to, he stated it was for a period of 14 months, and he did use hand tools. Petitioner further testified that no doctor before Dr. Mall recommended surgery. After Petitioner started working for ACT is when his hands got worse again, and he started having problems in his elbows. The shaking of the hands out while driving a bus was different than before, too.

On redirect, Petitioner stated that other than the few periods in 2006 and 2007, he was never laid off from Cerro. Petitioner further testified that the last couple of years at Cerro where his pain got worse was when he was working on the ANM machine. He also clarified that the only time he used hand tools in trade school was during the lab part, which was a very small part of his day.

On further cross-examination, Petitioner again stated he did not have any pain in his elbows while working at Cerro. Petitioner still works for ACT, and the amount of hours he works varies depending on bids. Petitioner could not recall the first conversation he had with Dr. Mall, and whether Petitioner thought the bus driving was causing problems in his elbows.

Petitioner testified that outside his work he watches TV, goes out to dinner, and doesn't do any sports or bowling. Petitioner also has a resale shop where he occasionally rings people out, but he has his sons do the heavy work. Most of the time Petitioner is driving a bus, so the shop is run by his sons, and he sometimes mows the lawn and shovels snow.

On redirect, Petitioner again testified that his elbow problems started when he was working for ACT. He also testified that his hands didn't hurt as much after he stopped working for Cerro and before he started working for ACT. Petitioner stated that the resale shop is mostly run by his wife and kids. Petitioner again confirmed that surgery was not recommended prior to him seeing Dr. Mall.

Respondent, Cerro Copper, called Joseph Grana, the manufacturing support manager, as a witness at trial. He testified that he first received the Application for Adjustment of Claim in this in early to mid November.

Respondent, ACT called Rhonda Webel as a witness at trial. She is the Human Resources Manager for ACT. She confirmed she received Petitioner's Application for Adjustment of Claim on July 18th.

CONCLUSIONS OF LAW

1. The Arbitrator finds Petitioner suffered repetitive trauma injuries to his bilateral hands arising out of and in the course of his employment with Cerro Copper, with a manifestation date of January 7, 2008. Petitioner testified in detail regarding his job duties while working for Cerro Copper, and he gave a consistent description of these duties to all the doctors he saw, and these duties are noted in Petitioner's medical records. These job duties included using various hand tools, lifting and working with copper, and operating machines. Petitioner performed these various job duties over a span of 15 years from 1991 through 2007, consistently working over 40 hours a week. While there was some disagreement among the various doctors in this case regarding the correct diagnosis of Petitioner's condition, the Arbitrator notes that Dr. VanRyn, Dr. Beatty, Dr. Mall, and Dr. Crandall all opined that Petitioner's job duties at Cerro Copper caused Petitioner's symptoms. The Arbitrator finds these opinions more reliable than those of Dr. Rotman, Respondent's IME doctor.

Regarding the manifestation date, as noted above, there was initially disagreement regarding the diagnosis of Petitioner's condition. A neurometrix test was initially done on Petitioner's upper extremities, and it was read as abnormal indicating possible carpal tunnel, however, the first doctor to see Petitioner after this test, Dr. VanRyn, diagnosed Petitioner with scapholunate instability. Dr. Glogovac later diagnosed Petitioner with an "aberrant" form of carpal tunnel, however the doctor at Midwest Occupational later indicated Petitioner's diagnosis was "unclear."

Dr. Rotman, Respondent's IME doctor, later opined that Petitioner did not have either carpal tunnel or scapholunate instability, and that Petitioner did not suffer from a work-related condition. Petitioner was not definitively diagnosed with carpal tunnel syndrome until he saw Dr. Beatty in 2010, after he had undergone a nerve conduction study at Christian Hospital in 2009. Further, the first doctor to opine that Petitioner had work-related carpal tunnel was Dr. Beatty in his deposition taken April 5, 2011.

In repetitive trauma cases, the injury date is the date when the injury manifests itself, which is "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Durand v. Industrial Commission*, 308 Ill. Dec. 715, 723 (2007). "Setting this so-called manifestation date is a fact determination..." *Durand*, at 722.

In this case, the first indication that Petitioner's condition was related to his employment was when Petitioner saw Dr. VanRyn on January 7, 2008. Prior to this, Petitioner had only seen his family physician for hand complaints, and the neurometrix test was performed, however, Dr. Mall and Dr. Crandall both testified this test is not very reliable. Further, the Petitioner testified that when Petitioner saw Dr. VanRyn, the doctor's diagnosis was scapholunate instability, and not carpal tunnel, and the first doctor to say that Petitioner had work-related carpal tunnel was Dr. Beatty in his deposition.

While Petitioner's diagnosis of work-related carpal tunnel was not made until 2010, it would have been plainly apparent to a reasonable person, i.e. the Petitioner, that he had a work related condition after seeing Dr. VanRyn. Therefore, at the very earliest, Petitioner's manifestation date is January 7, 2008.

2. Given a manifestation date of January 7, 2008, the Arbitrator finds notice was proper in this case. Petitioner's Application for Adjustment of Claim was filed with the Commission on November 15, 2007, prior to Petitioner's manifestation date. Petitioner therefore gave Respondent notice of an injury within 45 days of an injury pursuant to Section 6(c) of the Act.

3. For the reasons enumerated above, the Arbitrator finds a causal connection between Petitioner's accident of January 7, 2008 and his condition of ill-being, namely to the extent Petitioner suffered un-operated bilateral carpal tunnel syndrome.

4. Based on Respondent's Exhibit 15, which is a copy of Petitioner's wage statement, the Arbitrator finds that Petitioner had $12,747.73 in earnings, which corresponds to an average weekly wage of $708.21.

5. For the reasons enumerated above, the Arbitrator finds Respondent liable for the medical treatment and accompanying medical bills contained in Petitioner's Exhibit 15 of Dr. Eckert/Chambers Medical, Dr. Glogovac, Midwest Occupational, Dr. Hillard Scott, Christian Hospital, and St. Louis Neurological Institute. This treatment and the corresponding bills were both reasonable and necessary. Respondent is not liable for any other medical bills, as Petitioner exceeded his two choices of doctors.

6. For reasons further explained in the companion case of 13-WC-24044, the Arbitrator finds Petitioner is not entitled to any TTD benefits for this injury, as Petitioner suffered disability only to the extent of un-operated carpal tunnel syndrome and scapholunate instability.

7. The Arbitrator finds that Petitioner suffered the loss of 8.5% of the Right Hand and 6.5% loss of the Left Hand, as provided in Section 8(e) of the Act.

8. No evidence was presented regarding a credit due to Respondent for any benefits paid, therefore Respondent is not entitled to any credit.

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

SUE DANIELS,

Petitioner,

vs. NO: 13 WC 16880

15IWCC0777

CONTINENTAL TIRE NORTH AMERICA, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Sue Daniels established that she sustained an accident arising out of and in the course of her employment on February 3, 2013.

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. Based on the evidence, the Commission finds that Petitioner sustained a work-related injury on February 3, 2013. As the result of the accident, the Petitioner is entitled to TTD benefits from September 5, 2013 through November 13, 2013, representing 9-6/7 weeks. The Petitioner is also entitled to all reasonable and necessary medical expenses. The Commission finds Ms. Daniels sustained 7.5 percent loss of use of the leg pursuant to Section 8(e) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. According to the Application for Adjustment of Claim filed May 22, 2013, Petitioner was a 38 year old, married female with no dependants under the age of 18. Petitioner alleged injury to her "left lower extremity and other areas" while at work on February 3, 2013.

2. Sue Daniels had been employed by Continental Tire for 3 months at the time of her accident. On February 3, 2013, Ms. Daniels was working as a tire builder. She had to climb onto the guard rail to reach the tire tread as she was too short to reach the tread from the ground. Petitioner testified that she came down from the rail and turned back to her machine when her right leg went out from underneath her causing her to fall onto her left leg. T.16. She testified that both feet were on the ground at the time of the fall. T.45.

3. At the time of the accident, Petitioner was working in the tire builder training program. She would take the tread, put it on a roller, apply the cap strip, and then kick a pedal. The process took 45 seconds to complete. T.15. There are no mats on the floor and the concrete floor was very slick. T.21. There was no snow or water that was tracked into the building, and her shoes were dry and tied. T.51. She did not have anything in her hand nor was she reaching for anything when she fell. T.52. She was hurrying to get her job done. *Id.*

4. Petitioner testified that she was not sure what caused her to fall, but noticed there was "benny" (benzene) on the floor. She was not sure if she knocked it over as she came down from the guardrail, but thought that was what caused her to slip. T.17. Petitioner testified that it was possible the "benny" was not on the floor prior to her fall. T.50. "Benny" is an acetone that is applied to the tread so that it sticks to the drum. *Id.* Ms. Daniels noticed that she was wet after her fall and her skin started to burn. *Id.* The nurse gave her ointment a few days later for her chemical burn. T.53. She did not tell anyone at the hospital that she had a chemical burn as the burn did not form for a few days. *Id.*

5. Mr. Clay McDaniel is the plant safety coordinator and previously worked as a tire builder. T.59. He stated that the pace is constant but not hectic. They build close to 40 tires an hour. He stated that trainees do not have to worry about rates. T.62. He did not know how many tires Petitioner made per hour. T.75. He stated that the floors were not slick and are similar to any big box store, and are commercial grade finish. T.66. The Petitioner never reported to him that the floors were slick. T.69. He did not see any over spray from the machines. T.68. He was not working at the time of the fall and investigated the accident the next day. T.73. His investigation found no wet substance on the floor. There was nothing to fix or clean after the accident. T.71.

6. Mr. Jared Dowdy is the fire safety officer. He was aware of the incident and investigated the accident about 45 minutes after it occurred. His investigation concluded there were no objects on the floor, no slip hazards, or anything. It was normal. T.78. The floor was three years old and in a very pristine condition. He stated Ms. Daniels indicated there were no

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objects or hazards that caused her to fall. T.79. She never mentioned that she burned herself from "benny." *Id.*

7. The following reports were completed following the accident:

   a. Theresa Payne, RN, completed a First Report of Injury on February 3, 2013. Per the report, Petitioner indicated that she was applying chemical to the tread. As she turned back towards the machine, she slipped on the concrete which caused her leg to collapse. Her left knee struck the floor. She had a left knee contusion. RX.4. Petitioner told the company nurse that she took some Aleve prior to her shift due to some left knee pain.

   b. According to the Health Services "MOM" report completed by K. Merkel, LPN on February 3, 2013, the cause of Petitioner's fall was "unknown." The report indicated that Petitioner slipped coming down off a ladder in "206" and landed with her left knee underneath. RX.5. Petitioner testified that she did not tell Health Services that she did not know how she fell; rather, she stated that she did not know exactly how she fell. T.42. She did not tell anyone that she fell while stepping off a ladder. T.43.

   c. According to the "Claimant's Statement of Events" completed by Ms. Daniels on February 3, 2013, Petitioner indicated that she slipped on concrete. She reported that she started to turn to move towards a machine when her left leg slid and went under her right leg. She indicated that she had a prior ACL replacement and partial removal of torn meniscus. RX.7.

   d. According to the Incident Report completed by Jared Dowdy on February 3, 2013, Petitioner reported that she was applying chemical to the tread and, when she turned toward the machine, she slipped on the concrete causing her leg to collapse. There was no substance on the floor. It was listed as an "unknown source cause." There was no unsafe condition. RX.8. Petitioner testified the report was not accurate as she told them there was "benny" on the floor. T.47.

   e. According to the witness statement from Michelle Duffy dated March 11, 2013, Ms. Duffy reported that her back was towards Ms. Daniels when she heard a "smack" noise. She turned and saw the Petitioner on the ground. The Petitioner advised that her knee had given out from underneath her and she was in a lot of pain. RX.9. Petitioner testified that she did not tell her co-worker that her knee gave out. T.50.

8. Following the accident, Petitioner presented to St. Mary's Good Samaritan. According to the emergency nursing record from 8:30 a.m., Petitioner "fell on 'wet' floor." She was unable to work. According to the emergency physician record from 9:14 a.m., the "lose

balance" part of the record was circled and it was noted Petitioner "slipped on snow." Petitioner was diagnosed with a knee contusion and taken off work. Petitioner testified that she did not tell the doctor that she slipped and fell on the snow. T.43. According to an e-mail from "MTV Nurse" to multiple employees of the Continental Tire, Petitioner slipped coming down off a ladder in 206 and landed with left knee underneath body. The e-mail was sent at 12:14 p.m. Edema was present and she was sent to the ER. PX.2.

9. Petitioner sustained a prior non work-related left ACL tear and meniscus injury on July 4, 2012 when she fell on a pool deck. A left knee MRI performed on July 19, 2012 revealed a complete disruption of the ACL. There was also a stretch injury in the medial and lateral collateral ligaments, but no frank tear was identified. The medial meniscus showed thinning and high signal internally with no frank tears seen. Dr. Davis performed left arthroscopic anterior cruciate ligament reconstruction with Achilles tendon allograft and left knee arthroscopic partial medial meniscectomy on August 14, 2012. RX.3. On November 5, 2012, Petitioner reported to her physical therapist that a Great Dane ran into her left knee and she was now doing worse.

10. On December 31, 2012, Dr. Davis noted Petitioner was doing very well. She had returned to work as her short term disability had been denied. There was no effusion and she had full range of motion with a stable Lachman and a negative pivot shift. She was prescribed a functional ACL brace to wear. She could work full-duty without restrictions. RX.3.

11. Per the January 29, 2013 physical therapy record, Ms. Daniels indicated that she had intermittent pain. She had met the goals of strength, range of motion, mobility and function. It was noted that Petitioner had stopped attending physical therapy. The last date of visit was listed as November 29, 2012. RX.3. Petitioner testified that she missed 1 to 2 sessions due to her father's death. T.39.

12. Ms. Daniels subsequently returned to work as a tire builder. Petitioner testified that her left knee was doing pretty good immediately prior to the February 3, 2013 accident. She had a little bit of pain, but nothing that she could not work through. She had no instability issues. T.24.

13. Petitioner testified that she was not wearing her brace at the time of her February 3, 2013 accident as she was told by Continental Tire security that she could not wear it into the building. T.41.

14. Ms. Daniels underwent an MRI of the left knee at Orthopaedic Institute of Southern Illinois on May 20, 2013. The MRI revealed a 3 cm medial meniscus posterior horn oblique tear extending into the posterior body. The tear extended to the inferior articular surface. There was also a grade 2 lateral collateral ligament sprain and small joint effusion. The replaced ACL was intact. PX.2.

15. On May 29, 2013, Dr. Davis of Orthopaedic Institute of Southern Illinois examined the Petitioner. Examination revealed that she lacked terminal 2 to 3 degrees of extension, and flexed back to 120 to 130 degrees. She had a stable Lachman's and some medial greater than lateral joint line tenderness. The assessment was status post ACL reconstruction with a re-injury and a medial meniscus tear. She was to work modified duty and undergo therapy. Dr. Davis was hesitant to recommend surgery since it was a non-displaced medial meniscus tear. PX.2.

16. Dr. Davis performed a left knee arthroscopic partial medial meniscectomy and left knee arthroscopic extensive debridement of the intra articular adhesions and thickened anterior cruciate ligament on September 10, 2013. PX.2.

17. Petitioner was paid short term disability from September 13, 2013 through November 15, 2013. RX.2. Petitioner was returned to regular duty work on November 14, 2013. RX.10.

18. Respondent obtained an AMA rating from Dr. George Paletta of the Orthopedic Center of St. Louis on March 3, 2014. Petitioner had pain in her knee located predominantly in the anterior knee. She had a positive grab and "movie" sign. She had difficulty ascending and descending stairs. She had occasional swelling of the knee and trouble getting the knee fully straight. She had no radiating pain or associated numbness. She had no mechanical symptoms of catching or locking. Dr. Paletta opined that the meniscus tear was consistent with the mechanism of injury and Petitioner was at MMI. The impression was persistent patellofemoral pain in the setting of known patellofemoral chondrosis. Dr. Paletta found that Petitioner had a 3 percent permanent partial disability rating of the lower extremity. RX. 11.

19. Petitioner testified that she returned to work full-duty and was having a lot of trouble trying to climb up on the rails and pushing the racks as it put a lot of stress on her leg. T.27. She worked three days and informed Continental Tire that she was not able to perform her job duties. She went back to the doctor and has not returned to work. *Id.*

20. Ms. Daniels testified that she currently works as a part-time cashier at Casey's. T.28. She can perform her job, but not without a lot of issues. She has to sit and ice her knee after a 5.5 hour shift. T.29. She cannot straighten out her left leg and does not have full range of motion. She has a stabbing pain in the knee. *Id.* Her knee swells when she stands for longer than a half hour. T.28. She can only walk about 15 minutes before she experiences pain. T.31. She cannot walk normally and going up and down stairs is difficult. *Id.* She cannot squat and has issues with it locking, popping, and instability. T.30. She does not take any medication and just does therapy. *Id.*

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

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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).

The Court in *Vill. of Villa Park v. Ill. Workers' Comp. Comm'n,* 2013 IL App (2d) 130038WC, addressed the "arising out of employment" requirement. The Court stated that "an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Sisbro*, 207 Ill. 2d at 204 (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d at 58).

"There are three categories of risk an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 731 N.E.2d 795, 314 Ill. App. 3d 149, 247 Ill. Dec. 22 (2000). A fall caused by a weak knee is a personal risk. *Illinois Consolidated Telephone Company v. .Industrial Comm'n*, 314 Ill. App. 3d 347, 352-53, 732 N.E.2d 49, 247 Ill. Dec. 333 (2000) (Rakowski, J., specially concurring.). Injuries resulting from a fall caused by some personal weakness of the claimant, such as a weak knee, are not compensable under the Act unless the claimant's employment significantly contributes to the injury by placing him in a position of greater risk of falling. *Stapleton v. Industrial Comm'n*, 282 Ill. App. 3d 12, 16, 668 N.E.2d 15, 217 Ill. Dec. 830 (1996). Falling while traversing stairs is a neutral risk, and the injuries resulting therefrom generally do not arise out of employment. *Illinois Consolidated Telephone Company*, 314 Ill. App. at 353. As with personal risks, however, an exception to noncompensability under the Act exists where the requirements of the claimant's employment create a risk to which the general public is not exposed. *Id.* "The increased risk may be qualitative or quantitative, such as where the claimant is exposed to a common risk more frequently than the general public." *Id.*

The Commission finds that the Arbitrator's reliance on the fact that Petitioner had ongoing symptoms from the prior injury, that there was nothing incidental to her employment, and that she could not explain how she fell is not supported by the evidence.

First, the Commission notes that Ms. Daniels did explain how she fell. She explained that she stepped down from the guard rail and turned to her machine when her knee gave out. Her history is largely consistent throughout all the medical records and all the forms. Further, the medical reports indicate that the floor was wet when she slipped.

Second, the Commission finds no support that Petitioner's knee was in a weakened state. While it is true that Ms. Daniels had a prior ACL surgery, it is equally true that she had been released back to work without restriction. The physical therapy record from January 29, 2013 indicated that she had met her goals for strength, range of motion, and stability. The Respondent offered no evidence to rebut this record.

Third, Dr. Davis, on December 31, 2012, returned Ms. Daniels to work and recommended that she wear a functional ACL brace. The Petitioner, however, testified that the Respondent would not allow her to wear the knee brace into the building. The Commission notes that the Respondent did not rebut this assertion, despite calling two witnesses on its behalf. The evidence further demonstrates that the Respondent was aware that Petitioner had to climb the railing in order to perform her job duties and did nothing to prevent Petitioner from having to climb up and down the guardrail.

Fourth, the medical records contradict Respondent's assertion that the floor was dry. While the physician record indicated Petitioner slipped on snow, the nurse's note immediately prior to the physician's record indicated that Petitioner slipped on the wet floor. The reports also indicate that Petitioner was applying a chemical to the tread. The nurse's note and the reports are consistent with Petitioner's testimony that the floor was wet.

Fifth, the Commission finds the testimony of Mr. McDaniel and Mr. Dowdy not persuasive. Neither Mr. McDaniel nor Mr. Dowdy were present at the time of the accident. Mr. McDaniel did not investigate the accident until the next day and Mr. Dowdy did not investigate the accident until 45 minutes after it had occurred. The Commission gives little weight to the investigation performed by Mr. McDaniel and Mr. Dowdy given the lapse of time between the accident and their investigation.

The Commission notes that the Respondent's arguments are clearly refuted by the evidence. Petitioner was not wearing her knee brace at the time of the injury as Respondent would not allow her to wear it at work. While Petitioner may have had set backs during physical therapy, the records reveal she was released back to work full-duty and without restriction. The Respondent also allowed Petitioner to continually climb up and down the guard rail to perform her job duties. Further, the medical record reveals that the floor was wet, a fact which the Respondent ignored completely.

The Commission finds Petitioner established that she sustained an accident arising out of and in the course of her employment and that her condition is causally related to the accident.

The Commission finds Ms. Daniels is entitled to TTD benefits from September 5, 2013 through November 13, 2013, representing 9-6/7 weeks. This was the period she was off work following her surgery. Petitioner is further entitled to all reasonable and necessary medical expenses to the left knee.

According to Section 8.1(b) of the Act, for accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records.

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

The Petitioner testified that she had to leave the Respondent's employ as she could no longer perform her job duties. She now works as a Cashier. She experiences pain and swelling when she stands at work. She lacks full range of motion and has a stabbing pain in her knee. She cannot walk normally and her knee locks up and pops. The Respondent obtained an AMA rating finding Petitioner sustained 3% permanent partial disability. Having reviewed all the evidence, the Commission finds Petitioner is entitled to 7.5% loss of use of the left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 3, 2014 is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $450.11 per week for a period of 9-6/7 weeks, September 5, 2013 through November 13, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $405.10 per week for a period of 16.125 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 7.5% loss of use of the leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses under §8(a) of the Act and subject to the medical fee schedule. Respondent shall have a credit for all amounts paid through its group carrier, but shall indemnify and hold Petitioner harmless from any claims regarding payment of any amount for which it is receiving this credit, pursuant to Section 8(j) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,100.00. 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: OCT 22 2015

Michael J. Brennan

MJB/tdm
O: 8/24/15
052

Thomas J. Tyrrell

Dissent

I respectfully dissent from the decision of the majority. Arbitrator Kane's findings are thorough, well reasoned and grounded in the law. This decision is correct and should be affirmed

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DANIELS, SUE
Employee/Petitioner

Case# **13WC016880**

151WCC0777

CONTIENTAL TIRE NORTH AMERICA INC
Employer/Respondent

On 12/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1312 BEMENT & STUBBLEFIELD PC
GARY BEMENT
PO BOX 23926
BELLEVILLE, IL 62223

0299 KEEFE & DePAULI PC
ANDREW J KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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

Sue Daniels
Employee/Petitioner

v.

Continental Tire North America, Inc.
Employer/Respondent

Case # **13** WC **16880**

Consolidated cases: _____

15IWCC0777

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon Zanotti**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **July 9, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **02/03/13**, 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 $**8,101.96**; the average weekly wage was $**675.16**.

On the date of accident, Petitioner was **38** 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 $**3,685.00** for other benefits, for a total credit of $**3,685.00**.

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

ORDER

Petitioner failed to establish that she sustained an accident arising out of her employment. For reasons outlined in the Memorandum of the Arbitrator, Petitioner's request for benefits is hereby denied.

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

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

David A. Kane
Signature of Arbitrator

December 3, 2014
Date

DEC 3 - 2014

STATE OF ILLINOIS)
)SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SUE DANIELS
Employee/Petitioner

v. Case #: 13 WC 16880

CONTINENTAL TIRE, NORTH AMERICA, INC
Employer/Respondent

15IWCC0777

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

This matter was heard by Arbitrator **Brandon Zanotti, who subsequently left the Commission before issuing a Decision in this matter. A transcript of the evidence and the records introduced at trial were provided to Arbitrator David A. Kane in order to render a Decision.**

Petitioner, 38 years of age, was hired by Respondent as a sorter on April 30, 2012. She worked approximately three months before injuring her left knee at home. She testified that she slipped and twisted her knee while on a pool deck. She came under the care of Dr. J. T. Davis and was taken off work. On August 14, 2012, Petitioner underwent a left knee ACL reconstruction, Achilles tendon allograft, and partial medial meniscectomy. Petitioner was given a brace and ordered to undergo therapy. She received non-occupational disability benefits. A therapy note dated November 2, 2012 reflects Petitioner reporting progression with therapy until a Great Dane ran into her over the weekend and the knee now seemed worse. (RX 3). Petitioner denied the report at trial.

Petitioner reported a "locked knee" in a November 12, 2012 therapy note. Dr. Davis' November 19, 2012 note reflects Petitioner was to continue protective body mechanics, home exercises, medications and progress with activities as tolerated. She was instructed to return in two to three months. Petitioner contacted Dr. Davis on November 21, 2012 requesting a note allowing her off work for an additional two months. As of December 31, 2012, Petitioner reported having some occasional achiness when hyperextending the knee when standing. She also reported that she was required to return to work because her short term disability was denied by Met Life. (RX 3). Petitioner denied the report at trial. Dr. Davis ordered a functional ACL brace for Petitioner to use at work for extra protection and reassurance. Petitioner was instructed to return to Dr. Davis in a couple of months for ongoing care. As of January 4, 2013, an additional month of physical therapy was ordered. A January 29, 2013 therapy note reflects Petitioner was discharged from therapy because she stopped attending for reasons unknown. The therapist documented that Petitioner continued having intermittent pain. (RX 3).

Petitioner returned to work on January 24, 2013 as a passenger tire builder trainee. She testified that her previous job as a sorter was no longer available. It was an easy job. She did not want to work as a passenger tire builder but it was the only position available. Petitioner described what she perceived were the job duties required of a passenger tire builder. Safety Supervisor Clay McDaniel clarified that Petitioner was a trainee and the job requirements differed from that of the actual passenger tire builder position. He testified that employees would train for three to six months and were not required to meet quotas. In his experience, a trainee would only be capable of building 20-25 tires per hour versus building 45 tires per hour as purported by Petitioner. Mr. McDaniel testified that trainees work at a comfortable pace, with ample time to check their surroundings.

Mr. McDaniel described the machine operations in the hall Petitioner worked. He testified the machines were up-to-date and more ergonomic friendly than machines in the old plant. He testified the operation ran more smoothly and less physical labor was required. Mr. McDaniel explained the floor next to Petitioner's machine was pristine concrete without nicks or indentation. He compared the floors to a Sam's Club or Home Depot. He testified there was no heavy foot traffic in the area Petitioner worked. There would be no over-spray from the machines on the floor. Other than Petitioner's claim, he never received a report that the concrete floors were slick or caused an employee to slip. Supervisor Jared Dowdy testified to similar facts.

On February 3, 2013 Petitioner purportedly fell while working in the trainee position. The Form 45 reflects Petitioner reported applying chemical to tread so that it sticks to the drum and as she turned back towards the machine, she slipped on the concrete, causing her leg to collapse and hit her left knee on the floor. (RX 4). Petitioner was taken to Midwest Occupational Medicine following the incident. EMT Copple recorded that Petitioner landed with her left leg falling under her but the cause of the fall was unknown. Petitioner declined pain relievers because she had taken Aleve prior to her shift. Nurse Merkel recorded that Petitioner slipped coming down off a ladder in 206 and landed with left knee underneath body. (RX 5). Petitioner denied the nurse's report at trial.

Petitioner presented to Good Samaritan Hospital following the incident. The staff physician recorded that Petitioner had slipped on snow. (RX 6). Petitioner denied this report at trial.

Petitioner filled out a statement of events following her return from the hospital. She reported slipping on concrete when she started to turn to move towards the machine. She reported it was not a new injury but re-occurrence of an old injury. (RX 7).

An Injury/Illness/Incident Report was completed the same day. The supervisor recorded that Petitioner was building tires when she turned back towards the machine and slipped on the concrete causing her leg to collapse and hitting her knee on the floor. There was no substance on the floor. The report reflects no unsafe action determined, no unsafe condition, and an unknown source cause of the fall. (RX 8). Mr. McDaniel and Mr. Dowdy confirmed that no remedial measures were required following the incident.

Petitioner's co-worker filled out a witness statement dated March 11, 2013. The statement reflects co-worker Ms. Duffy reporting that Petitioner's knee gave out from under her and she came down hard. (RX 9). Ms. Duffy did not actually witness the incident.

At trial, Petitioner testified that she is not certain how she fell. She confirmed that she was not ascending or descending a ledge when she fell. She testified that both feet were on the concrete floor when she fell. She testified her shoes were tied, dry, and she did not recall tripping over anything. She testified that she did not have any work tools in her hand when she fell. She testified that she was not reaching for anything. She testified that she was working at her regular pace, there were no emergencies, and the machines were working properly. She testified that she had ample space to work and there was no traffic in the area. She did not bump into anyone. She testified that there was not any snow or water on the floor. She stated it was possible that she knocked over a "benny pail" when falling, but the "benny pail" was not on the floor and did not cause her to fall. She testified the "benny" caused burns on her legs. There is no documentation of her receiving medical treatment at any facility for the purported burns. She did not make a claim for burn injuries at trial. Petitioner acknowledged that she was not wearing her knee brace at the time of the incident despite her doctor's orders. She testified her employer did not allow her to wear the knee brace, but Mr. Dowdy testified this was not the case. Petitioner confirmed her knee was achy before the shift and she had taken Aleve. (RX 5).

Mr. McDaniel and Mr. Dowdy testified they investigated the incident following Petitioner's report. Through the investigation Mr. McDaniel and Mr. Dowdy confirmed there was no substance on the floor and there was no explanation as to why Petitioner fell. Neither supervisor believed any remedial measures were required. It was noted that Petitioner had recently returned to work from a prior non-occupational injury.

Petitioner underwent an MRI on May 20, 2013 that was interpreted to reveal a possible medial meniscus tear. (PX 2). Dr. Davis noted Petitioner had minimal medial symptoms and did not want to jump into surgery. (PX 2). A course of therapy was ordered. Petitioner underwent therapy at NovaCare through September 2013. (PX 3). Petitioner underwent a left knee arthroscopy on September 10, 2013. The operative report reflects the ACL graft remained intact. A partial medial meniscectomy was performed. (RX 2). Petitioner underwent additional therapy and was released to return to work without restriction on November 14, 2013. (RX 10).

Dr. George Paletta examined Petitioner on March 3, 2014. He believed Petitioner had reached maximum medical improvement from the meniscus injury. He opined Petitioner had an impairment rating of 3% of the lower extremity in accordance with AMA Guidelines. (RX 11).

At trial, Petitioner testified to ongoing complaints regarding her left knee. She now works as a clerk at a gas station.

CONCLUSIONS OF LAW

Issue (C&F): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent and was Petitioner's left knee condition causally related to a work "accident?"

Petitioner did not establish that she sustained an accident arising out her employment.

An injury must arise out of the employment to be covered under workers' compensation. There must be a causal connection between the injury and the employment. *Union Starch v. Industrial Comm'n.,* 56 Ill.2d 272, 307 N.E.2d 118 (1974). The injury must be caused by some risk that is incidental to the employment. *Weis Paper Mill Co. v. Industrial Comm'n.,* 293 Ill. 284, 127 N.E. 732 (1920). A mere coincidence that an injury happened on the employer's premises is not enough to establish that it arose out of the employment. *Orsini v. Industrial Comm'n.,* 117 Ill.2d 38, 509 N.E.2d 1005 (1987). A decision by the Commission cannot be based upon speculation or conjecture. *Deer and Company v. Industrial Comm'n.,* 47 Ill.2d 144, 265 N.E.2d 129 (1970). A claimant must prove "accident" by a preponderance of credible evidence. *IIT v. Industrial Comm'n.,* 68 Ill. 2d 236, 369 N.E.2d 853 (1977).

As here, Petitioner testified that she was not certain how she fell, but acknowledged her left knee was achy before her shift. According to the records, she had not completed recommended treatment following her prior non-occupational left knee injury. She had not been released from Dr. Davis' care. The fact that Petitioner could not explain how she fell and had ongoing symptoms from the prior injury, establishes that she did not prove "accident" by the preponderance of the evidence. A finding of "accident" cannot be based on speculation or conjecture. Clearly, the fall was from an internal or personal origin.

The evidence as noted in the Fact Findings reflects there was nothing incidental to the employment that caused Petitioner to fall. Petitioner conceded that she had no work tools in hand, was not reaching for anything, both feet were on a pristine concrete floor, her shoes were tied, dry and she did not trip on anything. It was merely a coincidence the injury occurred on the employer's premises. As such, the claim must be denied. The Arbitrator further notes the credible testimony of Mr. McDaniel and Mr. Dowdy establishes Petitioner was not exposed to a greater risk than the public. There were no known defects with the floor or the machinery.

There was no substance on the floor when Petitioner fell. Petitioner was working at a regular trainee pace and there were no emergencies. The Arbitrator questions Petitioner's credibility due to the inconsistencies between her testimony and the records.

For the above outlined reasons, Petitioner's claim for compensation is denied and any remaining issues are deemed moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRYAN FRIEMAN,

Petitioner,

vs. NO: 11 WC 33020

STATE OF ILLINOIS,
PINCKNEYVILLE
CORRECTIONAL CENTER,

15IWCC0778

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

The Commission notes that the evidence deposition of Robert Schuchert and Dr. Anthony Sudekum were taken for and tendered for use in other cases. The deposition of Robert Schuchert was taken in the case of Jimmy Phillips, a/k/a "Correctional Officer," et.al., v. SCI/Pinckneyville C.C., 10 WC 23567. The deposition of Dr. Sudekum was taken in the case of James Bauersachs a/k/a "Correctional Officer," et.al., v. State of Illinois/Menard Correctional Center, 10 WC 27503, et. al.

The Commission finds that the deposition testimony is inadmissible hearsay as it relates to the case at bar. The exhibits and purported testimony from the above depositions is stricken

15IWCC0778

from the record and reference to said is stricken from the Arbitrator's decision. Despite having found the aforesaid testimony inadmissible and striking same from the record, the Commission affirms the Arbitrator's decision, and finds sufficient other evidence of record in support of the Arbitrator's decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 16, 2015, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical expenses as outlined in Petitioner's group exhibit. Respondent shall have a credit for all amounts paid through its group carrier, but shall indemnify and hold Petitioner harmless from any claims regarding payment of any amount for which it is receiving this credit, pursuant to §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Paletta, including but not limited to surgery, 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 expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

DATED: OCT 2 2 2015

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 9-21-15
052

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

FRIEMAN, BRYAN
Employee/Petitioner

Case# **11WC033020**

15IWCC0778

SOI/PINCKNEYVILLE CORR CTR
Employer/Respondent

On 1/16/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITYAVE 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
WORKERS' COMP MGR
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JAN 16 2015

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bryan Frieman
Employee/Petitioner

v.

State of Illinois, Pinckneyville Corr. Ctr.
Employer/Respondent

Case # **11** WC **33020**

Consolidated cases: _____

15IWCC0778

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **November 13, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 12, 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 $**57,866.00**; the average weekly wage was $**1,112.81**.

On the date of accident, Petitioner was **46** 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 $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

Respondent is entitled to a credit of $**any benefits paid through group** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical expenses as outlined in Petitioner's group exhibit. Respondent shall have credit for all amounts paid through its group carrier, but shall indemnify and hold Petitioner harmless from any claims regarding payment of any amount for which it is receiving this credit, pursuant to §8(j) of the Act

Respondent shall authorize and pay for any medical treatment recommended by Dr. Paletta, including but not limited to surgery, as provided in §8(a) of the Act.

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

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

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

Edwin Cox

Signature of Arbitrator

1/12/15

Date

ICArbDec19(b)

JAN 16 2015

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRYAN FRIEMAN
Employee/Petitioner

v. Case # 11 WC 33020

SOI/PINCKNEYVILLE CORR. CTR.
Employer/Respondent

15IWCC0778

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner's Testimony – Part 1 of 3: Menard Correctional Center

Petitioner began his career with Respondent at its Menard Correctional Center in March of 1995 as a Correctional Officer. (T.11-12). Petitioner testified that he worked in both general population and segregation while at Menard. (T.15). He testified that working in segregation was more intensive because he had to use chuckholes to cuff and uncuff inmates, deliver food and pass all supplies. (T.15). Petitioner testified that the doors at Menard Correctional Center were heavy sliding doors, either solid or with bars, that frequently jammed. (T.13). Petitioner testified that it took "quite a bit" of effort to open up these doors, and that he had to "jerk them open." (T.13). He testified that Menard Correctional Center utilized Folger Adams or "big keys" that did not work easily. (T.13). He testified that it also took significant force to turn these keys, and as he turned the key, he had to pull on the sliding door to open it. (T.14). Petitioner reviewed the CorVel documentation summarizing the duties of a Menard Correctional Officer and agreed with the descriptions therein. (T.14).

Menard Correctional Center Job Site Analysis (PX22).

Respondent's Job Site Analysis provides a narrative description of the job duties of a Correctional Officer at Menard. (PX22). It classifies the strength demand of the job as frequent lifting and/or carrying up to 25 pounds. *Id.* Correctional Officers are required to frequently pull open doors from 2 ½ hours to 5 ½ hours per day, up to 66% of the time, or up to 200 times per day. *Id.* This includes pulling open chuckhole doors as needed during lockdowns for dining, and cuffing and uncuffing residents. *Id.* Wrist turning is required 34-66% of the time, 2 ½ to 5 hours per day, or 33 to 300 times per day. *Id.*

Menard Correctional Center DVD (PX23)

Petitioner introduced a DVD produced at Respondent's direction which depicts the duties of a Correctional Officer at Menard Correctional Center. (PX23). The DVD depicts various job tasks, assignments, areas, equipment and mechanisms demonstrated by a variety of Correctional Officers. *Id.* Depictions included the armory, shakedown officer, bar rapping, double gate door, double gate walkway, opening cell doors, turning gallery cranks, receiving control house, control room, receiving door, shower door segregation, shower door, segregation unit, segregation door, chuckholes, double gate, and tower. *Id.* Each area requires opening and closing multiple doors and using multiple keys, mostly Folger Adams keys. *Id.* These tasks were briefly shown. *Id.*

Bar rapping was simulated in the DVD and the officer explained that, depending upon the shift, all open bars will be rapped for security purposes. *Id.* Officers are to listen to the sound to ensure that the bar is solid and that the inmates have not tampered with the cell doors. *Id.* The officer held the bar with his right hand and struck the bars approximately 60 times to demonstrate bar rapping on 1 cell (5 to 6 bars vertically in 12 separate sections, each bar struck 1 time). *Id.* Bar rapping is conducted on the 7-3 and 3-11 shifts. *Id.* Officers perform bar rapping at the beginning of each shift on the gallery where they are assigned. *Id.* There are 55 cells per gallery. *Id.* While some galleries have half solid doors and half open bars, Correctional Officers will also be assigned more than one gallery shift per day. *Id.*

The Correctional Officers demonstrating these areas and job duties on the DVD used both hands to complete tasks. In fact, when the videographer asked a Correctional Officer if he always turned keys with his left hand, the officer switched hands and stated, "You learn to use both hands in here because you need about four of them." *Id.* On another occasion, when the videographer requested a Correctional Officer to demonstrate the unlocking maneuver in slow motion, the officer tried to do so and the lock stuck. *Id.* He had to turn it multiple times to get it to work and explained that the locks were difficult to turn in slow motion. *Id.* The DVD was stopped when a Correctional Officer struggled to open a cell door and yanked on it repeatedly with both hands. *Id.* There appeared to be a mechanical problem. *Id.*

Opinion of Dr. Sudekum in re Menard Correctional Officer (PX24-25)

Respondent retained Dr. Sudekum to review the written and videotaped job descriptions and the job analysis provided by Respondent for a Correctional Officer at Menard Correctional Center. (PX24). He also visited Menard Correctional Center where he directly observed job sites and experienced many of the tasks and manual activities performed by Correctional Officers. *Id.* Dr. Sudekum opined that the job activities of a Correctional Officer were an aggravating factor in the development and/or progression of upper extremity repetitive trauma injuries. *Id.* Dr.

Sudekum did not evaluate any specific cases or provide any medical opinion regarding any specific employee. *Id.*

Petitioner took the deposition of Respondent's records reviewer, Dr. Sudekum, pursuant to a Dedimus order. (PX25). Dr. Sudekum testified that he believed that the duties of Correctional Officers were causing symptoms and physiological changes that would constitute a work-related injury. *Id. at* 6-10. He toured Menard Correctional Center and found it to be very old and opined that Correctional Officers there performed tasks that were more strenuous than those performed by officers at more modern correctional facilities. *Id. at* 10-11. Specifically, he believed that bar rapping, where the officer holds onto a metal baton and drags it across the bars of each cell on each floor, was significant due to the vibration produced. *Id. at* 11-13. He further testified that the sliding cell doors were quite heavy and by themselves would vibrate. *Id. at* 12-13. Dr. Sudekum commented that he was aware that the DVD recording was stopped when there was difficulty opening a cell door. *Id. at* 12. He concluded that the vibration of bar rapping and opening and closing of heavy cell doors was most significant in aggravating carpal and cubital tunnel in Correctional Officers at Menard Correctional Center. *Id. at* 15-18.

Position Description in re Menard Correctional Officer (PX26)

The Post Description for Cellhouse Officers that was prepared by Respondent describes duties including pulling cell doors twice to ensure that cells are securely locked, random checking of all locks on the gallery, checking cell locks prior to moving inmates into respective cells, performing actual body (skin) counts by looking in or opening the cells, removing inmates from cells for escort, monitoring all movement, searching cells prior to placement of inmates, checking all locks, doors and restraints to ensure they are in proper operational order and secured, shaking down workers and inmates, keying in and out inmates from cells for all movement that is not a mass line movement, searching inmates entering and leaving the gallery, and securing grill and front doors. (PX26).

Petitioner's Testimony – Part 2 of 3: Pinckneyville Correctional Center

Petitioner began working at Pinckneyville Correctional Center in January of 1999. (T.10-11). When Petitioner transferred to Pinckneyville, he continued to work as a Correctional Officer until November 1, 2014, at which time he became a Transport Officer. (T.15-16). Petitioner estimated that he spent 90% of his career working as a segregation officer. (T.24). Petitioner testified that he spent the overwhelming majority of his tenure at Pinckneyville Correctional Center, 9 out of 15 years, working in Respondent's R5 segregation. (T.21-22, 23). While Petitioner testified that he also spent time in the general population houses 3 and 4, he testified that he spent the majority of his remaining 6 years in R6 or "little segregation," where bar rapping is performed on the shower doors. (T.23-24, 76, 83). Respondent submitted a staff

assignment history covering only two-and-a-half years of Petitioner's 15 years of employment, which reflected time in R6 and time in R5 as a Property Officer. (RX2).

Petitioner testified that inmates in R5 received their food, laundry and supplies through their chuckholes. (T.22). Petitioner testified that the doors in Pinckneyville's segregation are heavy swinging doors made of steel. (T.24). These are opened with a medium key, smaller than a Folger Adams key but larger than small or average keys. (T.25, 67). Petitioner testified on cross-examination that he had never seen the hinges on any doors oiled since he had been employed there. (T.66). He testified that both the doors and the locks on the doors stick. (T.67).

Respondent's chuckholes are opened with the large Folger Adams keys. (T.25). Petitioner described Folger Adams keys as 4 to 5 inch brass keys that require force and grip to turn. (T.25, 26). He testified:

> Some locks you can't hardly turn them. I mean, some turn easy, some turn hard. And some of them don't even – you got to jitter them to get them to open the chuckhole. You got to shake them and push them in farther, pull them out, kind of shake them around to get them to where they actually work. (T.25-26).

Petitioner also testified that the chuckholes do not work smoothly because food, juice and other substances or fluids spill and cause them to stick. (T.26). Petitioner testified that there is a locksmith on duty and has put in work orders before. (T.26, 27). He testified, however, that if he shook or turned them enough or tried a different key, he could open them. (T.26, 27). Petitioner testified that he has also hit them with his hands, kicked them and jimmied them to get them open. (T.27).

Petitioner testified that he performed wing checks every 30 minutes where he walked his wing and pulled on each door to make sure the door was secure and the inmates were alright. (T.27-28). Petitioner also performed shakedowns, which involved removing and lifting inmate property boxes from underneath bunks and searching their property as well as the entire cell for contraband. (T.28, 29). Petitioner testified that he cuffed and uncuffed inmates. (T.29). When the inmates resisted restraint, additional pressure was placed on his arms and hands. (T.29). He estimated that this occurred once per month or more. (T.65). Petitioner testified that he works the 7 to 3 morning shift, the shift during which there is the most movement. (T.30).

Petitioner testified that his job duties increased in varying degrees when the facility went on lockdown. (T.31-32). Petitioner testified that, depending on the level of the lockdown, he would have to do everything that inmate porters would be assigned to do, such as picking up trash and sweeping, in addition to his assigned duties. (T.32). Additionally, all inmate movement would be cuffed/restricted. (T.32, 33).

Petitioner testified that he reviewed the materials pertaining to Pinckneyville Correctional Center created by or at the request of Respondent such as the CorVel Job Site Analyses, the CorVel videos, and the "Demands of the Job" form. (T.30, 40-41). He testified that these did not accurately reflect the pace or frequency of the activities demonstrated. (T.40-41). He also noted the absence of details concerning the difficulties faced by officers such as "sticking doors." (T.41).

Demands of the Job Form (RX1)

Respondent submitted a "Demands of the Job" form within its Workers' Compensation Documentation Log, which is a form that is designed to quantify Petitioner's arm and hand usage in the performance of his job duties. (RX1). The form never does any lifting, from 1 pound to 100 pounds, "without intermittent rest." *Id.* The form indicates that Petitioner uses his hands for gross manipulation such as grasping, twisting and handling for up to 2 hours per day, and uses his hands for fine manipulation such as typing and good finger dexterity for up to 2 hours per day. *Id.* The form makes no indication whatsoever as to how much weight is lifted with or without carrying or with intermittent rest. *Id.* The Arbitrator notes that this form is directly at odds with the independent Job Site Analyses performed by CorVel.

Pinckneyville Correctional Center Job Site Analyses (RX3)

The CorVel Analyses indicate that 70% of the key turning is done by Wing Officers. (RX3). Both of Respondent's Job Site Analyses categorizes the strength demands Petitioner's job as "Medium" which is defined as "lifting 50 pounds maximum with frequent lifting and/or carrying up to 25 pounds. *Id.* "Frequent" is defined as 2.5 to 5.5 hours per day, 34% to 66% of a day, or 33 to 200 repetitions per day. *Id.* Correctional Officers also engage in "frequent" wrist turning and "frequent" finger manipulation. *Id.* The wrist turning was associated with the opening of doors and chuckholes up to 150 times per shift in the housing unit. *Id.* More keys would be turned during lockdown. *Id.* The hand-and-arm usage evaluations in the Analyses quantify a substantially greater amount of activity than what is indicated in Respondent's "Demands of the Job" form, despite its omissions as revealed in the testimony of Melanie Welch. (RX1; RX3).

Deposition of Melanie Welch (PX18)

Respondent's analyses and videos were created by Melanie Welch. (PX9). Ms. Welch is an employee of CorVel, which is a national corporation providing services to employers, third party administrators, insurance companies, and government agencies. (PX9, p.44). When asked if she had ever done a Job Site Analysis for an injured worker, the following interchange took place:

Q: As far as performing a job site analysis for an injured worker, have you ever done that?
A: Yes.

Q: Ma'am, I took your deposition on—in the case of Darin Hathaway versus IYC, State of Illinois on June 9, 2011, and I specifically asked you on line 14 through 18 on page 23, "As far as performing job site analysis for an injured worker, have you ever done that?" Your answer under oath at that point, ma'am, was, line 16 through 17, "For the employer. The injured worker did not call us, no." Do you remember that answer, ma'am? Have you done one since June 9, 2011?
A: Since June 9, 2011. Oh, you mean requested by an injured worker.

Q: No, ma'am. My question was pretty clear, and I caught you in a lie right out of the box. Now, my question now is very simple. Have you performed a job site analysis for an injured worker since June 9?
A: Not requested by an injured worker, but when I do, like, an ergonomic assessment, I consider that to be for the injured worker, for their behalf.

Q: Well, was this done on behalf of the employees at Pinckneyville Correctional Center or was it requested by the State of Illinois?
A: It's requested by the State of Illinois.

Q: I see.
A: For the injured worker.

Q: I don't think it's very funny, ma'am.
A: Okay.

Q: I note for the record you're laughing, but I consider that a sign of disrespect for all parties involved. *Id.* at 44-45.

Ms. Welch received her training in Job Site Analysis from ErgoRehab Incorporated. *Id.* at 45-46. This certification was obtained by mail and through the Internet, and was paid for by Corvel. *Id.* at 47-48.

Ms. Welch could not remember the last time she did any work on behalf of an injured worker, did not know the age of Pinckneyville Correctional Center, did not know that during the 5 to 7 years prior to the video being shot that the facility was short staffed, and admitted that the video was edited. *Id.* at 50-51.

Ms. Welch also believed that it was a requirement that 20% of the entire staff rotate every 90 days, despite the consistent testimony from other witnesses that some Correctional Officers stay in their positions for years. *Id.* at 55. She did not take into account overtime and she mistakenly believed that the segregation unit was contained in the video that she filmed. *Id.* at

56-58. The video did not show any of the locks that would not open, did not show how hard the locks were to open, did not show any bending or breaking of keys, did not show any new keys which were hard to put into the locks, and did not show the heaviness or the weight of the wing doors. *Id.* at 58-59.

Ms. Welch testified that she had neither seen nor lifted a property box, and was completely unaware that they contained TVs, radios, books, paperwork, computers, clothing. *Id.* at 63-64. She further acknowledged that the video showed nothing about Correctional Officers having to carry crates filled with cartons of milk or juice weighing hundreds of pounds up flights of steps to feed inmates. *Id.* at 66. When asked whether it would be important in consider whether a Correctional Officer had to carry a milk carton and/or food tray and simultaneously open and close difficult chuckholes that often stick, Ms. Welch answered, "I don't know, I didn't try it." *Id.* at 67. She also believed that restraining a combative inmate at a Respondent's Pinckneyville Correctional Center would fall in the "medium" category of job requirements. *Id.* at 64.

She further acknowledged that there was nothing in the Job Site Analysis or video about keying and un-keying doors for moving of inmates through the housing units in passes run on any given day; nothing about the transfer box, writs, medical furloughs, medical and furlough bags. *Id.* at 68-69. Nothing was contained in the video about keying out passes for clothing, barber shop, and commissary, or weapons and tactical training. (RX4; RX5).

She did not videotape or observe any cell shake downs and, in fact, believed that shake downs were performed on Correctional Officers themselves when they entered the prison. *Id.* at 76. She did not video tape the Correctional Officers having to push buttons and operate toggles to open doors, which required the officers to hold down the button with their thumb and toggle the switch with their little and pinky fingers at the same time. *Id.* at 77-78. She had no idea that this happened almost 250 times in an hour and thousands of times in a day. *Id.* at 78. After going through all this information, Ms. Welch testified that whether Correctional Officers are constantly and repetitively using their arms and hands in a forceful manner depended on their post. *Id.* at 88-89.

Live Testimony of Jason Thompson

Respondent called Jason Thompson, who testified that he worked at Pinckneyville Correctional Center as a Correctional Lieutenant until 2011. (T.85). He testified that he performed the key estimation study at the request of Warden Davis. (T.86).

Mr. Thompson testified that while he believed the doors in general population worked fairly well, he testified that all of the doors in R5 segregation were harder to open due to the fact that a rubber barrier was installed on the bottom of all the doors which creates friction and

prevents the doors from swinging open on their own. (T.89). He believed that the hinges rather than the locks on the doors were generally bad. (T.89-90). He testified that one would have to hold the lock longer and forcefully open chuckholes. (T.89-90). He felt, however, that only 2% of the doors locks were problematic. (T.89-90).

When asked to describe the difference between segregation and general population, he testified, "Segregation is segregation by design. We keep the worst inmates segregated from the rest of the population." (T.96). He testified that the rubber strips were added to the bottom of the doors to keep water out of the general walkway because inmates would stuff things into their toilet and flush it until their cell was flooded. (T.96).

Deposition of Testimony of Jason Thompson (PX14)

On cross-examination by counsel from the State during his deposition, the following exchange took place with regard to the condition of the chuckhole locks:

Q: Do you use keys as a lieutenant?
A: Yes.

Q: Do you have any difficulties with keys?
A: Sometimes.

Q: How often?
A: Chuckholes stick all of the time, and the reason they stick is because food and stuff gets – you're passing trays through it, so food would drip down in the lock and gum it up. On top of that, every now and then, you get an inmate try to sabotage a unit. It doesn't happen very often that way, but a lot of the chuckholes are sticky. And when I say "sticky," I just mean what they're supposed to do is you just should be able to turn it like that. (Indicating.) [Sic]. When they're brand-new, they're really easy to use. Ours are more difficult. (PX14, p.32-33).

With regard to the doors, his deposition testimony revealed that sometimes the pins in the door become loose and caused problems. (PX14, p.33). When asked to describe the cell doors, the following exchange took place:

Q: Comparing it to like your front door at home --
A: Uh-huh.

Q: -- the key -- is it more smooth than that, or less smooth, as long as your house key or house door is in functioning -- it's --
A: I would say in general it's comparable to a front door, except for the fact that it -- there's more constant tension on some of ours, whereas with a house key it's only when the lock engages and disengages. But yes. Similar.

Q: Are the cell doors -- are they heavy?

A: They're heavy, but they're on fairly stout hinges. I mean, the doors themselves are very heavy.

Q: Are they easy to open?
A: Comparatively speaking, like with a house door -- they're harder than your average house, like your civilian residence. They're -- you have to be -- get more momentum to open them, because they're heavy.

Q: Would they be comparable to like a hospital door?
A: Well, luckily, I haven't spent much time in a hospital, so I --
Q: Or is there a door that -- outside of a prison -- that you can say it would be comparable to?
MR. RICH: Look, Ms. Hagan, what you're doing is you're asking this witness for opinions. Unless you want to lay some foundation as an expert, then I need to start objecting. That's my objection.
Q: (By Ms. Hagan) You can answer.
A: Is it comparable to the outside door on the prison?

Q: Any outside door.
A: Let me try and think of one it would be comparable to. I can't really -- they're heavy doors. They're a lot harder than most doors you're ever going to come across in the civilian world. *Id.* at 33-35.

Lieutenant Thompson testified that keying cells and chuckholes, opening and closing doors, cuffing and un-cuffing inmates, turning difficult keys, opening difficult doors, pulling on bars, checking cell doors, weapons training, working mandated double shifts, performing extra duties on lock down, opening and closing chuckholes, lifting property boxes, carrying trays upstairs, restraining inmates, guiding inmates through lines, and performing various amounts of paperwork were the duties of a Correctional Officer. He further agreed that there was hardly a single part of the job that did not involve using one's arms, hands, or elbows. *Id.* at 38. In addition, he acknowledged that these activities involved force and stress. *Id.* at 40.

Post Description and Key Usage Estimate (RX3; RX6).

Respondent submitted a Post Description for a Housing Unit Wing Officer which enumerates the job duties of a Correctional Wing Officer. (RX3). Pertinent job duties involve:

- Restricting the activity of inmates and ensuring that they do not move from wing to wing;
- Searching inmates leaving and returning to the Unit on call passes or schedule movement;
- Completing cell searches every 60 days and logging the results on a form; Officers are required to shakedown all areas of the unit;
- Completing cell condition checks when inmates are assigned to different cells, noting any irregularities on a form and completing disciplinary reports if any damage has occurred;

- Performing inmate counts and inventory counts and completing count and inventory logs;
- Monitors the issue and use of caustic/toxic substances used in the cleaning area;
- Checking I.D. Cards when passing inmate mail;
- Make constant rounds checking all doors to inmate rooms and ensure that all security doors are closed and locked at all times, except when allowing authorized persons to pass through;
- Check all windows, doors and screens in the housing units in accordance with established procedures;
- Complying with D.R.'s, A.D.'s, I.D.'s, Warden's Bulletins, or special order bulletins, and performing other duties as required or assigned, which are reasonably within the scope of the duties enumerated in the Post Description. *Id.*

The key usage estimate indicates that general population Wing Officers turn 55 large keys and 50 small keys per shift by totaling the key usage estimate under the categories of wing checks, inmate traffic, laundry, utility closet, shakedowns, property box checks, and miscellaneous wing traffic. (RX6). Segregation and/or Receiving Segregation Officers turn between 90 to 245 large keys and between 15 to 70 small keys each shift. *Id.* However, the estimate contains disclaimers regarding its inadequacies and cautionary statements regarding the combing of posts and resulting usage increases:

> It must be stressed that these are estimations based on visual observations, average inmate movement experienced on the post, estimated amount of staff movement during the shifts, and the assumption that the institution is not on lockdown. Lockdown situations will increase these estimations considerably for posts that are normally open for inmate movement . . . [Emphasis Original].
>
> There are several posts, especially on the 3-11 and 11-7 shifts, in which the duties of two or more posts are combined into one post. An example of this is the 11-7 post 1250, in which the R1 A WING officer is also responsible for R1 B WING. This is a combined post. These posts are identified on the rosters in the same manner as the split posts. A regular post can become a combined post at any time by closing a non-mandatory post and placing the responsibility for the closed post on the mandatory post officer. This can be done on any shift, and when it occurs, the affected post will see usage increase by the amount of usage on the closed post. (RX6).

Deposition of Robert Schuchert – Pinckneyville Correctional Center Locksmith (PX8)

Mr. Schuchert was employed at Respondent's Correctional Center as the facility's locksmith. (PX8, p.4). He also operates an outside business called Schuchert's Lockshop in Chester, Illinois. *Id.* at 4. He began working for the State of Illinois in 1981 at Menard Psychiatric Center, and transferred to Pinckneyville Correctional Center on August 16, 1998. *Id.*

at 5-6. He served as a Correctional Officer, like Petitioner, from 1998 until January 2004. Since 2004, he has been a locksmith at Pinckneyville. *Id.* at 6. Schuchert viewed the videos from Menard Correctional Center and Pinckneyville Correctional Center. *Id.* at 7. He also reviewed the Job Site Analysis. *Id.* at 7-8. He testified that while employed as a locksmith at Pinckneyville, he developed bilateral compression neuropathies and filed a Workers' Compensation Claim that was accepted by Respondent. *Id.* at 8. He was voluntarily paid for his time off and received a settlement. *Id.* at 8, 33-34. He attributed his injuries to his repetitive work at Menard and Pinckneyville Correctional Centers. *Id.* at 9-10. He testified that his problems began while working in the segregation at Menard and progressed while performing his job duties at Pinckneyville. *Id.* at 9-10. He testified that, "It got to the point where if I had a tool box full of locks I couldn't carry them with my left hand, especially from one cell house to the next. I had to keep switching hands because it hurt so bad." *Id.* at 9-10. When asked to describe the difference between the locks in the segregation unit and the general population, he stated:

> The seg unit—the difference between the locks in the seg unit and general pop over there is they have a mogul key—a bigger electronic lock in their unit over there than general pop. General pop has a Medeco lock, which is a smaller key, which is compared to your house key. The mogul keys that are over in the seg unit—they're a bigger key. I would say probably about that big on the head. The length of the key is probably about that long. (Indicating.) *Id.* at 10.

He acknowledged that all Correctional/Wing Officers had to key open chuckholes, cell doors, cabinets, and medical cabinets; and diary each item that had to be keyed out, logged out, keyed back in, and logged back in. *Id.* at 11-12. The same requirements existed in medical. *Id.* at 12. When asked to describe the locks at Pinckneyville, he stated:

> They have gotten worse, naturally, through the years. When we first arrived, the inmates had their own keys to their locks, so there was a lot of wear and tear. I was trying to remember last night how long it's been since we got rid of the—we pulled the inmate keys out over there. *Id.* at 12.

He testified that approximately 7 to 8 years ago, the inmates had their own keys. *Id.* at 13. However, the keys were taken away due to the atrocious wear and tear on the locks from constant inmate traffic. *Id.* at 13. He described the current condition of the locks as fair to poor. *Id.* at 13-14. When asked to describe the locks where Petitioner has worked the last 5 years, he stated:

> . . .We had a lot of wear on the locks then, and it's been—the chuckhole locks have got a lot of wear, especially in the seg, because they get keyed all the time. You're feeding them three meals a day, plus you're transporting them in and out, if you're—if they're going to – they're going to the yard; they're going to passes, and right now, you're—in warm

> weather, pass ice, mail, anything else—you got to open that chuckhole. *Id.* at 13.

He acknowledged that Respondent's witness, Lieutenant Thompson, was correct when in stating that the locks and the chuckholes were very difficult to open. *Id.* at 16-17. The difficulty stemmed not only from the locks, but from the food spilled in them. *Id.* at 18. He estimated that he switched out between 2 to 5 locks per week, or at times, 4 or 5 locks will go out in a day. *Id.* at 22.

Petitioner's Medical History and Treatment

Petitioner testified that he does not suffer from gout, hypothyroidism or rheumatoid arthritis. (T.17). He testified occasionally engages in hunting and fishing. (T.19). He testified that although he purchased a motorcycle in April of 2011, he does not ride it very much. (T.21). Petitioner candidly testified that he suffers from diabetes; however, it is controlled through medication and diet. (T.16-17). He is not insulin dependent. (T.17). Petitioner testified that he has been diabetic for 6 or 7 years. (T.17-18). Petitioner began experiencing symptoms, however, long before he developed diabetes. (T.33). Petitioner testified on direct examination that he had symptoms of numbness and tingling in his hands starting around the year 2000 which he reported to his family physician. (T.33).

The records of Petitioner's family physician note that Petitioner obtained paperwork to file a workers' compensation claim; however, Petitioner did not file a workers' compensation claim until 2011, nor could he recall indicating any intent to file a claim. (T.34-36). Petitioner testified that he was evaluated by electrodiagnostic testing, but no physician advised him that his condition was related to his employment. (T.36-37). When asked why he did not file a claim sooner, he testified, "Because I didn't think it was bad enough to deal – I mean, I just figured deal with it. It wasn't bad enough." (T.36-37).

Petitioner testified that as he continued to work at Pinckneyville Correctional Center, his condition progressively worsened. (T.37, 39). Petitioner eventually finally filed a workers' compensation claim and sought further treatment for his condition on September 12, 2011, with Dr. George Paletta, who took the following history:

> This is the first visit for this 45-year-old right-hand dominant white male. He works as a prison guard. He is currently at the Pinckneyville Facility. Prior to that, he worked at Menard. He worked at Menard from 1995 to 1999. He then moved to the Pinckneyville Facility where he has been since 1999. His job requires all the typical duties of a correctional officer. This includes bar rapping, keying cell doors, opening and closing cell doors, handcuffing and un-handcuffing inmates, and at times, restraining inmates. He also has to do some writing of tickets and some data entry. He has a long history of some left wrist and hand issues dating back to 2002. In fact, at that time, he underwent

> EMG and nerve conduction studies that documented a mild carpal tunnel syndrome. He was treated with night splints at that point in time, but states those did not really help him. He never underwent any surgical decompression. Over the intervening years, he has had intermittent symptoms, but recently over the last year to two, those have become progressively worse. He now has a lot of nocturnal symptoms with numbness and tingling involving particularly the first three digits, but at times the whole hand. He also notes that the hands tend to go to sleep if he has to drive for an extended period of time. For example, he states he has to drive a van at the correctional facility and often times, with his hands in the driving position, his fingers go numb. He denies any fixed numbness, but states it is intermittent and seems to be positional or activity related. He is not currently taking any medications specifically for the wrist. He did have recent EMG and nerve conduction studies, which were made available for my review today.
>
> Past medical history, past surgical history, medications, allergies, review of systems, family history and social history are as per the intake questionnaire, which I have personally reviewed. (PX3).

Petitioner's new nerve conduction studies completed that day demonstrated moderately severe bilateral carpal tunnel syndrome. (PX3; PX4).

Dr. Paletta noted that there had been a clear progression of Petitioner's condition since his electrodiagnostic testing back in 2002. (PX3). He also noted that, given the progression of Petitioner's condition, it was extremely unlikely that a second trial of splinting would improve Petitioner' condition. (PX3). Petitioner testified at Arbitration that he wore the splints for three or four months with no beneficial effects, only loss of sleep. (T.82). Consequently, he recommended surgery. (PX3). Dr. Paletta stated that it was his opinion, based on Petitioner's subjective complaints, his physical examination findings, and his electrophysiologic studies, that Petitioner's bilateral wrist condition and his need for treatment to same was related to work. *Id.*

Petitioner's Testimony – Part 3 of 3: Manifestation of Injury

Petitioner alleged September 12, 2011, the first day a physician related his complaints to his employment, as his manifestation date. (T.37-38, 45). Petitioner testified on cross-examination that he suspected his injuries were work-related on August 23, 2011, the date he spoke with Dr. Paletta prior to his office visit; however, he testified to uncertainty about his suspicion (T.48, 51-52):

> Q: Okay. So even before you saw Dr. Paletta you knew you were there for a work-related injury?
> A: Well, I wasn't a hundred percent sure. I didn't know.
>
> Q: On the form you said you were there for that, true?
> A: Well, that's what I assumed. I'm not a doctor.

Q: And you were considering a lawsuit at that time or a Workers' Compensation case?
A: I didn't know. (T.52).

Petitioner testified at Arbitration that his symptoms of numbness, tingling and pain persist and that he would like to receive the intervention recommended by Dr. Paletta. (T.38-39).

Deposition of Dr. Daniel Phillips

Dr. Phillips is a clinical electrophysiologist, board certified in neurology and electrical diagnostics, whose practice is exclusively devoted electrical diagnostic work. (PX5, p.4). Dr. Phillips testified that his background as an electrical engineer with a subspecialty of biomedical engineering led to his career as a clinical neurologist and assistant professor of neurology at Washington University. *Id.* at 4-5. He is a diplomate of the American Academy of Neurology and a fellow in the American Association of Neuromuscular and Electrical Diagnostic Medicine. *Id.* at 5. As a fellow, he serves on the accreditation committee, which reviews the work of other laboratories and determines if they are of sufficient quality to be accredited by the organization. *Id.* at 6. He also serves on the Missouri State Liaison Committee and educates the legislature, insurance companies and interested public groups concerning issues of quality in electrical diagnostic medicine. *Id.* at 6. The Missouri administrative law judges recently requested that he lecture on the subject of how to identify quality electrodiagnostic studies. *Id.* at 11. He testified that his lab was one of the first eight to be accredited with exemplary status. *Id.* at 9. He does not and cannot play a part in accrediting labs in his own area. *Id.* at 9.

Dr. Phillips testified that he runs a consultative electrical diagnostic practice and performs all of his own diagnostic testing and work himself. *Id.* at 9-10. He testified that an EMG or electromyography is a study that involves inserting a small electrode into the muscle to record the electrical potentials from the muscle at rest and with activity, which paints a view of the morphology or formation and pathology of the muscle. *Id.* at 12-13. He testified that it is an anatomical nerve test that tells a physician what the nerve looks like, analogous to an electrical biopsy without removing any of the nerve. *Id.* at 12-13. A nerve conduction study is a functional test that tells a physician how the patient's nerve is responding to stimuli at different points in comparison to an established norm. *Id.* at 13. These tests allow a physician to determine the cause of a patient's symptoms and are nationally recognized tests relied upon in the scientific and medical communities. *Id.* at 13-14. The NeuroMetrix test, on the other hand, is unreliable and has been widely discredited by many sources. *Id.* at 26-29. He testified that he has done at least 45,000 electrodiagnostic studies over a span of 30 years and is thoroughly familiar various neuropathic patterns. *Id.* at 49.

Dr. Phillips explained that there are both relative and absolute values for comparison scales to determine any abnormality within the nerves. *Id.* at 19-20. Contrary to popular belief, "relative" values are not subjective. *Id.* at 21. While there are absolute cutoff levels for "average"

patients, these levels would change for patients with various morphologies or patients who are obese, have cold limbs, or suffer from diabetic neuropathies, which would have different cutoffs values. *Id.* at 19-20. He testified that there are different values for "somebody who is a four-foot-11 petite woman" and a "six-foot husky guy." *Id.* at 52. In these patients, a *fixed* relative value is compared to the actual distance between the motor and distal latencies to determine entrapment neuropathy. *Id.* at 20, 52. He testified, for example, that during tests performed over the median and ulnar nerves at the same distances, the median nerve distal latency should not be longer than the ulnar nerve distal latency by more than 1.4 milliseconds. *Id.* at 20. The 1.4 milliseconds is a fixed relative value between the distal latency of the nerve going through an entrapped area and the distal latency of the nerve that is not. *Id.* at 20. If the delay is more than 1.4 milliseconds, the latency of the nerve conduction is abnormal. *Id.* at 20.

Dr. Phillips testified that testing and comparison with relative values allows him to make a distinction between a compression neuropathy or a systemic condition such as diabetes. *Id.* at 22. Hence, he testified that the relative comparison scale is as equally valid as the absolute scale and vital to the diagnosis of patients who have underlying conditions or deviant anatomical structures. *Id.* at 20.

Dr. Phillips testified that he performed a physical examination of Petitioner and took a clinical history in addition to performing a nerve conduction study. *Id.* at 23-24, 32. He noted that although Petitioner had diabetes, he did not have any numbness in his feet. *Id.* at 24. He testified that this was significant because this was an indicator that Petitioner's diabetes was not clinically significant for neuropathy. *Id.* at 24-25. Dr. Phillips testified that clinically-significant diabetic neuropathy typically begins in the feet. *Id.* at 25. Dr. Phillips further testified that there was neither evidence of a generalized neuropathy nor evidence of diabetic neuropathy in the upper extremities during Petitioner's electrodiagnostic studies. *Id.* at 25-26. When asked during cross-examination how he was able to distinguish Petitioner's compression neuropathy from any potential diabetic neuropathy, he provided an illustration of his previous explanation of how a fixed relative value is used to determine compression related abnormality:

> Well, again, you look at the comparison between the median and ulnar interlatency differences. It's based upon comparative values. So for example, the diabetic neuropathy will have a prolonged ulnar motor or ulnar sensory terminal latency. There will be slowing of the conduction velocities in general in the entire test, and they'll be potentiated across points of selective points of vulnerability; okay?
>
> So you'll see, for example, that the ulnar nerve – in a diabetic, if you took the first page of the report – okay – that I did on September 12th – okay – I'll give you an idea what it looks like. Okay? So his right median motor terminal latency would typically be prolonged; okay? So – in absolute terms. So it might be 4.6.

> His ulnar, as opposed to being 2.6, probably 3.4; okay? His conduction velocity, as opposed to being in the 50s, are usually in the 40s; okay? 42, 46, 48 – that type of thing; okay? His conduction velocity across his elbow – okay – which is 58 across his elbows, usually drops in comparison to the distal velocity, so where it might be 50 in the forearms, it'll be 44 across the elbows, because the elbow represents another point of selective vulnerability that the diabetic neuropathy will show up at.
> . . . Now, you can still diagnose carpal tunnel in those people and you use relative values to do it, so for example, even if they have an underlying neuropathy but the median motor terminal latency is more than 1.4 milliseconds greater than the ulnar, they've got relative slowing across the elbow consistent with it.
>
> Similarly, you would compare the radial to median going to the thumb at the same distance. Even if both of them are delayed, if the difference is greater than .5 or .6 milliseconds between the median and radial going to the thumb, again it's a relative slowing in the counts. You do the same process with the orthodromics. They're very different-looking studies. *Id.* at 46-47, 48.

Dr. Phillips noted, however, that Petitioner's selective points of vulnerability showed relatively normal values:

> His ulnar sensory response are [sic] usually borderline or low voltage. His are well within the range of normal or – well – within the range of normal. I'd have to look back at the waveforms to see which one I was reading off of – the 21 or the 17.
>
> The radial sensory responses are typically diminished and they're slowed. Not the case. It's a general – the whole pattern – you don't have ulnar sensory orthodromics of 1.7 millisecond peak latencies in the diabetic neuropathies.

> The whole pattern of the study just looks different. All right? It looks like the pattern of a generalized nerve disease. . . *Id.* at 47-48.

Dr. Phillips testified that the characteristics of diabetic neuropathy were prolonged terminal latency, slowing of conduction velocities, diminished sensory amplitudes, as well as slowing of the sensory responses and prolongation of their peak latencies with axonal damage as it progresses. *Id.* at 61-62.

When asked to explain his diagnosis of right carpal tunnel, Dr. Phillips testified that while Petitioner's right median-to-ulnar distal latency was within 1.4 milliseconds, Petitioner's right radial sensory peak latencies and median-to-*radial* sensory latencies were prolonged and fell into the severe category. *Id.* at 53-54. Dr. Phillips also testified that Petitioner's 2002 nerve

conduction studies showed *bilateral* abnormalities based upon the recorded values, seven years before he was diagnosed with diabetes. *Id.* at 59, 65-66.

Deposition of Dr. George Paletta

Dr. Paletta, who evaluated Petitioner and referred him for diagnostic studies, testified that he has reviewed the materials pertaining to the job duties of a Menard Correctional Officer and those of a Pinckneyville Correctional Officer. (PX6, p.5-6). He testified that in addition to being a treating physician, he performs examination for and treats patients on behalf of insurance companies, employers and third-party administrators. *Id.* at 9-10. He testified that he frequently sees patients from Continental Tire, Walgreens Distribution Center and American Steel. *Id.* at 10. He has also treated Correctional Officers. *Id.* at 9.

Dr. Paletta testified that carpal tunnel is a peripheral compression neuropathy that results from compression of the nerve at the carpal tunnel and produces pain, numbness, tingling and in severe cases weakness or dysfunction of the hand. *Id.* at 11. He acknowledged that Petitioner was borderline obese and diabetic, but noted that Petitioner was non-insulin-dependent. *Id.* at 12-13.

Dr. Paletta testified that repetitive injuries such as carpal tunnel syndrome have a latency period, or a period of time that elapses between exposure and the development if the condition and/or symptoms. *Id.* at 14. He testified that since there are a wide variety of tolerances to repetitive injury among individuals, the latency periods and thresholds for individuals vary greatly. *Id.* at 14.

Dr. Paletta testified that Petitioner's job duties at both Menard Correctional Center and Pinckneyville Correctional Center contributed to the development of Petitioner's condition. *Id.* at 14-15. While Dr. Paletta testified that it would be impossible to parse out per se which facility was primarily responsible; he testified that examining a patient's history and what activities to which the patient attributed an onset or worsening of symptoms was important, as those are activities which are likely a factor in the development or progression of the patient's condition. *Id.* at 15. However, he noted that the 3-year latency period between Petitioner's employment at Menard and his manifestation of symptoms in 2002 was entirely within reason. *Id.* at 31.

Deposition of Dr. Williams – April 10, 2014

Respondent had Petitioner examined pursuant to §12 by Dr. Williams. (RX9; RX10, p.8). Dr. Williams testified that he performed approximately 200 independent medical examinations over the last year, 90% of which were for respondents/defendants. (RX10, p.5). He has been paid

over $632,000.00 in the 2012 and 2013 fiscal years by Respondent for performing IMEs and records reviews and giving depositions. *Id.* at 25-26.

Dr. Williams performed a physical examination and reviewed Petitioner's medical history and agreed with Petitioner's diagnosis of bilateral carpal tunnel syndrome. *Id.* at 14, 30-31. However, based upon his review of the records and the materials provided by Respondent, he concluded that Petitioner's bilateral carpal tunnel syndrome was neither caused nor contributed to by Petitioner's employment with Respondent. *Id.* at 15. Dr. Williams testified that he visited Respondent's Pinckneyville facility and opened and closed *a* chuckhole in segregation, cuffed and uncuffed an officer, and lifted property boxes and food trays. *Id.* at 16. Dr. Williams has not visited Menard Correctional Center. *Id.* at 27.

On cross-examination, Dr. Williams acknowledged that bar rapping produces vibration, and that performing that activity on a daily basis for four years could cause or contribute to the development of carpal tunnel syndrome. *Id.* at 27. He acknowledged that Petitioner had bilateral hand complaints dating back to 2002. *Id.* at 29. Yet, he did not believe that the symptoms he experienced in 2011 for which Petitioner filed a claim were related to Petitioner's work at Menard Correctional Center. *Id.* at 35. He agreed that there is a latency period for conditions such as carpal tunnel syndrome, and that the latency period is different for each individual. *Id.* at 36-37. He also testified he did not find any evidence of diabetic neuropathy in Petitioner. *Id.* at 29-30. He also testified that he has considerable respect for Dr. Paletta and refers his ulnar collateral ligament patients to Dr. Paletta for surgery. *Id.* at 31. Dr. Williams did not have access to the CorVel analysis, the DVD, a "Demands of the Job" form or the 2011 report and deposition of Dr. Sudekum relating to the duties of Menard Correctional Officers. *Id.* at 37-38. He testified that he had no specific information whatsoever about Petitioner's job duties at Menard Correctional Center. *Id.* at 37.

Dr. Williams agreed that Petitioner's hobbies of deer hunting with a shot gun and jug fishing would not be sufficient to contribute to or aggravate carpal tunnel syndrome. *Id.* at 31-32. He also acknowledged that based on the timeline of the development of Petitioner's carpal tunnel syndrome, his motorcycle purchase in 2009 or 2010 would not have been a causative factor, but potentially an aggravating one. *Id.* at 33-34. Dr. Williams testified that he was unaware that Dr. Sudekum testified that the duties of a Menard Correctional Officer were contributing and to and aggravating the development of conditions such as carpal and cubital tunnel syndrome. *Id.* at 38.

Dr. Williams was not provided with the depositions of the Pinckneyville Correctional Officers and Locksmith Robert Schuchert, or the deposition of the CorVel employee who performed the analysis. *Id.* at 39. He acknowledged that repeated pinching and key turning causes increased pressure in the carpal tunnel. *Id.* at 41. He acknowledged that forceful and repeated gripping causes increased pressure within the carpal tunnel. *Id.* at 41. He acknowledged

that correctional officers forcefully pull on doors while performing wing checks to make sure the doors are closed, and acknowledged that Correctional Officers perform many other hand and arm intensive duties such as shakedowns and restraining inmates. *Id.* at 42-45. However, he did not feel that Petitioner's 19 years of performing these duties were causative or aggravating factors in Petitioner's condition of ill-being. *Id.* at 45.

CONCLUSIONS OF LAW

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

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

The Arbitrator notes as a preliminary matter that the Statute of Limitations has no bearing on the presentation of evidence in repetitive trauma cases. This matter was recently addressed by the Appellate Court in *PPG Industries v. Illinois Workers' Compensation:*

> Additionally, looking to the plain and ordinary language of section 6(d), we find no evidentiary limitation. Section 6(d) provides limits with respect to the *filing* of a claim for benefits, not what evidence may be presented to support any particular claim. A repetitive-trauma injury is one which "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." *Peoria County*, 115 Ill.2d at 529, 106 Ill.Dec. 235, 505 N.E.2d at 1028; see also *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill.App.3d 607, 611, 126 Ill.Dec. 41, 531 N.E.2d 174, 176 (1988) ("By their very nature, repetitive-trauma injuries may take years to develop to a point of severity precluding the employee from performing in the workplace."). It stands to reason that a claimant's work history may be necessary and relevant to determining whether she sustained such a work-related, gradual injury. As noted by the arbitrator and the Commission, case law establishes that a claimant's work history has been routinely considered in repetitive-trauma cases, including work history that extended beyond three years prior to an alleged manifestation date. See *Kishwaukee Community Hospital v. Industrial Comm'n*, 356 Ill.App.3d 915, 917–18, 293 Ill.Dec. 313, 828 N.E.2d 283, 287 (2005) (over 30 years); *Oscar Mayer*, 176 Ill.App.3d at 608, 126 Ill.Dec. 41, 531 N.E.2d at 174–75 (15 years); *City of Springfield, Illinois v. Illinois Workers' Compensation Comm'n*, 388 Ill.App.3d 297, 300–01, 327 Ill.Dec. 333, 901 N.E.2d 1066, 1069–70 (2009) (approximately 8 years); *Peoria County*, 115 Ill.2d at 527, 106 Ill.Dec. 235, 505 N.E.2d at 1027 (6 years).

PPG Indus. v. Illinois Workers' Comp. Comm'n, 2014 IL App (4th) 130698WC, ¶ 19.

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture*, 99 I.I.C. 0961. "The word

'accident' is not a technical legal term, and has been held to mean anything that happens without design, or an event which is unforeseen by the person to whom it happens...Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Comm.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254 (1919). Under Illinois law an injury need not be the sole factor, or even the primary factor of an injury, as long as it is a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 205, 797 N.E.2d 665 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[*A*] Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (Ill. 2006).

The Arbitrator notes that Illinois Courts have refused to adopt any standard threshold which a claimant must meet in order for his or her job to classify as repetitive enough to establish causal connection. In the repetitive trauma case of *Fierke*, the Appellate Court specifically applied the foregoing legal standard of causation specifically to a repetitive trauma case and noted that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Fierke*, N.E.2d at 849. The Court specifically stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.*

The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain

amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (1991) and *Edward Hines supra.*

The Appellate Court in *Darling v. Indus. Comm'n* even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. *Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 195, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Darling*, N.E.2d at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. The Arbitrator notes that Petitioner's job duties involve the performance of tasks distinctly related to his employment which pose risks to which the public is not equally exposed. This risk is both qualitative and quantitative.

In *City of Springfield v. Illinois Workers' Comp. Comm'n*, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (Ill.App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in *City of Springfield v. Illinois Workers' Compensation Comm'n*, "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.* Based upon the aforementioned law, Petitioner can establish a claim for repetitive trauma even though he worked various assignments.

Based upon the aforementioned law, the Arbitrator does not find the causation opinion of Dr. Williams to be consistent with the law and the evidence in the record. Dr. Williams conceded that the activities performed by Petitioner at both Menard and Pinckneyville over 19 years were risk factors that could cause or contribute to the development of bilateral compression neuropathy; yet, he did not believe that Petitioner's conditions were related to his employment. (RX10). Dr. Williams felt that Petitioner's job duties at Menard Correctional Center were too remote from his 2011 claim, despite the fact that Petitioner initially developed symptoms in 2002, only 3 years from his employment at Menard Correctional Center. (RX10). Dr. Paletta testified that this was an entirely reasonable latency period. (PX6). It is a well-known general

fact that repetitive trauma injuries are cumulative and occur over time. Therefore, it is apparent that damage is sustained even before the injured begins to experience symptoms. The Commission recognized this fact by acknowledging that in repetitive trauma cases more than one employer can be responsible for the repetitive injuries sustained by employees. *See Lemes v. Peko Tile, Inc*, 07 I.W.C.C. 1545 (2007). Therefore, Petitioner's job duties as a Correctional Officer are relevant due to the fact that they predisposed him to repetitive injury. *See A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) (acknowledging that a claimant's long history of repetitive work may predispose them to repetitive injury and same is a factor for consideration).

Dr. Williams had no knowledge of Petitioner's job duties at Menard Correctional Center, and lacked considerable detail concerning facility conditions at Pinckneyville Correctional Center. (RX9; RX10). The Arbitrator is likewise not persuaded by the fact that Dr. Williams was able to perform one or two iterations of the tasks performed by Correctional Officers while on a guided tour under controlled/favorable conditions. The gradual breakdown of the physical structure on account of the repetitive/prolonged performance of these activities is what leads to the development of repetitive trauma; only the Petitioner or other correctional staff would have the standing to testify as to the impact of prolonged exposure to the performance of these occupational activities. Additionally, the evidence upon which Dr. Williams based his causation opinion was contradictory and flawed. Respondent's Demands of the Job form and the Job Site Analyses are a prime example. The Arbitrator finds the deposition testimony of the locksmith and Jason Thompson and Robert Schuchert particularly probative with regard to the poor condition of the locks.

The Arbitrator is persuaded by the causation opinion of Dr. Paletta. The evidence shows that Petitioner repeatedly turned keys, opened and closed cell doors, opened and closed chuckholes, restrained inmates, performed shakedowns and wing checks and other activities for nearly two decades for Respondent at Menard and Pinckneyville Correctional Centers. The overwhelming weight of the evidence also shows that the condition of the locks and doors in Respondent's facility increased the strain imposed on Petitioner's upper extremities. Dr. Paletta testified that these activities played a role as causative or aggravating factors in the development of Petitioner's bilateral carpal tunnel syndrome. (PX6).

The Commission has also found the at the job duties of a Correctional Officer at Pinckneyville Correctional Center aggravate and contribute to the development of repetitive injuries. *Dustin Bowles v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0842 (2014); *Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014); *Chris Walter v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0634 (2013); *Craig Briley v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0519 (2013). Although Petitioner's comorbid conditions and hobbies may have at some point played a role in his condition of ill-being, this is of no consequence where Petitioner has established that his job

duties are a contributing factor in the development of his condition. The Commission has recognized same in a correctional case where the claimant was involved in martial arts activity outside of his employment with Respondent. *Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014). In the repetitive trauma case of *Fierke*, the Appellate Court specifically applied the foregoing legal standard of causation specifically to a repetitive trauma case and noted that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Id.* at N.E.2d at 849. The Court specifically stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.*

Based upon the foregoing, the Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained accidental bilateral repetitive compression neuropathies that arose out of and in the course of his employment with Respondent, which are causally related to his current condition of ill-being.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?

Repetitive-trauma injuries occupy an odd niche between accidental injury, compensable under the Act, and occupational disease, compensable under the Workers' Occupational Diseases Act. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879, 710 N.E.2d 837, 840 (Ill. App. 1st Dist., 1999). In choosing to cover such injuries as accidental injuries, as noted by the Appellate Court in *A.C. & S.*, the Supreme Court **deliberately** modified the standards for determining the date of injury for repetitive trauma cases in order provide protection for injured workers. *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 840-841 (Ill. App. 1st Dist., 1999). Even though carpal tunnel syndrome is not treated as an occupational disease in Illinois, we still look to the Occupational Diseases Act for guidance. *Id.*

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining manifestation dates. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (2007). Although the date on which the employee becomes aware that he has a condition related to work was the first method for determining a manifestation date, it is not the only permissible means for alleging or proving manifestation. The manifestation date can be set as: **(a)** the date the employee actually became aware of the physical condition and its relation to work through medical consultation; **(b)** the date the employee requires medical treatment; **(c)** the date on which the employee can no longer perform work activities; or **(d)** when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987); *Oscar Mayer & Co. v.*

Industrial Commission, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

Although a claimant is aware of symptoms and carries a suspicion that these are work-related, the Supreme Court has stated, "The 'fact of injury' is not synonymous with the 'fact of discovery'" *Durand*, N.E.2d at 927. In short, claimants are not charged with filing a claim as soon as they believe they *may* have a work-related condition, nor are they penalized for failing to realize a condition is work-related when the employer feels that he or she should have. In fact, the Supreme Court stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking them to "rely on 'expert' medical testimony from a layperson." *Id.* at 929. The Court likewise noted that the claimants would have had difficulty proving injury with a sketchy and equivocal understanding of same. *Id.* at 930. The standard that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has since become a safety measure employed by all Courts to ensure that the employers do "penalize an employee who diligently worked through" his or her symptoms. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930. In *Durand*, the claimant was not sure her pain was from carpal tunnel syndrome, but "she believed it was work-related" in 1997, some 3 years before her injuries manifested in 2000. *Durand v. Indus. Comm'n*, 862 N.E.2d at 929-30.

In *Oscar Mayer*, the Court embraced the "date of collapse" method of determination (setting the manifestation date on the date of surgery, or the date the employee could no longer work), allowing compensation to be awarded to a claimant despite his full knowledge that his condition was work-related well before he filed a claim because the claimant diligently served his employer until he could no longer do so without intervention for his repetitive injuries. *Oscar Mayer supra.* The Court noted that no prejudice can occur in employing such a method, since it is not until the employee actually misses work for his injuries that the employer becomes adversely affected; and the notice provisions were not impugned as this flexible and fair provision in no way interfered with an employer's ability to effectively investigate the claim.

In *Three "D" Discount*, the claimant sought treatment with his family physician, Dr. Johnson, who referred him to a Dr. Block for evaluation. *Three "D" Discount Store v. Industrial Commission*, 556 N.E.2d 261 (1989). Dr. Block performed an EMG study and a physical examination of the claimant, and sent the EMG results to Dr. Johnson. *Id.* Dr. Block's report stated that his examination suggested bilateral carpal tunnel syndrome. *Id.* Dr. Johnson discussed the results of the EMG with the claimant and referred him to a Dr. McKechnie. Claimant reported to Dr. McKechnie and gave a history of his symptoms, but did not state that his condition was work-related or that Dr. Johnson had so informed him. Dr. McKechnie scheduled the claimant for surgery, and the claimant notified his employer that he required surgery and that it was his physician's opinion that that the condition was related to work. The Appellate Court found that Petitioner's manifestation date was the day he met with Dr. McKechnie and stated the following:

> The evidence in this case establishes that Dr. Carl Johnson discussed Dr. Block's report of the EMG results with petitioner. . . No direct evidence was presented regarding whether Dr. Johnson ever told Petitioner that his injury was work related. . . . It was not until July 10, when petitioner met with Dr. McKechnie, that it became clear that petitioner's condition necessitated surgery. . . Based on the evidence of record, it could be reasonably inferred that petitioner first learned that his condition of ill-being was work-related at some point between July 10, and the first of August, 1984. Applying the reasonable person test to these facts, we find that although petitioner persisted in his employment until August 10, a reasonable person in these circumstances would have been on notice that the condition was both work-related and medically disabling on July 10, 1984. *Three "D" Discount Store v. Industrial Commission*, 556 N.E.2d 261, (1989) [emphasis ours].

In the case at bar, Petitioner consistently testified that Dr. Paletta was the first physician who advised him that his condition was work-related, and that his visit was Dr. Paletta was the first time that he was certain, or rather, the causal connection between his injuries and his employment were "plainly apparent." (T.37-38, 45, 48, 51-52). The law allows Petitioner to select a manifestation date that coincides with discovery of injury *and its relation to work after medical consultation*. See *Steven Beal v. Town of Normal*, 06 IL.W.C. 25261, 10 I.W.C.C. 0380 (2010); *see also White v Worker's Compensation Commission*, 374 Ill.App.3d 907, 873 N.E.2d 388. 392-393 (4th Dist. 2007) (holding Petitioner could select accident date); *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 841-842 (1st Dist. 1999).

The Arbitrator therefore finds that Petitioner met his burden of proof in establishing that his injuries manifested on September 12, 2011. Petitioner completed and submitted a Notice of Injury to Respondent on September 13, 2011. (PX7; RX1). Therefore, Petitioner provided timely notice of his accidental injuries under the Act.

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

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

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

Petitioner has not been cured or relieved of the effects of his injuries. Due to the dispute, Petitioner has been unable to return to Dr. Paletta and undergo the recommended surgery. (T.38-

39). Petitioner testified that he would like to have the problem corrected. (T.38-39). Respondent's expert, Dr. Williams, agreed with the diagnosis of bilateral carpal tunnel syndrome, and testified that has considerable faith in the expertise of Dr. Paletta. (RX10).

Respondent is therefore ordered to pay the medical expenses contained in Petitioner's group exhibit and shall have credit for any amounts paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims from these medical providers arising out of the expenses for which it claims credit.

Respondent shall further authorize and pay for the treatment recommended by Dr. Paletta, including but not limited to surgery.

This award shall in no instance be a bar to a further 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 MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Harris,

Petitioner,

vs.

NO: 10 WC 22505

15IWCC0779

Cerro Flow,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects the Decision of the Arbitrator as to the amount of the average weekly wage in the Findings section of the Decision. The average weekly wage is incorrectly annotated as $720.00. However, the parties stipulated that Petitioner's average weekly wage was $664.28. The Arbitrator correctly utilized the $664.28 figure to calculate the rate of temporary total disability. Therefore, the Commission finds that Petitioner's average weekly wage is $664.28.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the average weekly wage of Petitioner is $664.28.

15IWCC0779

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 $32,000.00. 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: OCT 2 2 2015

TJT/ gaf
O: 8/24/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HARRIS, JEFFREY
Employee/Petitioner

Case# **10WC022505**

CERRO FLOW
Employer/Respondent

15IWCC0779

On 1/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1580 BECKER SCHROADER & CHAPMAN PC
NATHAN A BECKER
PO BOX 488
GRANITE CITY, IL 62040

0507 RUSIN & MACIOROWSKI LTD
THEODORE J POWERS
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CHICAGO, IL 60606

15IWCC0979

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jeffrey Harris
Employee/Petitioner

v.

Cerro Flow
Employer/Respondent

Case # 10 WC 22505

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 **Belleville**, on **September 29, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5-26-10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**37,440.00**; the average weekly wage was $**720.00**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** children under 18.

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

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

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $**short-term disability** for other benefits, for a total credit of $**any paid**.

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

ORDER:

Petitioner's accident arose out of and in the course of his employment with Respondent. The Arbitrator finds that Petitioner has bilateral Carpal Tunnel Syndrome, which arose out of and in the course of his employment with Respondent.

Petitioner's condition of ill-being, bilateral Carpal Tunnel Syndrome, is causally connected to his employment with Respondent. The Arbitrator bases this opinion on the testimony of Petitioner and Dr. Beatty. The Arbitrator finds the testimony of Dr. Beatty to be more credible than that of Dr. Strecker.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule (Section 8(a) and 8.2 of the Act) as follows: Anderson Hospital - $56.11; Belleville Memorial Hospital - $639.49; Dr. Anwar Khan - $22.10; Southern Illinois Plastic & Hand Surgery (Dr. Beatty) - $1,807.67; Edwardsville Surgery Center - $ 253.49; Dr. Gregory Randle - $67.50; Apex Physical Therapy - $212.70.

The Arbitrator finds Petitioner's symptoms of bilateral carpal tunnel syndrome were relieved by the surgeries performed by Dr. Beatty. This is based on the medical records and the testimony of Petitioner. These facts not only confirm the diagnosis, they show the treatment was reasonable and necessary to treat Petitioner's work related condition.

Respondent shall receive an 8(j) credit for any amounts actually paid by Respondent's group insurance.

Respondent shall pay Petitioner temporary total disability benefits of $442.85/week for 9 and 6/7 weeks, commencing 9/5/2012 through 11/12/2012, as provided in Section 8(b) of the Act. Respondent shall receive a credit for amounts paid by Respondent's short-term disability policy.

Respondent shall pay Petitioner permanent partial disability benefits of $398.57/week for 61.5 weeks because the injury sustained caused the 15% loss of the right hand and 15% of the left hands, 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.

Carl Lee
Signature of Arbitrator

12/12/14
Date

JAN 5 - 2015

Jeffrey Harris vs. Cerro Flow
10 WC 22505

The Arbitrator hereby finds the following facts:

Petitioner, Jeffrey Harris Sr., is a 54-year-old fork-lift driver/crane operator for Respondent, Cerro Flow Copper. Petitioner claims repetitive trauma injury to his bilateral hands, resulting in bilateral carpal tunnel syndrome. On the date of claimed accident, May 26, 2010, Petitioner had been employed with Respondent for 32 years.

Petitioner first reported issues with this right hand, arm and shoulder to his primary care doctor, Dr. Nidal Shawahin, M.D. on May 5, 2010. Px1 at 2. The main complaints were tingling in the 3rd, 4th, and 5th fingers, pain in the right elbow and shoulder. Id. On physical examination Petitioner had a positive Phalen's test on the right. Px1 at 3. Dr. Shawahin suspected possible carpal tunnel syndrome and recommended an EMG/NCS of the right upper extremity. Id.

Petitioner underwent an EMG/NCS on May 19, 2010. The study was only done on Petitioner's right arm. Px4 at 1. Dr. A. Khan interpretation was moderately advanced right carpal tunnel syndrome. Id.

On May 26, 2010, Petitioner had a follow up with Dr. Shawahin. The doctor noted a positive EMG/NCS for carpal tunnel syndrome recommended surgery. Px1 at 6.

Petitioner sought a surgical consultation with Dr. Michael Beatty on July 29, 2010. Px9 at 6. At that time Petitioner's main complaints were numbness and tingling involving the long, ring, and little fingers of the right hand. Petitioner also told Dr. Beatty he had symptoms in his left hand. Id. The physical examination revealed positive Tinel's of the palm side of both wrists and positive Phalen's bilaterally. Px9 at 7. Dr. Beatty diagnosed Petitioner with bilateral carpal tunnel syndrome. Px9 at 12. To help further evaluate the left hand, Dr. Beatty ordered an EMG/NCS of the left upper extremity. Px9 at 13-14.

On November 11, 2010, Petitioner underwent an EMG/NCS of his left upper extremity. Dr. Syed Ali performed the test and found the results to be consistent with left carpal tunnel syndrome. Px5 at 1.

Following the left sided EMG/NCS, Dr. Beatty recommended bilateral carpal tunnel releases. Px9 at 15. Dr. Beatty testified he diagnosed Petitioner with bilateral carpal tunnel syndrome after having preformed a physical examination of Petitioner, after reviewing two EMG/NCS's, after taking a history of illness, and after reviewing Dr. Shawahin's medical chart. Px9 at 15.

Petitioner filled out a job description for Dr. Beatty which is contained at Petitioner's Exhibit #2, Pages 1 and 2. His primary duties were crane operator and fork-lift driver. These tasks involved the physical manipulation of numerous levers. Additionally, Petitioner was required to band material together, write, and push/pull/lift copper tubing. He worked between 8 and 10 hours a shift. Px2 at 1. Petitioner noted he could drive the fork-lift at work up to 5 hours a shift. Px2 at 2.

Dr. Beatty testified he reviewed Petitioner's job duties and discussed those activities with him. Px9 at 23-24. Additionally, Dr. Beatty stated he was familiar with the physical requirements to operate over-head crane, folk-lifts, and banding machines. Px9 at 24-25. After taking all relevant medical information into consideration and after discussing Petitioner's job duties with him, Dr. Beatty testified, within a reasonable degree of medical certainty, that Petitioner's job duties were the causative basis for the development of his compressive nerve disorders or worsening of preexisting nerve issue. Px9 at 26-27.

On September 5, 2012, Petitioner underwent a right carpal tunnel release by Dr. Beatty. Upon visual inspection, Dr. Beatty noted the median nerve to be compressed with a blush site evident. Px6 at 1.

On October 3, 2012, Petitioner underwent a left carpal tunnel release by Dr. Beatty. Upon visual inspection the median nerve was noted to be enveloped in thick dense fiber areolar tissue. Px7 at 1. Dr. Beatty stated: "Compression evident, blush site evident, and also tight volar retinacular antebrachial fascial band at the wrist was evident and released." Id.

Post-operatively, Dr. Beatty ordered Petitioner to attend hand physical therapy. Px2 at 22. As a result of the two hand surgeries, Petitioner was held off of work completely from September 5, 2012 through November 12, 2012. Petitioner returned to work on November 13, 2012. Px2 at 23. Petitioner was placed at maximum medical improvement on December 4, 2012. Px2 at 24.

Regarding his work duties, Petitioner testified his bid job was fork-lift driver. He worked between 8 and 10 hour shifts, with an hour lunch and two-15 minute breaks. To operate a fork-lift, Petitioner would steer with his left hand and manipulate the levers with his right hand. He operated two different types of fork-lifts. The "regular" model has three levers and the "scrap dumper" has five levers. Petitioner mainly used the regular model, but he drove the scrap dumper when required. Regardless of which machine he was driving, the levers were either pushed forward or pulled backwards with the right hand to operate the forks. Petitioner testified all of the fork-lifts vibrate. While driving the fork-lift Petitioner would sometimes use both hands to steer, but most often he would steer with this left hand and rest his right hand on the levers. The whole time his body and hands were subject to vibration from the fork-lift. Petitioner was actually assigned to the scrap dumper when he first noticed tingling and numbness in his hands and first reported these issues to Respondent.

The job description tendered as Respondent's #4 was reviewed by Petitioner. He testified that it did not accurately reflect the amount of work actually done by a Lane One Operator.

Petitioner also regularly operated overhead cranes. One type of overhead crane utilized a remote control box, which he wore on a harness, with three levers operated by the right hand, while the left hand would hook material. The three switches have to be held down to operate the crane. Petitioner was required to use a hacksaw and remove any defective copper from the coils as he used the crane. He would use the hacksaw with his right hand and use the left hand to brace the copper coils.

Petitioner also operated an overhead crane in the shipping department. This crane's operating box hangs from overhead and has to be held and operated with both hands. While working on the overhead crane in the shipping department, Petitioner would have to band tubing. Depending on the length of the copper tubing Petitioner would either has to place two or three bands on each bundle and then load the bundle into a truck. The banding is done by hand with a manual crank bander.

Petitioner testified prior to surgery he had complaints of tingling and numbness in his both hands. These symptoms occurred at work and woke him up at night. Petitioner testified he received complete relief of his bilateral hand tingling and numbness following the carpal tunnel releases. At the time of trial, Petitioner continued to be symptom free.

The original hearing date was June 27, 2014. The trial was continued after Petitioner rested in anticipation of Respondent calling Mr. Ray Thorensen, who Petitioner testified was his direct supervisor at the time he reported his injury. The trial resumed on September 29, 2014. Paul Combs testified for Respondent. At the time Petitioner reported his injury he was working for Respondent in Cedar City, Utah.

Conclusions of Law:

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

Petitioner's accident arose out of and in the course of his employment with Respondent. The Arbitrator finds that Petitioner has bilateral Carpal Tunnel Syndrome, which arose out of and in the course of his employment with Respondent.

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

Petitioner's condition of ill-being, bilateral Carpal Tunnel Syndrome, is causally connected to his employment with Respondent. The Arbitrator bases this opinion on the testimony of Petitioner and Dr. Beatty. The Arbitrator finds the testimony of Dr. Beatty to be more credible than that of Dr. Strecker.

Issue J: Were the medical services that were provided to Petitioner reasonable and necessary?

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule (Section 8(a) and 8.2 of the Act) as follows: Anderson Hospital - $56.11; Belleville Memorial Hospital - $639.49; Dr. Anwar Khan - $22.10; Southern Illinois Plastic & Hand Surgery (Dr. Beatty) - $1,807.67; Edwardsville Surgery Center - $ 253.49; Dr. Gregory Randle - $67.50; Apex Physical Therapy - $212.70.

The Arbitrator finds Petitioner's symptoms of bilateral carpal tunnel syndrome were relieved by the surgeries performed by Dr. Beatty. This is based on the medical records and the testimony of Petitioner. These facts not only confirm the diagnosis, they show the treatment was reasonable and necessary to treat Petitioner's work related condition.

Respondent shall receive an 8(j) credit for any amounts actually paid by Respondent's group insurance.

Issue K: Is Petitioner entitled to TTD benefits?

Respondent shall pay Petitioner temporary total disability benefits of $442.85/week for 9 and 6/7 weeks, commencing 9/5/2012 through 11/12/2012, as provided in Section 8(b) of the Act. Respondent shall receive a credit for amounts paid by Respondent's short-term disability policy.

Issue L: Nature and Extent of injury?

Respondent shall pay Petitioner permanent partial disability benefits of $398.57/week for 61.5 weeks because the injury sustained caused the 15% loss of the right hand and 15% of the left hands, as provided in Section 8(e) of the Act.

Date: Carl Lee 12/12/14

Honorable Edward Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ 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

Marcus L. Adams,

Petitioner,

15IWCC0780

vs.

NO: 13 WC 28878

Hi-Tech Industrial Services, 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 February 4, 2015 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $20,100.00. 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: OCT 2 3 2015
KWL/vf
O-8/24/15
42

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. A thorough review of the record clearly reveals numerous credibility deficiencies in Petitioner's case that when viewed in concert substantiate Petitioner's failure to prove a causal connection to his alleged current condition of ill being. Additional the testimony of Dr. Crandall is more persuasive as it is based in an opinion grounded in objective evidence rather than subjective complaints. The finding of a causal connection is against the preponderance of the evidence and should be reversed.

Kevin W. Lamborn

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

15IWCC0780

ADAMS, MARCUS L Case# **13WC028878**

Employee/Petitioner

HI-TECH INDUSTRIAL SERVICES INC

Employer/Respondent

On 2/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0834 KANOSKI BRESNEY
CHARLES EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

2904 HENNESSY & ROACH PC
PAUL BERARD
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

15IWCC0780

MARCUS L. ADAMS,
Employee/Petitioner

v.

HI-TECH INDUSTRIAL SERVICES, INC.,
Employer/Respondent

Case # **13** WC **28878**

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 **Springfield**, on **1/16/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/9/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**3,125.50**; the average weekly wage was $**400.00**.

On the date of accident, Petitioner was **38** years of age, ***single*** 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 $**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 Petitioner temporary total disability benefits of $266.67/week for 75 weeks, commencing 8/10/13 through 1/16/15, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services related to the treatment of petitioner's left arm from 8/9/13 through 1/16/15, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary prospective medical services related to petitioner's left arm and complex regional pain syndrome, as recommended by Dr. Baker, only after Dr. Baker has had an opportunity to reexamine him, given that the time has already passed for most of Dr. Baker's treatment recommendations .

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

1/30/15
Date

FEB 4 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 38 year old operator/laborer, sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/9/13. Petitioner testified that the injury occurred when he picked up a flex steel metal pipe, it snapped, and caused a 6-7 cm laceration of his left forearm.

Petitioner presented to St. Mary's Hospital following the injury. He was treated by Dr. Gregory Cowell. He presented with a laceration of the left arm that occurred at work. He stated that he was cut by a pipe. He denied any numbness or other injuries. Upon examination, Dr. Cowell diagnosed a linear superficial laceration of the left forearm. Petitioner's laceration was closed with 14 staples. Petitioner was discharged home.

On 8/14/13 petitioner underwent a controlled substance test. The drug test was positive for marijuana. Based on this positive controlled substance finding petitioner was fired from his job with respondent.

On 8/23/13 petitioner presented to St. Mary's Occupational Health Services for follow-up of the laceration of the left wrist. It was noted that petitioner was originally scheduled for staple removal on 8/19/13, but did not show. Petitioner had drainage and decreased movement in the left hand. Petitioner was diagnosed with a wound infection. Petitioner's staples were removed. Petitioner was taken off work. He was referred to St. Mary's emergency room for further care. Later that day petitioner returned to St. Mary's Hospital with a left wrist wound infection of his laceration and pain in his left wrist. A culture was performed and the diagnosis was moderate staphylococcus aureus. Petitioner was treated and released with an antibiotic prescription to be taken twice a day. Petitioner's condition upon release was stable.

On 8/26/13 petitioner presented to Dr. Baker. Dr. Baker noted a 6 cm laceration of the left distal ulnar forearm with some jagged edges, and draining medially. Dr. Baker examined petitioner and assessed numbness distal to the laceration over the typical sensory area of the ulnar nerve. Threshold discriminatory perceptions were markedly reduced. Dr. Baker noted that the ulnar nerve innervated intrinsics were weaker in the left hand versus the right hand. An examination of the arterial flow of the left hand revealed most flow through the radial system and almost no flow through the ulnar system. Dr. Baker diagnosed a laceration, complex, with subsequent wound infection of the left forearm; ulnar nerve injury to the distal left forearm; and ulnar artery injury on the left. On 8/28/13 petitioner complained of ongoing numbness in the ulnar area of the hand. The wound was improved. Petitioner still had some drainage. Dr. Baker recommended daily dressing changes. His impression was the same, but improving.

On 9/3/13 Dr. Baker noted a small amount of drainage on the dressing. Petitioner stated that his pain comes and goes. He reported the pain as being from the left shoulder down to the hand. Dr. Baker noted that the wound was almost closed except at each end. Dr. Baker noted that threshold testing again revealed decreased perception over the ulnar nerve distal to the injury. Using Weinstein calibrations, the median nerve of the left hand had discriminations of 0.2 gms. The ulnar nerve head discrimination of greater than 4 gms. He noted that the muscles were still weaker in the left hand in the distribution of the motor branch of the ulnar nerve. His impression was an ulnar nerve injury and continuing improvement of the infection in the wound. On 9/5/13 petitioner returned to Dr. Baker and stated that he had a small piece of staple in the laceration site at the end of the outer wrist. Dr. Baker removed that staple.

On 9/9/13 petitioner underwent three x-rays of the left wrist. The findings were normal. On 9/10/13 petitioner returned to St. Mary's Occupational Health Services. Petitioner stated that he had seen Dr. Baker, and an ulnar nerve injury was suspected. Petitioner stated that Dr. Baker was going to perform an exploration of the wound the next day. An examination revealed a volar laceration with drainage sites with healed wound, that was somewhat swollen but dry. Decreased grip was noted, as well as an aesthetic areas of the fourth and fifth fingers. Petitioner was continued off work.

On 9/11/13 petitioner returned to Dr. Baker. Dr. Baker noted no drainage, and some slight swelling. He was of the opinion that petitioner's condition was improving. Petitioner stated that his hand continued to ache. Dr. Baker noted that petitioner's decreased sensation over the distribution of the ulnar nerve had not abated.

Petitioner next saw Dr. Baker on 1/15/14. Petitioner stated that he was still off work at that time. He also complained of severe discomfort in his left hand especially when exposed to cold. An examination revealed softening of the traumatic scarring. Percussion of the scar revealed no withdrawal reflex. Decreased sensory perception was present over the distribution of the ulnar nerve distal to the site of the injury. Actively all joints including the metacarpal phalangeal joints, proximal phalangeal joints and distal phalangeal joints were supple, though petitioner had difficulty making a fist. Dr. Baker recommended a nerve conduction and muscle enervation testing to further delineate the course of his ulnar nerve injury. This testing was denied by Worker's Compensation.

On 4/8/14 Dr. Baker drafted a letter to petitioner's attorney, Charles Edmiston. He was of the opinion that petitioner's findings were consistent with the injury suffered in early August while working at the Decatur plant of Archer Daniels Midland. He was of the opinion that all subsequent conditions had arisen from this injury. He believed that petitioner's long-term prognosis was guarded as intervention for

the ulnar nerve system of both sensory component and motor component were unknown in the left hand. He did not know if the ulnar artery had repaired itself or recanualized since the time of the injury.

On 5/12/14 petitioner underwent an EMG and nerve conduction study of the left upper extremity. The findings were a normal nerve conduction and needle electromyographic study of the left upper extremity without any evidence for carpal tunnel or cubital tunnel syndrome, cervical radiculopathy, shoulder girdle neuropathy, plexopathy or disease at muscle level. An examination by Dr. Radha Mahmoud revealed that petitioner had an inability to fully flex his ring and fifth fingers on his left hand, and had continuing pain when the area was palpated.

On 6/4/14 petitioner returned to Dr. Baker to discuss the results of the EMG. He stated that cold still caused him severe discomfort. He stated that it was hard to sleep. He stated that even a fan causes him discomfort. He stated that when he tried to mow the lawn the vibration of the lawnmower was very painful to his hand. He stated that his fingers felt like they were on fire. Dr. Baker noted good pseudo-motor activity of the left hand. The joints were noted as being supple, but movement of making a fist was not coordinated. Dr. Baker assessed some form of complex regional pain syndrome. He noted that petitioner does not use his left-hand spontaneously, but rather protects it. Dr. Baker continued petitioner off work.

On 6/10/14 petitioner returned to Dr. Fabrique at MG Occupational Health and Wellness at St. Mary's for recheck of a laceration of the distal aspect of the left forearm. Petitioner reported that the wound was well healed, but he was having high sensitivity to cold and touch in the left forearm, wrist, and hand. He stated that he had been seeing Dr. Baker. Dr. Fabrique noted an approximately 7 cm healed laceration of the distal volar surface. No keloid formation was noted. Petitioner's left hand, wrist, and forearm were nontender to touch. He noted that petitioner's left fourth and fifth digits did not close with fist making, but could be passively closed to full fist. Capillary filling bilaterally, but capillary bed on left was pale versus right. Dr. Fabrique assessed a laceration of left forearm with complex regional pain syndrome. He referred petitioner back to Dr. Baker.

On 8/27/14 petitioner underwent a Section 12 examination performed by Dr. Evan Crandall. Petitioner gave a history of sustaining a laceration to his left wrist on 8/9/13 that was repaired with staples. Petitioner stated that he has not worked since the date of the injury. He stated that his laceration became infected, and that cold causes him pain. He stated that he has decreased grip strength and numbness along the ulnar aspect of the forearm and in the fourth and fifth fingers of the left hand. He also reported that he had decreased range of motion. Petitioner is right-hand dominant.

Dr. Crandall performed a physical examination of the left upper extremity. He noted a 6 cm scar over the volar ulnar aspect of the wrist that was well healed. He noted a negative ulnar Tinel's sign at the elbow and a negative ulnar Tinel's sign at the wrist. He noted a negative median Tinel's sign and a negative Phalen's test, a negative provocative test, and a negative Finkelstein test. He saw no evidence of ganglions, trigger fingering or thenar muscle atrophy. He also saw no muscle wasting. He noted that petitioner could hold his fingers together, but when he asked him to separate them, petitioner said that he could not separate the fourth and fifth fingers, or the third and fourth fingers of the left hand. He was able to separate the index finger from the long finger, and could separate the thumb from the index finger. Petitioner demonstrated giveaway weakness on grip strength. When petitioner was asked to grip, he did not move any of the flexor tendons. Dr. Crandall saw no findings of loss of hair, and no color or temperature changes. He also noted no point tenderness on exam. On examination, Dr. Crandall noted that the sensory, grip, pinch and range of motion data were all diagnostic for submaximal effort. Dr. Crandall performed an EMG of the left upper extremity that was normal. He also ordered an ultrasound to check the ulnar nerve, and that study was normal. Dr. Crandall reviewed petitioner's previous medical records. Based on his examination, testing, and record review, Dr. Crandall believed the petitioner's clinical presentation showed evidence of symptom magnification and contrived postures. He noted that the petitioner told him that his doctor considered having him undergo an exploration surgery. Dr. Crandall noted that petitioner had 2 normal nerve conduction studies and a normal ultrasound. Therefore, he predicted that an exploration of the structures of the wrist would not be helpful. Dr. Crandall was of the opinion that petitioner had reached maximum medical improvement about six months after the date of injury. He noted that petitioner has been off work for a year, but has not sustained an injury that requires him being taken off work. He was of the opinion that petitioner does not have complex regional pain syndrome, or any findings which were consistent with that condition. He was of the opinion that petitioner had a laceration of the left wrist which was well healed. He did not recommend any surgical exploration.

On 10/29/14 the evidence deposition of Dr. Stuart Baker, a plastic surgeon and hand surgeon, was taken on behalf of the petitioner. Dr. Baker opined that as of last time he saw petitioner he was not able to work. Dr. Baker testified that the basis for reaching his diagnosis of complex regional pain syndrome was that petitioner described that his hand was on fire, and that this is a very common finding for complex regional pain syndrome. The other thing he noted was that petitioner's pain was out of proportion to the stimuli. He stated that this is one of the typical findings of a complex regional pain syndrome patient. He stated that patients also have difficulty coordinating movement of the hand because

they are fearful of pain. Dr. Baker testified that there are no definitive physical findings of the condition. He recommended that petitioner be treated as a complex regional pain patient by using a variety of treatment modalities. He stated that there is no specific way to do it, but generally he would start with some specialized physical therapy, including carrying objects using his hands. Then he would get into medical management of multiple types of drugs, and then progress to intravenous injections or stellate ganglion blocks, and lastly into more complex surgeries. Dr. Baker opined that petitioner's complex regional pain syndrome is causally related to the laceration he suffered to his left hand at work in August 2013. Dr. Baker noted that Dr. Susan Wu is a physical medicine doctor that Dr. Fabrique tried to refer petitioner to. Dr. Baker was of the opinion that a finding that the capillary bed on the left was pale versus the right, is a finding that can be related to the complex regional pain syndrome. Dr. Baker testified that if petitioner was still suffering symptoms similar to when he last presented to him he would recommend treatment with Dr. Wu.

On cross-examination Dr. Baker was of the opinion that petitioner did not display any other inconsistent behaviors of possible symptom magnification other than was noted in his report dated 1/15/14. Dr. Baker testified that as of the last time he saw petitioner he was able to separate the third, fourth, and fifth fingers on the left hand fingers better. He testified that if petitioner was unable to separate his hands in August 2014 that could open up a diagnosis of a clenched fist. He stated that some patients can develop a complete blockage of the ability to move the fingers properly after an injury, and even though physiologically they should be able to, something happens in the brain and they are unable to do it. Dr. Baker testified that on the last date he saw him he had concerns that petitioner may be developing a psychological condition in addition to the complex regional pain syndrome. Dr. Baker testified that complex regional pain syndrome does not necessarily show up on an EMG. Dr. Baker testified that his diagnoses and opinions are not entirely based on petitioner's subjective history. Dr. Baker was of the opinion that petitioner could sit at a desk doing right-handed work if it was available. He thought petitioner was capable of answering a telephone. Dr. Baker stated that the longer you delay physical therapy the less effective it becomes. He stated that the best time to do it is within a year and a half of the injury. Since that time had already passed, he stated that the possibility of positive returns decreases significantly with time. However, he felt that doing it was well worth a try. Dr. Baker testified that if it was discovered that petitioner was fabricating of these complaints, then that would change his opinions. Dr. Baker testified that although he may have recommended some possible surgeries, at this particular point he would not do surgery because the effects of the nerve injury from a surgical standpoint were gone.

On 12/16/14 the evidence deposition of Dr. Crandall, a plastic surgeon and hand surgeon, was taken on behalf of respondent. Dr. Crandall testified that a person that has complex regional pain syndrome has unmitigated pain with certain types of findings such as swelling, color changes, temperature changes because of an injury that's secondary to swelling and non-movement after an injury. Dr. Crandall opined that he did not find any findings consistent with complex regional pain syndrome when he examined petitioner. He stated the most common finding is swelling, the second most common finding is change of temperature, and the third most common finding is exquisite pain untouched. He stated that petitioner did not have swelling or change of temperature. He also noted that if petitioner had exquisite pain untouched he would not be able to passively move the petitioner's hand, which he was able to do. He testified that complex regional pain syndrome patients will also have loss of hair and petitioner did not have any. Dr. Crandall was of the opinion that complex regional pain syndrome is never a permanent condition, and that petitioner's symptoms would not be present a year after his accident. Dr. Crandall testified that he has treated probably over 30 patients with complex regional pain syndrome. He stated that petitioner never reported to him that he felt like his hand was on fire or that he was hypersensitive to touch. He did state that petitioner reported to him that he could not have a fan blowing on his hand because it would cause him too much pain. However, Dr. Crandall did not believe this was a complaint indicative of complex regional pain syndrome. Dr. Crandall was of the opinion that petitioner did not have complex regional pain syndrome on the day that he saw him, and would not have developed it after that point. He further opined that if petitioner had had it before he saw him, that it had gone away and he had no findings of it by the time he examined.

On cross-examination Dr. Crandall stated that petitioner specifically told him that cold causes pain, that he had decreased grip strength, that he could not take things up, that he had numbness in his forearm, and he had decreased range of motion. Dr. Crandall was of the opinion that if petitioner had cut the ulnar nerve he would not be able to move any of his fingers apart from one another, not just the third, fourth, and fifth. Dr. Crandall opined that petitioner had no findings consistent with clenched fist syndrome.

Petitioner testified that he cannot be around cold, air-conditioning, or a fan. He stated that he has to wrap his left arm in a warm towel. He testified that he has no strength in his left hand, and no feeling from the outer side of his little finger up his forearm. He testified that he cannot make a fist actively, but can do it passively by closing it with his other hand. He testified that if he touches metal he gets a sharp pain in his left hand only, up to the shoulder. He reported increased pain with cold, metal, fan, and air conditioner. He testified that it feels like his arm and hand are frostbitten. He testified that the pain is

always there. He complained of numbness in his left ring and small finger, and the outer side of his forearm midway up to his elbow. Petitioner denied any these problems before his accident. Petitioner testified that he cannot spread his fingers apart. He testified that he can move his thumb, index, and middle fingers apart, but not his fourth and fifth fingers. Petitioner testified that he has not worked since the date of injury, per his doctors orders. Petitioner testified that he does not have a valid driver's license, because he owes fines.

Petitioner testified that he has never worked a desk job. He stated that he has a GED, and completed high school through the 11th grade. Petitioner testified that he can operate a computer with one hand.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner alleges that his current condition of ill-being as it relates to his left arm and complex regional pain syndrome is causally related to the injury he sustained on 8/9/13. Respondent claims that petitioner sustained a laceration to his left arm that had resolved by 2/9/14, that he does not have complex regional pain syndrome, that he reached maximum medical improvement by 2/9/14, and that he was capable of working full duty as of 2/9/14.

It is unrebutted that petitioner sustained a 6-7 cm laceration of his left wrist/forearm that was closed with 14 staples on 8/9/13. Dr. Cowell, who examined petitioner at the emergency room on 8/9/13, assessed a linear superficial laceration of the left forearm. On 8/23/13 petitioner was diagnosed with a wound infection and pain in his left wrist. He was diagnosed with moderate staphylococcus aureus.

On 8/26/13 petitioner began treating with Dr. Baker, a plastic surgeon and hand surgeon. He diagnosed a 6 cm laceration of the left distal ulnar forearm. He noted that petitioner had numbness distal to the laceration over the typical sensory area of the ulnar nerve; that his threshold discriminatory perceptions were markedly reduced; and the unlar nerve innervated intrinsics were weaker in the left hand versus the right hand. Dr. Baker also noted that the arterial flow of the left hand revealed almost no flow through the ulnar system.

Petitioner continued to treat with Dr. Baker and continued to complain of ongoing numbness in the ulnar area of the left hand. On 9/3/13 Dr. Baker noted that threshold testing again revealed decreased perception over the ulnar nerve distal to the injury. He noted ulnar nerve head discrimination on the left hand greater than 4 gms, and the muscles were weaker in the left hand in the distribution of the motor branch of the ulnar nerve. By 9/10/13 petitioner was demonstrating decreased grip in the left hand, as

well as aesthetic areas of the left 4th and 5th fingers. On 9/11/13 Dr. Baker noted some slight swelling, and noted petitioner's decreased sensation over the distribution of the ulnar nerve hand not abated.

By 1/15/14 petitioner was complaining of severe discomfort in his left hand when exposed to cold. Dr. Baker noted decreased sensory perception over the distribution of the ulnar nerve distal to the site of the injury.

Petitioner underwent two EMG nerve conduction studies that were normal. However, when he underwent the EMG by Dr. Mahmound on 5/12/14, Dr. Mahmound noted that petitioner had an inability to fully flex the 4th and 5th fingers on his left hand, and that he had pain when the area was palpated.

On 6/4/14 petitioner reported to Dr. Baker that cold was still causing him severe discomfort in his left hand. He even stated that a fan causes him severe discomfort, and that he felt like his fingers were on fire. Dr. Baker noted that petitioner's movement of making a fist was not coordinated. This was the first time Dr. Baker assessed complex regional pain syndrome.

Petitioner next treated with Dr. Fabrique. He told Dr. Fabrique that he was having high sensitivity to cold, in the left forearm, wrist and hand. Dr. Fabrique also noted that petitioner's 4th and 5th fingers on his left hand did not close with fist making actively, but could be closed passively. Dr. Fabrique also noted that petitioner's capillary bed on the left was pale versus the right. Dr. Fabrique also diagnosed a laceration of the left forearm with complex regional pain syndrome.

The only other doctor that examined petitioner was Dr. Crandall, on behalf of respondent. Petitioner reported that cold causes him pain, and that he had decreased grip strength and numbness along the ulnar aspect of the forearm and in the 4th and 5th fingers of the left hand. He also reported decreased range of motion. Dr. Crandall noted that petitioner told him he could not separate the 4th and 5th fingers of the left hand, or the 3rd and 4th fingers of the left hand. He also noted that petitioner demonstrated giveaway weakness on grip strength. Dr. Crandall noted no loss of hair, or color or temperature changes. He also was of the opinion that the sensory, grip, pinch and range of motion data were all diagnostic for submaximal effort. Dr. Crandall performed a 2nd EMG and ultrasound of the ulnar nerve that were normal. Dr. Crandall did not believe petitioner had complex regional pain syndrome or findings consistent with that condition. He was of the opinion that petitioner sustained a laceration of the left wrist that was well healed 6 months after the date of injury.

In his deposition Dr. Baker testified that he based his diagnosis of complex regional pain syndrome on the fact that petitioner described that his hand was on fire. He was of the opinion that this is a very

common finding for complex regional pain syndrome. He also relied on the fact that petitioner's pain was out proportion to stimuli, which he opined was another typical finding of complex regional pain syndrome. He believed petitioner's inability to move his fingers could be due to fear of pain and a psychological issue. Lastly, he based his finding of complex regional pain syndrome on his finding that the capillary bed on the left was pale versus the right. Dr. Baker opined that complex regional pain syndrome will not necessarily show up on an EMG. He testified that his diagnoses and findings were not only based on petitioner's subjective complaints.

In his deposition Dr. Crandall, also a hand surgeon and plastic surgeon, testified that a person with complex regional pain syndrome will have findings such as swelling, color changes, loss of hair, and temperature changes. He stated that he did not find any of these in petitioner. He believed that if petitioner had exquisite pain untouched he would not be able to passively move the petitioner's hand, which he was able to do. He opined that complex regional pain syndrome is never permanent, and petitioner would not have symptoms a year after his injury. He denied that petitioner ever told him that his hand felt like it was on fire, but admitted that he told him that a fan blowing on his hand caused him a lot of pain. Dr. Crandall opined that petitioner does not have complex regional pain syndrome. He opined that petitioner sustained a laceration that had reached maximum medical improvement 6 months after the injury. On cross examination, Dr. Crandall testified that petitioner specifically told him that cold causes pain, that he had a decreased grip strength, that he could not take things up, that he had numbness in his forearm and that he had decreased range of motion. Dr. Crandall believed that if petitioner cut his ulnar nerve he would not be able to move his fingers apart at all.

Based on the above, as well as the credible record, the arbitrator finds the opinions of Dr. Baker and Dr. Fabrique more persuasive than those of Dr. Baker. The arbitrator bases this opinion on the fact that petitioner's symptoms had been consistent from when he first saw Dr. Baker and worsened over time. They were also consistent with what he told Dr. Fabrique. The arbitrator finds that Dr. Baker did in fact note swelling, hypersensitivity to cold, and a capillary bed on the left that was pale versus the right. It is unsure whether petitioner had any temperature changes because no doctor performed that test. The arbitrator admits that petitioner did not have any hair loss, but based on Dr. Baker's opinions, he did not believe a patient must have all possible symptoms of complex regional pain syndrome for the condition to exist. The arbitrator finds the most significant evidence in determining causality between petitioner's current condition of ill-being and the injury on 8/9/13 to be the fact that petitioner's complaints since he first saw Dr. Baker about two weeks after the injury until he testified at trial were consistent.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that his current condition of ill-being as it relates to his left arm, including the diagnosis of complex regional pain syndrome, causally related to the injury he sustained on 8/9/13.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found the petitioner's current condition of ill-being as it relates to his left arm is causally related to the injury he sustained on 8/9/13, the arbitrator finds all treatment petitioner received from 8/9/13 through 1/16/15 reasonable and necessary to cure or relieve petitioner from the effects of his injury.

Based on the above, as well as the credible evidence the arbitrator finds the respondent shall pay reasonable and necessary medical services related to the treatment of petitioner's left arm from 8/9/13 through 1/16/15, as provided in Sections 8(a) and 8.2 of the Act.

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

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found the petitioner's current condition of ill-being as it relates to his left arm is causally related to the injury he sustained on 8/9/13, but has not treated with Dr. Baker since 6/4/14, the arbitrator finds the petitioner needs to present to Dr. Baker to find out what treatment is reasonable and necessary for his complex regional pain syndrome as of this date. The arbitrator is requiring this visit based on Dr. Baker's own testimony that it was too late for surgery for this condition, his opinion that the longer you delay physical therapy the less effective it becomes, and that the best time to perform surgery would be within a year and a half of the injury, which will be in February of 2015. The arbitrator believes a follow up examination with Dr. Baker is necessary to determine if physical therapy would still be effective, or if some other treatment modality would be more effective, such as the medical management of multiple types of drugs, intravenous injections or stellate ganglion blocks he recommended.

Based on the above as well as the credible evidence the arbitrator finds the petitioner is entitled to prospective medical treatment as recommended by Dr. Baker only after he has had an opportunity to reexamine him, given the fact that the time has lapsed for many of Dr. Baker's treatment recommendations.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner was taken off work on the date of injury. Dr. Baker continued that off work authorization from the first time he saw him on 8/26/13 through the last date he saw him on 6/4/14. Dr. Crandall was of the opinion that petitioner did not have complex regional pain syndrome and was capable of returning to full duty work within 6 months of his injury. Having adopted Dr. Baker's and Dr. Fabrique's diagnosis of complex regional pain syndrome, and his off work status as of the last time he saw him on 6/4/14, the arbitrator finds the petitioner was temporarily totally disabled from 8/10/13 through 1/16/15. Although Dr. Baker was of the opinion during his deposition on 10/29/14 that petitioner could sit at a desk doing right handed work, if it was available, and that he was capable of answering the telephone, respondent never offered petitioner any light duty work within these restrictions.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner was temporarily totally disabled from 8/10/13 through 1/16/15, a period of 75 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ 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

Ana Roman,
Petitioner,
vs.

15IWCC0781

NO: 11 WC 26246

Crown Services,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of reinstatement and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 20, 2015 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: OCT 23 2015
KWL/vf
O-10/13/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF DUPAGE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ana Roman,
Petitioner,
vs.

15IWCC0782
NO: 10 WC031737

Crown Services,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of reinstatement and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 20, 2015 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: OCT 23 2015
KWL/vf
O-10/13/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Salvador Izaguirre,

Petitioner,

15IWCC0783

vs.

NO: 14 WC 335

H & M International,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 15, 2015 is hereby affirmed and adopted.

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

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: OCT 2 3 2015
KWL/vf
O-10/13/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

15IWCC0783

IZAGUIRRE, SALVADOR
Employee/Petitioner

Case# **14WC000335**

H&M INTERNATIONAL
Employer/Respondent

On 12/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2001 LOUIS A PLZAK & ASSOCIATES
24 W 500 MAPLE AVE
SUITE 201
NAPERVILLE, IL 60540

1872 SPIEGEL & CAHILL PC
PATRICK J JESSE
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

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)

15IWCC0783

Case # 14 WC 335

Consolidated cases: _____

Salvador Izaguirre
Employee/Petitioner

v.

H&M International
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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **November 6, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 10, 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 $**51,093.68**; the average weekly wage was $**1,001.84**.

On the date of accident, Petitioner was **41** 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 $**7,628.48** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**7,628.48**.

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 $1,663.00 to Northlake F.P.D.; $8,329.48 to Holy Cross Hospital; $1,768.00 to Emergency Room Care Providers, S.C.; $1,019.00 to Sinai Health System; and $40.01 to Community Pathology Associates, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $671.23 per week for 47 weeks, commencing 12/11/13 through 11/6/14, as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner penalties of $2,956.43, as provided in Section 16 of the Act; $14,782.14, as provided in Section 19(k) of the Act; and $6,480.00, as provided in Section 19(l) of the Act.

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

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

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

Signature of Arbitrator

12·2·14
Date

ICArbDec19(b)

DEC 15 2014

State of Illinois)
)
County of Cook)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATOR DECISION

SALVADOR IZAGUIRRE,)
)
Petitioner,)
)
v.)
)
H&M INTERNATIONAL,)
)
Respondent.)

15IWCC0783

No. 14 WC 335

FINDINGS OF FACT

The Petitioner, Salvador Izaguirre, testified that he has been working for the Respondent, H&M International, since 2007, as spotter and tractor operator. He was hired and performed his job duties in Northlake, Illinois, which is in Cook County. He testified that he was an "On-Call" employee and as such, he was required to work when called upon, including overtime, or he would face penalties and possible loss of his job for refusing. He also testified that if he started a job, he would have to finish the job, even if his shift ended. Finally, he presented a pay log which showed that he worked overtime in 50 of the 52 weeks preceding the date of accident. (Px. O)

The Petitioner testified that he was working on December 10, 2013, and moved a spotter truck for a co-worker, and then retrieve an ice scraper for the same co-worker. As he was walking back to his truck to get his helmet, a different co-worker was backing up a spotter truck that was hauling a 20 foot long chassis trailer. He did not see the Petitioner and struck him from behind, pinning him between the chassis trailer and a Ford F150 pickup truck that was parked nearby. He was pinned for several moments with his hands above his head, facing the F150

pickup truck, unable to move. Once the vehicles were separated, he fell to the ground, gathered himself and crawled to the cab of his vehicle until assistance arrived. He was taken from the scene via ambulance by the Northlake Fire Department (Px. B) to Loyola Gottlieb Memorial Hospital complaining of lower back pain and testicular pain. (Px. D) The emergency room doctors took x-rays, a CT scan and performed some lab tests. (Px. D) He was diagnosed with right traumatic testicular pain and right side traumatic pain and was told to follow up with his family physician. (Px. D)

The next day, the Petitioner followed up with his family physician, Dr. George Thomas at the Evergreen Care Center. (Px. E) He had continued complaints of pain in his low back and groin and was sent for more x-rays and an MRI of the lumbar spine and was taken off work. (Px. E, pg. 2) The MRI and x-rays were performed at Advanced Medical Imaging Center on December 26, 2013. (Px. E, pgs. 19–23) The MRI revealed a disc extrusion at L4-L5. (Px. E, pg. 19–23) Based on the results of the MRI, Dr. Thomas referred him to a neurosurgeon specialist for further evaluation. (Px. E, pg. 4)

The Petitioner then went to see Dr. Howard An at Midwest Orthopedics at Rush on January 21, 2014, and gave a consistent injury history and complaint of low back pain. (Px. F., pgs. 71-73) Dr. An noted that Petitioner had a prior back injury history, but indicated that this accident aggravated the prior condition (Px. F, pg. 73) and that the diagnosis and treatment were causally related to the accident. (Px. F, pg. 72) Dr. An felt that surgery was a last resort and that Petitioner should attempt a conservative course of treatment consisting of physical therapy and stronger pain and anti-inflammatory medications, as well as light duty work restrictions. (Px. F, pg. 73) Petitioner testified that his employer does not provide light duty restrictions. Petitioner was referred to and saw Dr. David Cheng, also at Midwest Orthopedics at Rush, to attempt the

conservative care. He saw Dr. Cheng on February 5, 2014, and was prescribed a six week course of physical therapy and to continue work restrictions. (Px. F, pg. 76). On March 6, 2014, he saw Dr. Cheng again and was told to continue physical therapy and work restrictions, and was prescribed to take Norco and to get bi-lateral L4 transforaminal epidural injections. (Px. F, pg. 81) He received the injections on March 18, 2014. (Px. F, pg. 83) Petitioner saw Dr. Cheng again on April 1, 2014, and was referred back to Dr. An because all conservative measures had failed. (Px. F, pg. 85) He saw Dr. An on April 18, 2014, and Dr. An prescribed a two-level L3-L4 and L4-L5 decompression and fusion with possibility of interbody. (Px. F, pg. 87) The worker's compensation carrier has refused to authorize the surgery and would not approve any more visits to either Dr. Cheng or Dr. An.

The Respondent sent Petitioner for an IME with Dr. Jerry Bauer on February 17, 2014, who opined that 1) his diagnosis is back pain with some symptoms in his leg that began after the incident, but that he had prior episodes of a similar nature; 2) that the MRI performed on December 26, 2013, did show a small herniated extruded disc fragment superiorly on the right at L4-5, but he could not determine if it was related to the incident or a "spontaneous" occurrence; 3) he was unable to explain the numbness in his thighs; 4) that physical therapy was medically necessary and related to the injury; 5) that work conditioning may be required 6) that he was capable of working with restrictions of a 20lb lifting restriction and avoid frequent bending, and that said restrictions are related to the injury; 7) that he is not able to perform his current job description and 8) that he is not at MMI. (Rx 1) He also felt that Mr. Izaguirre had underlying degenerative disc disease at L3-4 and L4-5; that an extruded disc at L3-4 that showed up on a prior MRI had resolved spontaneously; and that neither an epidural injection, nor surgery would be warranted at this time. (Rx. 1)

TTD benefits were paid to the Petitioner from the date of incident until April 3, 2014, at the rate of $476.78 per week. Petitioner also had health insurance benefits through his employment. Petitioner testified that due to the amount of wages he lost because he had been unable to work since the date of accident, and the discontinuation of TTD benefits, he could not afford to pay his premiums and his health insurance was cancelled. He then had to obtain Medicaid.

Unfortunately, neither Dr. An, Dr. Cheng nor Midwest Orthopedics at Rush accepts Medicaid as a form of payment. The Petitioner was still experiencing symptoms and needed to receive treatment so he went to Holy Cross Hospital emergency room. He first presented on June 4, 2014, with complaints of low back pain and received pain shots and medications. (Px. G, pg. 6). He returned to the Holy Cross Hospital emergency room numerous times thereafter: June 16, 2014 (Px. G, pgs. 25-44); June 26, 2014 (Px. G, pgs. 45-62); July 4, 2014 (Px. G, pgs. 63-80); July 9, 2014 (Px. G, pgs. 81-89); July 18, 2014 (Px. G, pgs. 90-108); and August 13, 2014 (Px. G, pgs. 109-150) to help manage his pain. He received the same type of treatments each time.

The worker's compensation did authorize one final appointment at Midwest Orthopedics at Rush, which the Petitioner attended on September 18, 2014. Petitioner testified that he was prescribed more pain medications until surgery. Respondent refused to pay for these medications as well. That is the last date that Petitioner has received treatment of any kind.

At the request of the Respondent, the Petitioner went to see Dr. Jerry Bauer again on September 29, 2014, for a follow up IME. This time, Dr. Bauer opined that 1) his diagnosis is subjective low back pain with underlying degenerative disc disease; 2) there is no indication that any of Petitioner's symptoms or complaints are related to the accident; 3) the treatment of

physical therapy, epidural steroid injection and emergency room visits were not related to the accident; 4) if Petitioner would have surgery, it would not be related to the accident; 5) if the Petitioner requires works restrictions, they would not be related to the accident; and 6) that he has reached MMI. (Rx. 2)

Petitioner testified that he had prior problems with his lower back, the first being in 2004, but was of unknown origin. He was thrown from a horse in 2010 and landed on his hip and then a few weeks later he was involved in a motor vehicle incident where his vehicle was forced off the road into a ditch. In February of 2012, he was involved in a minor motor vehicle collision and in May of 2012, his low back was bothering him because he was working two jobs. For each of these incidents, he received pain and anti-inflammatory medications, had epidural injections and physical therapy, except for the February 2012 motor vehicle collision wherein he only went to the emergency room. Each time, the treatment Petitioner received was sufficient enough to resolve his symptoms and allow him to return to work full duty. The last date he received any treatment for the prior conditions was June 19, 2012,which is almost 18 months prior to the accident. (Rx. 5, pg. 30).

Petitioner testified that following his last date of treatment on June 19, 2012, he did not receive any further medical treatment for his back. He further testified that he was working full duty since that date, without restrictions and without assistance from any co-workers to perform his job duties. He also testified that he worked anywhere from 40 to 80 hours per week from that time. This all went through the date of accident on December 10, 2013. Finally, he indicated that the problems he experiences now are worse than he had before because they are more frequent, more debilitating, and are not responding to the same types of conservative care that he received in the past.

Petitioner has testified that he has not worked since the day of the accident and would have the surgery if it was authorized.

The Petitioner has not been involved in any other accidents or incidents since December 10, 2013, that have caused injury to his lower back.

A. In support of the Arbitrator's Decision as to whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator makes the following findings:

It is axiomatic that Illinois employers take employees as they find them. It is also well-recognized that even though an employee may have a pre-existing condition that makes him more vulnerable to injury, recovery for an injury will not be denied as long as it can be shown that the employment was also a causative factor. Sisbro v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

This a very serious injury wherein the Petitioner was hit from behind by a tractor and chassis trailer and pinned for several moments with his arms extended in the air up against a Ford F150 pickup truck.

The Respondent submitted several prior MRI's of the Petitioner's lumbar spine dated June 25, 2010 (R5, pgs. 7-8); March 16, 2011 (R5, pgs. 4-6); August 17, 2011 (R5, pgs. 1-3), and November 1, 2011 (R4). In reviewing these MRI's, they each show a bulging/protruding disc at L4-5, measuring approximately 3mm. Subsequent to the accident, Petitioner's MRI on December 26, 2013, showed an extrusion measuring .5 cm x .7 cm with material extending in subligamentous fashion about 1.6 cm above the intervertebral disc level. (Px. E, pgs. 19-22) An extrusion is far worse than a bulge or protrusion because that means the disc has actually ruptured allowing disc material to spill out, which the MRI shows has happened here.

Respondent's physician, Dr. Bauer, acknowledged in his initial IME the extrusion existed at L4-5, but he could not determine if it was related to the accident or whether it was just a spontaneous occurrence. There was no evidence introduced at the hearing to show a "spontaneous occurrence," however, there is evidence of a traumatic injury occurring on December 10, 2013. Dr. Bauer can't explain the Petitioner's numbness, and he then contradicts himself saying he can't even determine if the disc is herniated, but somehow he can affirmatively state that the disc is not causing Petitioner's symptoms. This just is not credible. He also acknowledged that the Petitioner is not at MMI, and that he cannot do his regular job duies. He agreed with the work restrictions, and said they too were related to the accident. He also acknowledged that the treatment of physical therapy is necessary and related.

In his follow up IME, Dr. Bauer, no longer feels that the treatment he previously agreed with is related. He no longer feels that the work restrictions that he previously agreed with are now related. He says he has absolutely no indication that symptoms or complaints are related to the accident seemingly ignoring that the fact that the Petitioner had no problems for 18 months and then the symptoms began again immediately following the accident. He believes that all Petitioner's problems are due to his underlying diagnosis of degenerative disc disease, but doesn't allow or even address the possibility that the very serious accident could have aggravated this condition, again ignoring 18 months of no symptoms, no treatment, and the ability to work full duty for between 40 to 80 hours a week.

Also, nothing occurred in the 7 months between IME's that would cause Dr. Bauer to change his opinion. In this time frame, Petitioner had not returned to work, he had not re-injured himself in anyway, he did not undergoing any new diagnostic testing, and Dr. Bauer had access to all prior MRI's of the Petitioner as well as information regarding prior injuries of Petitioner at

the time he produced his first report. Based on the above, the credibility of Dr. Bauer has to be called into question.

Dr. Howard An, a Board Certified Orthopedic Back Surgeon, Petitioner's main treating physician, being fully aware that Petitioner had prior problems with his back, has indicted the subject accident has aggravated the prior back problems. (Px. F, pg. 72-73) And further, the diagnosis of L4-L5 disc extrusion with cephalad migration and bi-lateral radicular pain is related to the accident. (Px. F, pg. 72). He has recommended surgery as a result. (Px. F, pg. 87)

The Petitioner has testified that prior to Dr. An, no other doctor has ever told him he needed to have surgery. The Respondent introduced medical records from Dr. Purnendu Gupta of the University of Chicago dated October 14, 2011, and October 20, 2011. (Rx. 3, pgs. 8-11) Dr. Gupta stated, "I briefly explained to Mr. Izaguirre that I do not feel surgery would be recommended for back pain but we would consider it certainly if there was significant nerve compression which may help with his leg symptoms. We will determine that as soon as his MRI can be scheduled." This statement is not a determination that surgery is required to cure his condition. Dr. Gupta is merely discussing a possible course of treatment if it is shown that there is significant nerve compression by further testing. Respondent has not introduced any other medical records or evidence where it is shown that the Petitioner had significant nerve compression prior to the date of accident. Respondent has not introduced any other medical records where it is shown that surgery is even discussed, let alone, recommended other than Dr. Gupta's notes. The Petitioner indicated that the conservative treatment he received lessened his symptoms and allowed him to work full duty. He also testified that he never had any surgical procedures on his back.

The case at hand is similar to Benjamin Mulvaney v. Mulvaney Painting, 13 IWCC 588;

2013 Ill.Wrk.Comp. LEXIS 664, where the Commission found causal connection. In *Mulvaney*, the petitioner had a prior history of low back pain, but he didn't have any relevant prior treatment that was close in time to the accident. Petitioner had sporadic treatment in the two years prior to the injury, but he did not miss any time from work and he was able to work regular duty. Since the accident, the petitioner was not able to work his regular duty job. Further, he was unable to seek regular care because of the denials by the respondent's worker's compensation carrier and his lack of group health insurance. Id. at 19.

The case at hand is also similar to Noah Brinkman v. MBI, 11 IWCC 0133; 2011 Ill.Wrk.Comp. LEXIS 147, where the Commission again found causal connection. In *Brinkman*, the petitioner had experienced low back problems prior to being hired by respondent. There was no indication that the problems required anything more than conservative care. Nor was there any evidence these problems prevented petitioner from performing strenuous tasks for his job up and until the undisputed accident. He disclosed his prior back issues to his treating physicians as well. Due to the facts that the petitioner performed his heavy duty job for 2 ½ years before the accident, the difficulties he had performing his job after the accident, and the causation opinion of his treating physicians, the Commission found causal connection. Id. at 29-31.

Another case on point is Thomas Dewitt v. State of Illinois, 10 IWCC 158; 2010 Ill.Wrk.Comp. LEXIS 1201. In *Dewitt*, the petitioner had a back surgery two years prior to the date of accident and was also subject to episodic back pain due to degenerative disc disease. He last received treatment on May of 2008, and was injured on November 26, 2008. In finding causal connection, the Commission looked at the facts that from May to November 26, 2008, there was no medical treatment, the petitioner was not on any work restrictions and the petitioner never missed any time from work. Additionally, there was no evidence that any doctor

recommended a fusion prior to November 26, 2008. These facts taken together were enough to find causality. Id. at 21-22.

Finally, another case on point is Martin Martinez v. Group O and Caterpillar, Inc., 12 IWCC 1385; 2012 Ill.Wrk.Comp. LEXIS 1402. Martinez injured his low back on January 3, 2008. He had a prior lumbar surgery before he was hired by respondent. He was released at MMI in February of 2007. Between the MMI release and the accident the following January, there was no evidence that petitioner received any medical care for his back, despite respondent introducing numerous exhibits containing prior medical care. Also, petitioner was able to work his job full duty during this period. There was no testimony that petitioner made any complaints of pain to any co-workers or anyone working for respondent. There was no dispute that petitioner was involved in a serious accident where he was knocked to the ground by an object weighing over 100 pounds. Petitioner had immediate complaints of pain and began treating right away. Petitioner attempted conservative care, which failed and required surgery. Based on the above, the Commission found causation. Id. at 20-24.

Proof of the state of health of an employee prior to and down to the time of the injury, and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. Kress Corp. v. Industrial Commission, 190 Ill.app.3d 72, 82 (1989).

Here, Mr. Izaguirre has testified without contradiction, that he was not experiencing any problems with his back in the time period immediately to December 10, 2013; that he sustained a clear and traumatic injury on December 10, 2103; that he experienced immediate pain in his low back and testicles (which swelled up considerably) as soon as he was un-pinned from the two vehicles at the scene of the accident; that he was taken from the scene via ambulance to the

hospital; and that he had follow up treatment the next day by his family physician. The Petitioner then obtained constant and ongoing medical care thereafter for several months while awaiting approval of the surgery. (Px. E, F, and G)

He also testified without contradiction that he was working his full duty job for 18 months prior to the accident; that he was not on any work restrictions for that 18 month period; and that he had no medical treatment during that same 18 month period. Finally, he testified he was not involved in any other accidents wherein he sustained injury to his back after December 10, 2013.

Based on *Sisbro*, requiring that the employment be only "a" causative factor; the credible opinion of his main treating physician, Dr. An, who has indicated that the injuries sustained were a result of the accident; and by comparing the Petitioner's medical condition prior to December 10, 2013, with his condition thereafter; the Petitioner has shown a causal relationship between his accidental injury on December 10, 2013, and his present condition.

The Respondent offered no credible evidence to rebut the testimony of the Petitioner, which the Arbitrator finds to be credible. The Arbitrator finds the Petitioner's current condition of ill-being is causally related to the injury.

B. In support of the Arbitrator's Decision as to what the Petitioner's earnings were, the Arbitrator makes the following findings:

The Courts have found that overtime is to be included in the calculation of Petitioner's weekly wage if 1) the Petitioner were required to work overtime as a condition of his employment; 2) Petitioner consistently worked a set number of hours each week or 3) the overtime hours the Petitioner worked were part of his regular hours of employment. See Tower Automotive v. Worker's Compensation Commission, 407 Ill.App.3d 427 (1st Dist. 2011),

referencing Airborne Express v. Illinois Worker's Compensation Commission, 372 Ill.App.3d 549 (1st Dist. 2007).

Petitioner testified that his employment is governed by a Collective Bargaining Agreement. (Px. P). Section 3.2 Overtime on page 4 of the Collective Bargaining Agreement specifically provides "The Employer shall have the right to require employees to work as much overtime as the Employer deems necessary, including overtime work on holidays." (Px. P) The Agreement also states that "If the Employer deems emergency overtime is necessary and the hours become continuous with the next shift, the Employer will hold over, by seniority without penalty to the Employer." (Px. P)

Respondent provided a job description to Dr. Howard An which indicates that the Employee is required to work an 8 hour shift. The job description also states that overtime is frequent and is mandatory in some cases. (Px. F, pg. 6)

Petitioner further testified that he was an on-call employee, which meant he had to work if he was called upon. He also testified that he could lose his job if he refused to work. Finally, he indicated that once he started a job, he was required to finish it, even if his shift ended.

Petitioner submitted wage information for the year prior to the accident, and it showed that he worked overtime in 50 of the 52 weeks prior to the accident. (Px. O)

The issue of including overtime in the average weekly wage was address before in Donald Davidson v. Southern Wine & Spirits, 13 IWCC 408; 2013 Ill.Wrk.Comp. LEXIS 455. In Davidson, the petitioner was required to complete his delivery route and didn't have the option of returning to the office if the route was not done. Also, although his overtime hours varied, he worked every week after his initial training period had ended. The Commission held

that due to these two factors, his overtime was a condition of his employment and thus included in the average weekly wage calculation. Id. at 29.

This issue was also addressed in John R. Colles v. Corporate Express, 13 IWCC 259; 2013 Ill.Wrk.Comp. LEXIS 291, where again the overtime the petitioner worked was included in the average weekly wage. In *Colles*, the petitioner testified that he worked from 7 am every day until his route was done. The overtime was mandatory because he had to get his route done no matter what, and if he had a job, he had to get it finished before the end of the day. The Commission held that the overtime worked was a part of the regular hours of employment given that he had to complete his route regardless of the time it took, and therefore, any overtime associated therewith was a condition of his employment. Id. at 37.

In the case at hand, the Petitioner has met all the requirements laid out in the *Tower* and *Airborne Express* opinions. Based on the Collective Bargaining Agreement, the job description provided by the employer, and Petitioner's testimony that he had to finish any jobs he started and accept all overtime presented or possibly lose his job, the Arbitrator finds that the overtime was mandatory and a condition of the employment. Furthermore, the wage information provided by the Petitioner showing that he worked 50 out of 52 weeks was consistent, and therefore, his overtime should be included in the average weekly wage.

The Respondent offered no evidence to rebut the testimony or evidence of the Petitioner, which the Arbitrator finds to be credible. The parties have stipulated that if the Arbitrator finds that overtime should be included in the average weekly wage calculation, then the average weekly wage shall be $1,001.84, and it is so ordered.

C. In support of the Arbitrator's Decision as to whether the medical services provide to Petitioner were reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator makes the following findings:

The Petitioner testified that he suffered immediate and disabling injuries at the time of the accident. He received medical treatment the same day of the accident endeavoring to cure his injuries and received continuous treatment thereafter.

The Petitioner submitted into evidence Arbitrator's Exhibit 1 which listed the amount of medical bills that remain unpaid for treatment the Petitioner received for his injuries.

Northlake F.P.D.
Date: 12/10/13
Amount: $1,663.00

Holy Cross Hospital
Dates: 6/4/14 to 8/13/14
Amount: $8,329.48

Emergency Room Care Providers, S.C.
Dates: 6/4/14 to 6/26/14
Amount: $1,768.00

Sinai Health System
Dates: 7/4/14 to 8/13/14
Amount: $1,019.00

Community Pathology Associates
Date: 6/4/14
Amount: $40.01

See Px. C, Px. H, Px. I, Px. J and Px. K. The parties stipulated at the hearing to the admission of these bills. These bills remain unpaid.

Having found in Petitioner's favor on the issue of causal connection, the Arbitrator awards Petitioner those medical expenses in exhibits Px. C, H, I, J, and K stemming from the treatment rendered from December 10, 2013, through August 13, 2014. Respondent will pay all awarded medical expenses directly to the providers subject to the statutory medical fee schedule in effect on the dates of treatment.

D. In support of the Arbitrator's Decision as to whether Petitioner is entitled to prospective medical care, the Arbitrator makes the following findings:

The Petitioner received all forms of conservative care which he has testified have failed. He has been off work for almost a year, and has had no relief from his symptoms. Dr. Cheng has indicated that all conservative methods have failed. Dr. An has indicated that Petitioner needs surgery.

In reviewing the medical records of Dr. George Thomas at Evergreen Care Center (Px. E) and of Dr. Howard An and Dr. David Cheng of Midwest Orthopedics at Rush (Px. F), and hearing the testimony of Petitioner of his medical condition and how the accident occurred, the Arbitrator finds that the Petitioner has sustained a significant injury to his lower back that requires surgery. The Arbitrator relying on the opinions of the treating physicians, concludes that Respondent shall authorize and pay for the treatment protocol as outlined by Dr. An, namely a two-level L3-L4 and L4-L5 decompression and fusion with possibility of interbody (Px. F, pg. 87) along with any post-surgery rehabilitation and medications required.

E. In support of the Arbitrator's Decision as to what temporary benefits are in dispute, the Arbitrator makes the following findings:

The Petitioner claims that he is entitled to temporary total disability benefits for 47 weeks, covering the period from December 11, 2013, until November 6, 2014. The emergency room physician took Petitioner off work on December 10, 2013, until December 12, 2013, with restrictions of a sitting job only, no lifting or carrying at all until cleared by corporate health. (Ex. D, pg. 6) On December 11, 2013, Dr. Thomas took Petitioner off work until December 19, 2013. (Px. E, pg. 3) On January 14, 2014, Dr. Thomas indicated that Petitioner be off work from the date of accident until he is cleared by a specialist. (Px. E, pg. 5) On January 21, 2014, Dr. An indicated that Petitioner is able to work with light duty restrictions of lifting with a 20 pound

maximum. (Px. F, pg. 72) On February 5, 2014, Dr. Cheng indicated that Petitioner is able to work with light duty restrictions of lifting 20 pounds with frequent carrying of objects weighing up to 10 pounds, and no bending, twisting, squatting, climbing and reaching, but limited sitting, driving, standing and walking. (Px. F, pg. 33) On March 6, 2014, Dr. Cheng continued these restrictions. (Px. F, pg. 36) On March 18, 2014, Dr. Cheng continued these restrictions again. (Px. F, pg. 34) On April 1, 2014, Dr. Cheng took Petitioner off work. (Px. F, pg. 35) On April 20, 2014, Dr. An indicated Petitioner is unable to work due to his lumbar spine condition. (Px. F, pg. 89)

On February 17, 2014, Respondent's IME physician indicated that the Petitioner should have light duty restrictions of lifting 20 pounds and limited bending. (Rx. 1)

Petitioner testified that he sought light duty, but was informed that the Respondent does not provide any light duty work. Petitioner's job duties as indicated in the job description submitted by Respondent to Dr. An (Px. F, pg. 6) show the Petitioner is required to physically climb in and out of the cab, walk on grating, bend to connect and disconnect air cables and occasionally adjust dolly wheels when moving trailers throughout the yard. Petitioner testified that when he uses the crane, the operation of the crane is easy, but he is required to sit for long periods of time, 7 to 8 hours at a time, sometimes longer. Based on the restrictions provided by Dr. An, Dr. Cheng, and even Dr. Bauer, the Petitioner could not perform his job duties. Furthermore, Respondent has put forth no evidence whatsoever that Respondent would provide Petitioner with a light duty job. Regardless, Dr. An took him off work completely pending surgery on April 20, 2014. The parties stipulated that Respondent paid TTD benefits to the Petitioner from December 11, 2013, to April 3, 2014, totaling $7,628.48. (Arb. Exh. 1)

Based on the above, and since the Arbitrator has concluded that the Petitioner's medical condition is causally related to that injury, the Respondent is liable to pay temporary total disability benefits to the Petitioner for 47 weeks based on average weekly wage of $1,001.84. After allowing a credit of $7,628.48, the amount awarded to Petitioner is $23,919.46.

($1,001.84 x 47 x 67%) - $7,628.48 = $23,919.46

F. In support of the Arbitrator's Decision as to should penalties and fees be imposed upon the Respondent, the Arbitrator makes the following findings:

Section 19(k) of the Worker's Compensation Act provides for penalties as follows:

"In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." *820 ILCS 305/19(k).*

Section 19(l) also provides for assessment of penalties:

"In case the employer or his or her insurance carrier shall without good and just cause, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." *820 ILCS 305/19(l).*

Lastly, Section 16 of the Act provides for an award of attorney fees where an employer or insurance carrier "Has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses, which do not present a real

controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act." *820 ILCS 305/16.*

While a claimant seeking benefits under the Act bears the burden of proof as to most issues, the burden shifts to the employer when penalties and fees are at stake. Specifically, the employer must show that it acted in an objectively reasonable manner, under all existing circumstances, in denying benefits. Board of Education v. Industrial Commission, 93 IL2d 1 (1982).

Once 14 days without benefits passed, the rebuttable presumption of unreasonable delay shifted to the Respondent. Respondent failed to introduce evidence to rebut this presumption. Respondent was paying TTD to the Petitioner from December 11, 2013, to April 3, 2014. Respondent paid all of Petitioner's medical care, except for the ambulance bill on the date of accident, through April 18, 2014, and then stopped paying both TTD benefits and medical benefits. The Respondent must have a basis for denying these benefits at the time the benefits are denied, and must provide the Petitioner with the basis for denial in writing. The Respondent has never issued a letter indicating that the TTD benefits were being stopped, and furthermore, has never provided a basis to deny the benefits.

In reviewing Respondent's Response to Petitioner's Motion For Penalties and Fees (Rx. 6), the only defense raised by the Respondent is that Respondent is relying upon the IME report dated February 17, 2014, in which Dr. Bauer indicates that the Petitioner is not a surgical candidate.

The problem with that argument is Dr. Bauer's initial report does not provide the required basis. If anything, the report shows that the Respondent should have continued paying TTD benefits. In his report, Dr. Bauer actually believed that Petitioner was not at MMI. (Rx. 1) He

went on to opine that Petitioner is not able to perform his current job description and was only capable of working with restrictions of a 20 pounds lifting and avoiding frequent bending. (Rx. 1) He further opined that said restrictions are related to the injury. (Rx 1) He also felt that the Petitioner was not done treating; that Petitioner should have physical therapy for 6 to 8 weeks; and that Petitioner may require a work conditioning program after that. (Rx. 1)

On May 2, 2014, Respondent was sent a letter indicating that surgery was recommended, and Petitioner was requesting approval of same. (Px. M) In the same letter, Petitioner requested that Respondent continue making TTD payments, which had stopped, and to provide a denial letter with the basis therefore, if said benefits were in fact being denied. (Px. M)

The Respondent decided they wanted another IME, however, Respondent waited until July 14, 2014, over two months to arrange the second IME with Dr. Bauer, and even then, the IME was not set to go until September 29, 2014.

In the interim, the Respondent knew or should have had the knowledge within their control, that: 1) Petitioner received no income from the Respondent since April 3, 2014; 2) the Petitioner applied for and was denied short and long term disability benefits that were supposed to be provided by the Respondent as benefit to the Petitioner as part of his employment; and 3) that Petitioner no longer had group health insurance benefits because they were cancelled due lack of payment of the premiums.

If Respondent has an argument that it was justified in denying TTD benefits, the argument would not be applicable until after Respondent received the report from the follow up IME with Dr. Bauer on September 29, 2014. The problem is that Respondent waited over 7 months from the initial IME to obtain that second opinion. So the net result was that the Petitioner needed surgery and had no ability to work. He had no insurance to pay for the surgery

and no income from any source, including from the Respondent's worker's compensation carrier or from the short and long term disability carriers up and through the date of hearing. In stopping TTD benefits in April, while not getting a follow up report for several months, the Respondent has demonstrated vexatious delay.

Respondent did introduce proof of an advance payment against permanency over Petitioner's objection. However, said payment is not relevant to the issue because it for permanency, not TTD. Furthermore, even if the payment is to be considered, it is less than half of what Respondent actually owed to Petitioner at the time it was made.

Based on the above, the Arbitrator finds that the Respondent is guilty of unreasonable or vexatious delay of payment of compensation without good and just cause, and further, the Respondent unreasonably delayed and denied the payment of benefits under Section 8(a) or Section 8(b). As a result, the Respondent shall be required to pay penalties to the Petitioner under Section 19(k) and Section 19(l) of the Worker's Compensation Act and attorney fees under Section 16 of the Act as indicated and calculated below.

It is noted that the parties stipulated that if penalties are awarded, the average weekly wage should be $774.00 for the purposes of calculating said damages. Again, Respondent shall get a credit for the TTD amount previously paid.

Section 19 (k) (TTD): (47 weeks x $774.00 x 67%) - $7,628.48 x 50% = $8,372.39

Section 19 (k) (Unpaid Medical Bills): $12,819.49 x 50% = $6,409.75

Section 19 (l): April 4, 2014, to November 6, 2014 = 216 days x $30 = $6,480.00

Section 16: $8,372.39 + $6,409.75 = $14,782.14 x 20% = $2,956.43

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☐ 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

GREGORY MAHAN,

Petitioner,

15IWCC0784

vs.

NO: 08 WC 029061

FREEMAN UNITED COAL COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of occupational disease, permanent disability and evidentiary rulings and being advised of the facts and law, reverses, in part, the Decision of the Arbitrator as stated below and, in part, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Act relieves the Commission of the burden of determining whether Petitioner had been exposed to an occupational disease. Petitioner worked in underground mines for over thirty years. He, unquestioningly, satisfies the statutory presumption to having been exposed to occupational diseases. The question before the Commission is whether that exposure resulted in Petitioner contracting any occupational disease(s). There is no statutory presumption that exposure to occupational diseases results in the contraction of occupational diseases.

Arbitrator Maureen Pulia presided over Petitioner's claim to having sustained occupational diseases that arose out of and in the course of his employment with Respondent. Petitioner, specifically, claims to have contracted respiratory diseases as a result of inhaling coal dust and various mine gases while working as a miner. Arbitrator Pulia, in her November 14, 2014, arbitration decision, found Petitioner had failed to prove that he was positive for any occupational disease as of his last day of exposure, August 6, 2007. The Commission finds adequate evidence to the contrary.

The Commission finds Petitioner satisfied his burden of proving that his work in the underground mining environment and resulted in either caused or aggravated his chronic bronchitis, rhinitis and sinusitis and, accordingly, reverses the finding of Arbitrator Pulia on this issue. Apparently underappreciated by Arbitrator Pulia was Petitioner's testimony concerning his deteriorating physical

condition as she did not comment about it in the arbitration decision. Petitioner testified to being unable to walk more than a mile on level ground and at a normal pace before becoming short of breath. He testified further to often having to sit down when outside, noting specifically his inability to mow only half of his lawn without having to rest. He also testified to struggling to climb up the nine steps that lead out from his basement. Notice is taken of Petitioner's lifelong habit of smoking tobacco and does not discount that it likely contributes to the difficulty Petitioner has with breathing and physical activities, but, the Commission recognizes that recovery under the Act requires only some aspect of his condition to be the result of his exposure to occupational diseases and finds the exposures Petitioner experienced while working in the mines combined with his smoking habit have resulted in Petitioner's present condition.

The Commission is also not troubled with the absence of any diagnosis of chronic bronchitis in the medical treatment records of Dr. Pravinderpal Gill, Petitioner's treating primary care physician. Respondent's examining physician, Dr. James Castle, noted that some primary care physicians, unlike specialists, perform "complaint-oriented" examinations. The Commission finds this appears to have been Dr. Gill's approach to treating Petitioner, simply addressing the specific ailment Petitioner complaining about at the time. This approach would explain, as Dr. Gill testified to, why he didn't record Petitioner as coughing or having sinus issues as frequently as might be expected. Dr. Gill also indicated that he didn't believe Petitioner came to him every time he had a cough and sometimes worked through the coughing episodes without treatment. The Commission takes notice that Dr. Gill, in response to a written question Petitioner's attorney posed to him, expressed his belief that Petitioner had chronic bronchitis that was related to Petitioner's exposure to the coal mine environment. He made himself available to be questioned and repeated this belief when questioned. The Commission finds Dr. Gill, both as expressed in his medical treatment records and in his deposition testimony, to be credible and reliable.

Another of Petitioner's treating physicians, Dr. Manjesh Prabhu, testified with respect to Petitioner's chronic bronchitis. Dr. Prabhu stated he treated Petitioner from 1992 through 1995, found Petitioner to have chronic bronchitis in November 1993 and was aware that Petitioner was both a coal miner and a cigarette smoker. He indicated that the most common cause for chronic bronchitis was smoking and that a significant smoking history could predispose a smoker to upper respiratory infections. Dr. Prabhu, both in writing and in his deposition testimony, left open the possibility of Petitioner's chronic bronchitis being aggravated as a result of him working as a coal miner. Nothing brought forth, either in Dr. Prabhu's records or testimony, gives the Commission pause to find Dr. Prabhu to be less than credible.

The Commission, in addition to reviewing the medical treatment records and the testimony of Dr. Gill and Dr. Prabdu, was provided an examination report and evidence deposition of Dr. William Clapp. Dr. Clapp examined Petitioner on April 16, 2010, and again on November 16, 2011. These examinations were conducted at Petitioner's attorney's request and resulted in Dr. Clapp taking a history, on April 16, 2010, of coughing episodically between ten and fifteen years and another, on November 16, 2011, of Petitioner coughing every day. Tests taken on those occasions found Petitioner's results to be within the range of normal but did indicate Petitioner used a considerable amount of his breathing reserve, an amount Dr. Clapp testified as being indicative of lung disease. Dr. Clapp was aware of Petitioner's smoking history and of Petitioner's being exposed to airborne elements that can cause or aggravate chronic bronchitis. Dr. Clapp concluded that it was the combination of Petitioner's smoking and his exposures within the coal mine which resulted in the chronic bronchitis that was revealed during the examinations. Dr. Clapp is found to be credible.

Respondent engaged Dr. James Castle to review medical records, and Dr. Castle reviewed the April 28, 2008, radiographic report of Dr. Henry Smith; the November 16, 2011, medical report of Dr. William Clapp; the radiographic reports of Dr. Christopher Meyer; the medical records from Springfield

Clinic; medical records from Orthopedic Center; medical records from Dr. Prabu; medical records from St. Vincent Memorial Hospital; medical records from Midwest Occupational Health Association; medical records from Memorial Medical Center; medical records from Dr. Sterling Parker. He came to the conclusion that Petitioner exhibited no evidence of any impairment related to exposure to the environment of a coal mine. He attributed the impairment found in Petitioner's records exclusively to Petitioner's decades-long smoking habit and obesity. Dr. Castle, however, indicated that a pulmonologist who obtained a history and examined a subject would be in a good position to diagnose chronic bronchitis, noting that it is better to have a history as well as an examination and the ability to ask questions of the subject. Dr. Castle did not have these opportunities whereas Dr. Gill and Dr. Prabu did so repeatedly and Dr. Clapp did on the occasion he saw Petitioner. Per Dr. Castle, these three physicians were in a better position to diagnosis Petitioner's respiratory complaints.

The Commission is comfortable relying on the opinions of Dr. Gill, Dr. Prabhu and Dr. Clapp as all three questioned and examined Petitioner and took into consideration all of the possible causes for Petitioner's complaints and also the possible interplay between those causes. Dr. Castle, on the other hand, failed to articulate that he even considered any such interplay. The Commission, in reliance on the opinions of Dr. Gill, Dr. Prabhu and Dr. Clapp, find Petitioner proved that his chronic bronchitis, rhinitis and sinusitis were at least aggravated by the exposures he encountered while working as a coal miner on August 6, 2007.

The Commission is not as comfortable finding Petitioner established that he contracted coal workers' pneumoconiosis (CWP) and affirms Arbitrator Pulia's finding that Petitioner failed to prove that his exposures to occupational hazards resulted in him developing CWP. Dr. Clapp is a B-reader and diagnosed Petitioner with CWP, finding it to be the result of coal mine exposures. His tests results were negative, but this did not preclude Dr. Clapp from positing that radiographic CWP might be present. Dr. Clapp's tepid endorsement is consistent with the more definitive opinions offered by Dr. Henry Smith, Dr. Robert Cohen and Dr. Michael Alexander, a B-readers. Those three opinions, however, were offered only in a letter and not subjected to questioning. Those three opinions, also, were countered by B-readers who found CWP not present in Petitioner's chest x-rays. The B-readings conducted by Dr. John Parker and Dr. Robert Harrison were performed using chest x-rays from May 7, 2007. These x-rays, taken prior the two-year anniversary of Petitioner last being exposed to the coal mine environment, therefore, are not reliable to ascertain the condition of Petitioner's lungs after 2007. Two other physicians, Dr. Castle and Dr. Christopher Meyer, allowed for the possibility that CWP might be present at the pathological level. The Commission has no reason to find the opinions of Dr. Smith, Dr. Cohen and Dr. Alexander to be any more credible than the opinions of Dr. Castle and Dr. Meyer or vice versa.

The Commission is under no obligation to adopt any of the proffered opinions but gives greater weight to those who provided evidence testimony. In the present case, however, the testifying physicians stated only that CWP could be present within Petitioner's lungs. To adopt these opinions, the Commission would have to engage in impermissible speculation. The Commission, therefore, finds Petitioner failed to prove Petitioner satisfied his burden of showing his claimed CWP arose out of and in the course of his employment.

Petitioner's aggravation of his chronic bronchitis, rhinitis and sinusitis has resulted in a permanent disability. Petitioner seeks compensation in the form of a wage differential award under Section 8(d)1. To receive a wage differential award, Petitioner must prove he qualifies by proving "(1) partial incapacity which prevents him from pursuing his 'usual and customary line of employment,' and (2) an impairment of earnings." *Gallianetti v. Industrial Commission*, 315 Ill. App. 3d 721, 729-730, 734 N.E.2d 482, 248 Ill. Dec. 554 (3rd Dist. 2000).

Petitioner presented evidence sufficient enough for the Commission to conclude that he is unable

to return to his chosen career as a miner. Dr. Gill, Dr. Prabhu and Dr. Clapp all testified that returning to a mining environment would or could exacerbate Petitioner's chronic bronchitis. The Commission finds these opinions to credible and, as result, finds Petitioner satisfied the first prong of *Gallinatetti.* It is found, however, the second prong of *Gallinatetti* is not satisfied.

To prove an impairment of earnings, "claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment." *Gallinatetti*, 315 Ill. App. 3d at 730. Petitioner fails to prove this.

Petitioner never returned to work and, therefore cannot prove what his pre-accident earnings were and post-accident earnings were. He, instead, would have to demonstrate a wage impairment by proving what he was capable of earning in suitable employment.

Petitioner secured the services of June Blaine, a vocational rehabilitation counselor. She assessed Petitioner's academic and employment histories as well as any transferrable skills Petitioner might possess. She concluded Petitioner, a high school graduate and a career miner, possessed no vocational skills that would allow him to work in any position other than an entry-level position earning between minimum wage and $9.00 an hour. Ms. Blain identified positions such as a gas station attendant, an unarmed security guard, an assembly line worker and a bus driver as positions Petitioner might be qualified to work in. The Commission gives little credence to Ms. Blaine's assessment.

Ms. Blaine provided no evidence as to how she determined Petitioner's potential earnings or potential employment opportunities. There is no suggestion of a labor market survey being conducted, one that would have identified both the wages and possible places of employment. In the absence of any evidence to the contrary, the Commission finds Ms. Blaine engaged in unsupported speculation to arrive at her findings.

Petitioner testified to believing that he signed up for a panel at the Crown II mine and to looking to see if mines in Alabama were hiring. He claimed that he did not look into any other types of jobs only to then testify that he saw employment listings for welders in the *Springfield Journal* and thought about becoming a truck driver. *Gallinatetti* found there was no affirmative requirement under Section 8(d)1 that a claimant conduct a job search but indicated that a job search was one way to demonstrate impairment of earnings. *Gallinatetti*, 315 Ill. App.3d at 731.

The claimant in *Gallinatetti* visited various businesses in the area in which he lived as well as potential employers identified in a labor market survey that was prepared him in an effort to secure employment and resulted in the claimant finding only one job within his restrictions. *Gallinatetti*, 315 Ill. App.3d at 731-732 A byproduct of the claimant's job search was that it provided the court with information about the wages the claimant could expect to earn and allowed the court to determine a wage differential award. *Gallinatetti*, 315 Ill. App.3d at 732. In the present case, Petitioner failed to perform anything but a minimally, cursory job search. In so doing, he did not obtain any information about the wages he might earn, information the Commission could have used to establish a wage differential award.

"[T]he plain language of Section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity." *Gallinatetti*, 315 Ill. App.3d at 728. The Commission believes the evidence Petitioner presented, namely the unsupported opinion of Ms. Blaine with respect to Petitioner's potential earnings, does not satisfy *Gallinatetti.* Accordingly, the Commission awards Petitioner permanent disability benefits under Section 8(d)2 of the Act and finds Petitioner sustained a 7½% loss of the person as a whole

15IWCC0784

for injuries sustained under the Illinois Workers' Occupational Disease Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $457.04 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7½% loss of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 3 2015
KWL/mav
O: 08/24/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0784

MAHAN, GREGORY
Employee/Petitioner

Case# 08WC029061

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

On 11/14/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

1662 CRAIG & CRAIG
KENNETH F WERTS
PO BOX 1545
MT VERNON, IL 62864

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 15IWCC0784

GREGORY MAHAN,
Employee/Petitioner

v.

FREEMAN UNITED COAL MINING COMPANY,
Employer/Respondent

Case # **08** WC **29061**

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 **Springfield**, on **10/15/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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) and 19 (d) of Occupational Diseases Act**

FINDINGS

On **8/6/07**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**39,610.52**; the average weekly wage was $**761.74**.

On the date of accident, Petitioner was **55** 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 $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment by respondent on 8/6/07. Petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

11/12/14
Date

NOV 14 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 55 year old coal miner, alleges he sustained an occupational disease that arose out of and in the course of his employment by respondent on 8/6/07. Petitioner is a high school graduate. He worked for 31 years in respondent's coal mine. During this period he was exposed to silica, glue, diesel fumes, trowel dust, and smoke from coal fires. Petitioner last worked for respondent on 8/6/07, the date he sustained an unrelated injury. The Crown 2 mine, where petitioner worked, was closed on 8/29/07. Petitioner was not working on this date because he was still off work as a result of his unrelated back injury he sustained on 8/6/07.

At the time the petitioner stopped working and the mine was closed petitioner's classification was a rock duster. In this capacity petitioner testified that he was exposed to coal mine dust. Petitioner testified that he decided to take his retirement on the date the mine was closed. He stated that he took his retirement because the mine was closing. At that time petitioner was also having problems with his leg, knee, shoulder and back. Petitioner has had rotator cuff repairs to both his left and right shoulders, and a left hip replacement. He also testified that his breathing problems were a factor in his decision to retire.

Petitioner filed a claim for the back injury that he sustained on 8/6/07, his last day of work in the mine. This injury was filed as claim 09 WC 1720. This claim was settled and approved on 7/22/13 for $14,056.60. When petitioner went off work on 8/6/07 for his unrelated back injury he got accident sickness benefits from the mine through 2/29/08. During this period petitioner underwent a microdiscectomy at L4-L5 on the right, and an exploration and framinotomy on the right at L5-S1performed by Dr. Pineda on 12/13/07.

Despite his decision to retire, petitioner signed up with the union panel for a surface job at a sister mine. He testified that he had no real expectation of getting a job because he would lose his seniority if he went to another mine. He was also believed he would not be offered a job in another mine because he was a past union president. Petitioner testified that after he was laid off he did not conduct a real job search. He stated that he looked at a couple mines out of state in Alabama, but they were also laying off. In addition to looking for other mine jobs petitioner testified that he looked for jobs in the paper. He stated that he did not see any jobs he wanted, or any jobs he felt he was qualified for. Petitioner has not worked since the mine shut down on 8/6/07. At trial, he testified that he would not take a job in the coal mine if he was offered one.

Prior to beginning his employment with respondent on 8/18/76 petitioner worked for Pepsi stocking trucks and cleaning up broken bottles for about 1-1/2 years. He also worked as a brick layer for 2-1/2 years.

When petitioner began working for respondent on 8/18/76 he was hired as a laborer. He worked in this job for 2-3 years. While working as a laborer he shoveled coal on a belt, built stopping material for sections,

and dug out the shovel cart. Petitioner next worked as shuttle car operator for 2 years. This involved following after the continuous miner loading coal into the shuttle cart. In this position petitioner testified that he was exposed to a lot of coal dust and silica. Petitioner then worked as a continuous miner for 17-18 years. This job involved cutting virgin coal. Petitioner would churn out the coal and cut the coal out of the block of coal. Petitioner testified that this job was the dirtiest in the mine because you are cutting the coal. He testified that the coal dust was dry and you could see it in the air. In 1998 petitioner began working in the rock duster job. This job involved dusting belt lines with a machine. Petitioner would go under the chute and fill it up and dump it. Petitioner would go into the old rooms where coal had already been mined out and he removed the dust. He testified that there was very little air volume in these rooms and there was a lot of silica in them. Petitioner remained in this position until he was laid off and retired on 8/6/07.

Petitioner testified that he first noticed breathing problems in the early 1990's when he was working as a miner operator. He noticed that he was coughing a lot and had difficulty breathing, especially in dusty areas. At times he said it was intolerable. Petitioner testified that he can walk on level ground for about a mile before he becomes short of breath. He also testified that he can walk up 9 steps before he becomes short of breath. Petitioner testified that his breathing problems worsened after he retired. Petitioner is currently not taking any breathing medications. He testified that he sometimes needs to sit down about halfway through mowing his lawn. Petitioner's hobbies include riding his motorcycle and fishing. Petitioner has no difficulty enjoying his hobbies. Petitioner testified that he used to hunt but has not done much hunting in the last 6 years.

Petitioner testified that he has never worked a desk job, and has only worked manual labor jobs. Petitioner stated that he has been a smoker since the late 1970's. He testified that he stopped smoking for about 6-8 years then started again. Petitioner still smokes 1/2 pack of cigarettes a day. Petitioner currently takes pain medications for his shoulder and/or neck, but does not take them regularly.

On 10/24/12 the evidence deposition of Dr. William Clapp, a B-Reader certified in internal medicine, critical care medicine and pulmonary medicine, was taken on behalf of petitioner. Petitioner testified that he was sent to Dr. Clapp by his attorney.

Petitioner was examined by Dr. Clapp on 4/16/10. At that time Dr. Clapp was not a B-Reader. Dr. Clapp did not become a B-Reader until December of 2010. Petitioner's chief complaint was productive cough of whitish sputum, and shortness of breath on exertion, that has been episodic for 10-15 years. Petitioner reported that he had been hospitalized on 3 occasions for bronchopneumonia. He gave a smoking history of 1/2 pack a day for 42 years. He also stated that he drinks a 12 pack of beer a day. Dr. Clapp was not absolutely certain that he reviewed the chest x-ray taken 4/28/08 that was read by Dr. Cohen, certified B-Reader, with an impression

that was positive for the opacities of pneumoconiosis at profusion 1/1, p/q shaped opacities. Dr. Clapp assessed coal worker's pneumoconiosis. He based this diagnosis in part on petitioner's 2 year exposure to inorganic dust while he was a brick layer from the age of 23-25. He was of the opinion that while the bricklaying exposure may have contributed in a small way to petitioner's pneumoconiosis, the duration of his exposure was insignificant in comparison to his exposures to coal dust as a coal miner. He also diagnosed chronic bronchitis caused by his work as a coal miner, his 21 pack years of smoking, and his exposure to dust while working as a brick layer. Dr. Clapp was of the opinion that the data from the pulmonary function testing, cardiopulmonary exercise testing, and arterial blood gases were all essentially normal. As a result, he was of the opinion that petitioner was not totally disabled from his last coal mine job. Dr. Clapp was of the opinion that petitioner's 28.7 years of coal mine dust exposure was significantly contributory to the development of his abnormal chest x-ray that indicates the presence of pneumoconiosis.

Dr. Clapp testified that coal worker's pneumoconiosis requires a tissue reaction to the coal dust trapped in the lungs. He opined that the scarring in emphysema of coal worker's pneumoconiosis is permanent and can progress to massive fibrosis or cor pulmonale, both of which are life threatening. Dr. Clapp opined that it can progress even after the daily exposure to coal mine dust ceases. Dr. Clapp opined that someone can have coal worker's pneumoconiosis and have normal pulmonary function testing, normal blood gases, normal physical exam, and radiographically significant pneumoconiosis without symptoms or complaints. Dr. Clapp testified that not all coal miner's get pneumoconiosis. Dr. Clapp opined that petitioner is medically prohibited from returning to work in the coal mine because of his chronic bronchitis. He opined that petitioner is having a tissue reaction to the coal dust that is in his lungs. Dr. Clapp opined that a combination of factors contributed to petitioner's shortness of breath. Dr. Clapp testified that coal dust, rock dust, roof bolt glue, and diesel exhaust can be causative and aggravating factors in chronic bronchitis. He believed petitioner's chronic bronchitis was the result of multiple toxic exposures in the coal mine and his smoking. Dr. Clapp was of the opinion that just because petitioner's physical exam, PFT, blood gases, and diffusion capacity were normal does not rule out that he may have possible lung injury, damage or disease, radiographically significant coal worker's pneumoconiosis, or chronic bronchitis. Dr. Clapp opined that petitioner has coal worker's pneumoconiosis caused by underground coal dust exposure. He believed petitioner had it when he stopped working and believed it would be unwise for petitioner to work in the mines again. Dr. Clapp opined that petitioner's coal mine experience could be a cause or aggravating factor in sinusitis. Dr. Clapp was of the opinion that coal worker's pneumoconiosis tends to occur more in the upper zones, but can occur in all lung zones. He based this opinion on an article by Lee Petsonk and Scott Lanier, occupational pulmonologists. Dr. Clapp opined that there is no cure for coal worker's pneumoconiosis.

On cross examination Dr. Clapp testified that he does all his examinations and testing on claimants. He has never done a testing or exam for a coal company. Dr. Clapp testified that there are many causes for exertional dysnea (shortness of breath), with a frequent cause being deconditioning. He testified that it is more prevalent in the older population, and those with heart disease. Dr. Clapp testified that shortness of breath, in and of itself, does not imply a diseased state. Dr. Clapp testified that petitioner did not relate to him a history of sinusitis. Dr. Clapp stated that he did not review any of petitioner's medical records. Dr. Clapp stated that a significant smoking history can be associated with a cough and sputum that can be clear. He was of the opinion that a significant smoking history can be associated with the development of chronic bronchitis, and exertional shortness of breath. He stated that petitioner cannot have further exposure to tobacco smoke without endangering his life. Dr. Clapp testified that without Dr. Cohen's impression regarding the chest x-ray, he would not have diagnosed pneumoconiosis. He testified that he would have diagnosed chronic bronchitis from exposure to coal dust and other toxins in the mine, and cigarette smoking. Dr. Clapp testified that he cannot date the abnormality that Dr. Cohen saw on the chest x-ray. Dr. Clapp was of the opinion that petitioner did not have cor pulmonale or progressive massive fibrosis.

On 12/11/13 the evidence deposition of June Blaine, a vocational rehabilitation counselor, was taken on behalf of petitioner. Blaine completed a vocational assessment of petitioner on 10/29/13. Blaine was asked to assume that petitioner was unable to return to work in the coal mine given he has been diagnosed with coal worker's pneumoconiosis and is unable to return to work in the mine. Blaine noted that petitioner was 62 years old with all but 6 years of working career as a coal miner. She also noted that petitioner has a high school diploma but his vocational testing shows his academic achievement is less than his level of education except in word reading. Given his lack of computer skills, age, limited training after high school and lack of transferable skills, Blaine believe $9.00 an hour would be the highest wage level petitioner could earn, which would be significantly less than he was earning as a coal miner. She thought it would be difficult for petitioner to find a job, but not impossible.

On cross examination Blaine testified that petitioner told her he got "winded", but she did not review any medical records. Blaine testified that she was not aware that petitioner had applied for social security disability. Blaine testified that she did not ask petitioner what medications he was taking. She stated that she only asked if was using an inhaler and he said no. Blaine testified that she did not look for any jobs for petitioner. She also testified that if it turns out petitioner does not have coal worker's pneumoconiosis her opinions would likely be different.

On 1/17/14 the evidence deposition of Dr. Pavinderpal Gill, an internal medicine doctor, was taken on behalf of petitioner. He testified that he has treated many coal miners and former coal miners for lung and heart disease. Dr. Gill testified that he treated petitioner for several years, but could not say how many years. Dr. Gill was of the opinion that petitioner has chronic bronchitis that was caused in part or aggravated by his exposures as a coal miner. He was also of the opinion that his long time smoking probably made his chronic bronchitis worse. Dr. Gill was of the opinion that petitioner could or might have coal worker's pneumoconiosis. He believed that any further exposure to a coal mine would risk progression of his bronchitis. Dr. Gill was of the opinion that petitioner's hypoxia could have been caused or aggravated by his exposure as a coal miner, and any further exposure to the coal mines could worsen his hypoxia. Dr. Gill was of the opinion that petitioner was disabled from work as a coal miner. Dr. Gill was not sure if petitioner has heart problems.

On cross examination Dr. Gill agreed that he first saw petitioner on 10/15/99. On that date petitioner was complaining of a cough, but denied any shortness of breath. Petitioner denied any similar symptoms in the past, but did provide a history of occasional sinusitis. Dr. Gill then saw petitioner again on 7/20/01 for complaints of sinus congestion, drainage and a dry cough. Dr. Gill assessed sinusitis. On 12/7/01 Petitioner returned to Dr. Gill and complained of a nonproductive cough and sinus drainage. A physical examination of petitioner's chest and lungs were clear. Petitioner did not have any shortness of breath. Dr. Gill diagnosed petitioner with acute bronchitis for the first time. On 1/14/02 petitioner returned to Dr. Gill with nasal congestion, more so in the evenings with minimal cough. Petitioner's chest was clear at that time. Dr. Gill diagnosed allergic rhinitis and sinusitis most likely due to pollen. On 1/25/02 Dr. Gill saw petitioner for a pre-op exam. Petitioner related a cough at that time. His lungs were clear. On 10/17/02 petitioner returned to Dr. Gill with a cough, sinus congestion and drainage. An examination revealed clear chest and lungs. He diagnosed an upper respiratory infection and told petitioner to stop smoking. On 12/22/04 petitioner presented to Dr. Gill with a sore throat and a cough, worse at night. His chest and lungs were clear at that time. Petitioner also had no shortness of breath. Dr. Gill assessed an upper respiratory infection and allergic rhinitis. On 11/2/05 petitioner complained of a cough and aching all over. He also reported draining in the back of the throat. His chest was clear. He returned on 11/4/05 still coughing. A physical examination showed his chest was clear. On 7/29/06 petitioner presented to Dr. Gill complaining of some sinus congestion and drainage. Petitioner's lungs were clear. Dr. Gill assessed an upper respiratory tract infection. On 8/17/06 Dr. Ludwig gave petitioner permanent restrictions of no overhead lifting of 20-25 pounds with respect to his shoulders. On 10/4/06 Dr. Brower noted that petitioner told him that he planned on retiring on 1/3/07.

Dr. Gill testified that up through the day petitioner last worked for respondent he never diagnosed petitioner with any chronic bronchitis or any occupational disease. He further testified that he never restricted petitioner from work for an occupational disease. Following his retirement, petitioner presented to Dr. Gill on 2/23/08 with a sore throat, hoarseness and cough for one week, sinus congestion and drainage. He assessed a sinus infection. On 5/27/08 Dr. Gill noted that petitioner was desaturated at night and put him on oxygen supplementation at that point. He assessed hypoxia. Petitioner was not hypoxic during the day. On 7/16/08 Dr. Gill noted that petitioner's lungs were clear. On 8/26/08 petitioner's lungs were clear. On 8/30/08 petitioner had a chest x-ray that showed a granuloma, a calcification from previous inflammation in the lung. Dr. Gill stated that any kind of infection can cause granuloma. It was noted as histoplasmosis, which is a fungal infection due to bird droppings. In 2008 and later "sleep apnea" was noted in petitioner's chart. On 10/30/08 petitioner complained of chronic pain in his back and neck and into his left leg that limited his activity. He reported that he could no longer walk a couple of miles like he used to because of the pain in his back. On 1/30/09 petitioner talked with Dr. Gill regarding his disability due to his back. On 4/28/09 petitioner returned to Dr. Gill complaining of a cough, sinus drainage and a low grade fever. Dr. Gill assessed folliculitis that petitioner related he got while hunting. As of 12/21/09 Dr. Gill had not diagnosed petitioner with an occupational disease or chronic bronchitis. On 2/24/10 Dr. Gill referred petitioner to Dr. Prahbu, a pulmonologist, who suspected petitioner had sleep apnea. On 11/9/10 petitioner reported a cough and acute sinusitis. His lungs were clear. On 11/23/10 he reported a nonproductive cough. His lungs were clear and he related no shortness of breath at rest. On 5/29/12 petitioner was assessed with acute sinusitis. On 11/2/12 Dr. Gill completed a persons with disability certification for a parking card due to his osteoarthritis. At this time Dr. Gill was of the opinion that petitioner was severely limited in his ability to walk due to his arthritic neurological or orthopedic condition. On 12/20/12 Dr. Gill measured petitioner's oxygen saturation and it was 96, which was normal. Petitioner then went to the hospital to do a 6 minute walk where his blood gas was measured at 98%, which was normal. Petitioner did not complain of shortness of breath. On 1/3/13 petitioner had a left total knee replacement. On 4/15/13 petitioner was prescribed a TENS unit for his back pain. On 6/24/13 petitioner was complaining of right hip pain. The last time Dr. Gill saw petitioner was on 10/30/13 when petitioner presented with left low back pain.

Dr. Gill testified that during the entire time he treated petitioner he never diagnosed him with chronic bronchitis or any occupational disease. Dr. Gill was of the opinion that since petitioner went off work for his back surgery he has been disabled because of his back. Dr. Gill was of the opinion that sinusitis and rhinitis can be aggravated by coal mine exposures. Dr. Gill testified that just because a person has clear lungs on auscultation of the chest that does not mean that they cannot have any lung disease. Dr. Gill was of the opinion

that petitioner did not suffer any permanent disability from sinusitis or rhinitis. Dr. Gill testified that petitioner has a significant smoking history associated with cough, sputum and shortness of breath. He further testified that with continued tobacco use he would expect these symptoms to increase over time. Dr. Gill testified that if a person leaves the coal mine and has lung damage or disease from the coal mine and they continue to smoke, the continued smoking will add to the damage from the coal mining. Dr. Gill testified that he never rendered or reached an opinion that petitioner was unable to work as a coal miner because of his sinusitis and rhinitis. Dr. Gill was of the opinion that it was petitioner's back pain that ended his employment with respondent.

On 12/2/13 the evidence of Dr. Manjeshwar Prabhu, a pulmonologist, was taken on behalf of the petitioner. Dr. Prabhu performed black lung examination for the Department of Labor for 4-5 years. Dr. Prabhu testified that he looks at x-rays and forms his own opinions. On 1/1/13 Dr. Prabhu drafted a letter to Mr. Wissore, petitioner's attorney. He noted that petitioner was seen on 11/24/93 and had bronchitis which he assessed as chronic bronchitis. He wrote that work as a coal miner may have aggravated his preexisting bronchitis, and ongoing exposure in the coal mine would aggravate petitioner's bronchitis. Dr. Prabhu testified that petitioner had bronchitis secondary to cigarette smoking with a 2 day history of dry, nonproductive cough, and he suspected petitioner may be picking up a respiratory infection.

On cross examination Dr. Prabhu stated that he was not a B-Reader. He testified that petitioner had a long and significant smoking history, and he counseled petitioner on more than one occasion to stop smoking. Dr. Prabhu testified that significant tobacco use is associated with the development of shortness of breath, cough and sputum production, and the most common cause of chronic bronchitis. Dr. Prabhu also testified that a significant smoking history predisposed an individual to upper respiratory infections. Dr. Prabhu testified that when petitioner presented to him on 8/16/93 with a cough and scanty sputum he had been off work for two weeks due to a left arm injury. On 11/24/93 petitioner related a two day history of dry, nonproductive cough and Dr. Prabhu assessed bronchitis secondary to cigarette smoking. On 4/24/94 Dr. Prabhu diagnosed petitioner with infective bronchitis.

On 12/7/07 petitioner had a chest x-ray taken that was interpreted by Dr. Haag. He found the heart and pulmonary vasculature to be normal with the lungs remaining expanded and clear. He also noted a calcified granuloma.

On 5/6/10 Dr. Prabhu evaluated petitioner for his shortness of breath. Petitioner was still smoking at that time. A physical examination revealed lungs clear without wheeze, crackle or pleural rub. Petitioner denied a cough and sputum.

On 11/9/10 petitioner had another chest x-ray that was interpreted by Dr. Andrew Sherrick. He compared it to the one taken on 12/7/07. He saw no change in the films.

On 10/5/12 petitioner returned to Dr. Prabhu for complaints of shortness of breath. Petitioner told Dr. Prabhu that he was concerned that he had black lung. He denied persistent cough or sputum production. Dr. Prabhu assessed shortness of breath that was confirmed by a blood gas test that showed his oxygen level was running low. Petitioner had no cough or sputum production. Petitioner had another chest x-ray performed that day by Dr. Sherrick and compared it to the one on 11/9/10. He indicated that the film remained stable.

On 12/20/12 petitioner underwent another chest x-ray that was interpreted by Dr. David Ruskey. He compared the results to the chest x-ray performed on 11/9/10. His impression was that it was unchanged.

Dr. Prabhu testified that he never prescribed any breathing medications for petitioner and never restricted him from work on a permanent basis due to pulmonary disease. Dr. Prabhu admitted that he never charted in his records that petitioner had chronic bronchitis.

On 5/27/08 Dr. Smith interpreted chest x-rays of petitioner taken 4/28/08. Dr. Smith is a B-Reader. His impression was pneumoconiosis with interstitial fibrosis of classification p/s, mid to lower zones involved, profusion 1/1. On 3/30/12 Dr. Smith interpreted another one of petitioner's chest x-rays taken 1/25/02. His impression was simple coal worker's pneumoconiosis with small opacities primary p, secondary s, bilateral mid to lower zones of a profusion of 1/0. He also noted nodularity in the right anterior lung base likely related to old granulomatous calcifications. On 3/24/14 Dr. Smith read another of petitioner's chest x-rays taken 5/7/07. His impression was simple coal worker's pneumoconiosis with small opacities primary p, secondary p, upper, mid and lower zones bilaterally, profusion of 1/0. Dr. Smith has been a B-Reader since 1987.

On 9/13/10 Dr. Cohen interpreted chest x-rays for petitioner taken 4/28/08. His impression was that the exam was positive for the opacities of pneumoconiosis at profusion of 1/1, p/q shaped opacities. Dr. Cohen has been a B-Reader since 1998.

On 5/6/12 Dr. Michael Alexander interpreted chest x-rays of petitioner taken 1/25/02. His impression was coal worker's pneumoconiosis category p/p, 1/1. Dr. Alexander has been a B-Reader since 1992.

On 7/12/13 the evidence deposition of Dr. James Castle, a pulmonologist, was taken on behalf of the respondent. On 2/20/12 Dr. Castle drafted a letter to Mr. Werts, respondent's attorney. Dr. Castle reviewed the radiographic report of Dr. Smith for the film dated 4/28/08; the medical report of Dr. Clapp with cover letter dated 11/16/11; the radiographic reports of by Dr. Christopher Meyer; the medical records from the Springfield Clinic; medical records from Orthopedic Center; medical records from the Orthopedic Center, Dr. Lynch;

medical records from Dr. Prabhu; medical records from St. Vincent Memorial Hospital; medical records from Midwest Occupational Health Association; medical records from Memorial Medical Center; medical records from Dr. Sterling Parker; report of Decision from the Social Security Administration dated 2/23/09; and the radiographic reports by Dr. James R. Castle.

After reviewing all these records Dr. Castle opined that petitioner does not suffer from any pulmonary disease or impairment as a result of his occupational exposure to coal mine dust. He further opined that petitioner does not have any evidence of occupational pneumoconiosis including coal worker's pneumoconiosis. Dr. Castle was of the opinion that petitioner worked in or around the underground mining industry for a sufficient enough time to have developed coal worker's pneumoconiosis if he were a susceptible host. Dr. Castle opined that another risk factor for the development of pulmonary disease is that of tobacco abuse, and petitioner had a history of smoking at least one pack of cigarettes daily for 42 years, and continued to smoke as recently as 2010. Dr. Castle opined that this is a sufficient enough exposure history to have caused him to develop diseases such as chronic obstructive pulmonary disease, i.e., chronic bronchitis/emphysema and/or lung cancer and/or atherosclerotic cardiovascular disease if he were a susceptible host. Dr. Castle further opined that petitioner had another risk for the development of pulmonary symptoms in that he was obese. He was of the opinion that a BMI of 33 is a sufficient degree of obesity to cause him to develop significant symptoms of shortness of breath, as well as physiologic changes including resting and/or nocturnal hypoxemia. He was further of the opinion that it was also significant enough to contribute to problems such as diabetes and obstructive sleep apnea.

Dr. Castle opined that petitioner did not demonstrate any consistent physical findings indicating the presence of an interstitial pulmonary process, and did not have a consistent finding of rales, crackles, or crepitations. He noted that in most circumstances petitioner's physical examination of the chest was normal. Dr. Castle opined that the x-rays he reviewed did not show any evidence of pneumoconiosis whatsoever, but did show evidence of a calcified granuloma. He further noted that none of the radiographic reports from various hospital evaluations demonstrated any findings consistent with pneumoconiosis. He was of the opinion that even though Dr. Cohen and Dr. Smith did note findings consistent with minimal, simple pneumoconiosis, that Dr. Smith noted that these findings were predominantly in the middle and lower lung zones, which is not typical of coal worker's pneumoconiosis. Regardless, of Dr. Smith's and Dr. Cohen's findings, Dr. Castle opined that petitioner's chest x-rays do not show any evidence consistent with coal worker's pneumoconiosis. Dr. Castle further opined that petitioner has no physiologic evidence of any respiratory impairment from any cause including pneumoconiosis, and did not demonstrate a disabling abnormality of blood gas transfer mechanisms.

Dr. Castle opined that petitioner has no respiratory disability from any pulmonary process including coal worker's pneumoconiosis or a coal mine dust induced lung disease. Dr. Castle was of the opinion that from a purely pulmonary point of view, petitioner retains the respiratory capacity to perform any and all coal mining employment duties for which he has been trained. Dr. Castle opined that petitioner has no pulmonary disease or impairment occurring as a result of his occupational exposure including coal mine dust exposure.

Dr. Castle reviewed the petitioner's chest radiographs from 1/25/02 and 4/28/08 and found no parenchymal abnormalities consistent with pneumoconiosis, but found granulomatous changes most likely a condition of histoplasmosis, due to a fungal infection. Dr. Castle has been a B-Reader since 1985.

Dr. Castle was of the opinion that people with hypertension and hypertensive heart disease and people whose heart does not respond the way it should with exercise will experience general fatigue, as well as shortness of breath or dyspnea. Dr. Castle was of the opinion that based on the results from the testing he reviewed, they did not reveal a pulmonary or ventilatory cause to explain petitioner's shortness of breath. Dr. Castle opined that petitioner was capable of heavy manual labor from a strictly pulmonary or ventilatory standpoint. Dr. Castle opined that if someone has simple coal worker's pneumoconiosis it would be very rare for his condition to progress once the exposure ceases.

On cross-examination Dr. Castle was of the opinion that a person can have a chronic cough with sputum production which would meet the definition of so called chronic bronchitis without necessarily having it emanate from deep within the lung itself or within the airways. Dr. Castle said it would be unusual that a person who has coal workers' pneumoconiosis by x-ray that it would manifests itself first in the middle and lower lung zones. He agreed that there are exposures in the environment of a coal mine that can aggravate a preexisting asthma, but that coal work is not known as a cause of asthma or a worsening agent of asthma per se over time. He also agreed that the inhalation of diesel fuels can aggravate asthma. Dr. Castle was of the opinion that repeated exacerbations of asthma can make asthma worse and cause a remodeling of the airways so that a portion of the reactive component becomes a fixed obstructive problem. Dr. Castle was of the opinion that the abnormality of the pneumoconiosis is basically a trapped coal dust in a part of the lung which ends up wrapped in scar tissue and can be accompanied by emphysema around it. He testified that the affected tissue cannot perform the function of normal healthy lung tissue. He agreed that if a person has coal worker's pneumoconiosis, they would have an impairment in the function of their lungs at the site of the scarring and emphysema. Dr. Castle was of the opinion that it is very uncommon for coal workers' pneumoconiosis to progress after cessation from coal mining. Dr. Castle was of the opinion that chronic bronchitis requires the

presence of sputum production over a finite period of time for two years, and does not always originate in the lung.

On 7/2012 the evidence deposition of Dr. Christopher Meyer, a radiologist, was taken on behalf of respondent. Dr. Meyer is a B-Reader, and has been one since 1999. Dr. Meyer is Professor of Diagnostic radiology at University Hospital and Clinics in Madison, WI. Dr. Meyer opined that coal worker's pneumoconiosis is an upper zone predominant process. Dr. Meyer reviewed a PA and lateral chest x-ray for petitioner dated 1/25/02, and a PA and lateral chest x-ray for petitioner dated 4/28/08. He noted that both were rated quality 2. He testified that this meant that one had scapula overlap and some mottle, and the other one was underexposed and mottle. Dr. Meyer testified that mottle gives a granularity that may stimulate background fine nodularity. He testified that the way one can distinguish the two is to actually look outside the lung parenchyma, look in the overly soft tissues, and if the same mottled or granular appearance is seen, you know it is due to technical factors, rather than due to a true intrinsic disease. Dr. Meyer opined that the presence of mottle in a film, if it is not recognized, results in over-reading of the film.

Dr. Meyer was of the opinion that the radiograph dated 1/25/02 demonstrated a calcified granuloma in the right middle lobe, but was otherwise unremarkable. He was also of the opinion that the radiograph from 4/28/08 redemonstrated the same calcified granuloma in the right middle lobe. He opined that both radiographs demonstrated no findings of coal worker's pneumoconiosis.

On cross examination Dr. Meyer was of the opinion that abnormalities consistent with coal dust exposure are nodules that are smaller and a little less distinct than the abnormalities consistent with silicosis, where the nodules are a little larger and a lit bit more distinct. Dr. Meyer testified that he has spent his entire career as a chest radiologist devoted to looking at chest radiographs day in and day out to establish the spectrum of normal. Dr. Meyer was of the opinion that all long time coal miners are going to come out with some dust deposit trapped in their lungs, however the majority will not have changes in their lungs that qualify for coal worker's pneumoconiosis. Dr. Meyer was of the opinion that coal worker's pneumoconiosis appears first radiographically or pathologically, and as it becomes more significant, it would begin to manifest itself in pulmonary function abnormalities or clinical abnormalities. Dr. Meyer testified that he is usually retained by the coal mine company rather than the coal miner. Dr. Meyer agreed that silos at a coal mine is a place where there would be large birds, and an area where the risk of histoplasmosis is greater. He testified that most people cannot pinpoint when they had a histoplasmosis infection. Dr. Meyer testified that one over zero is the lowest level that is considered positive on a chest x-ray.

Respondent offered into evidence a radiograph of petitioner's chest that was dated 5/7/07 and was performed at the request of NIOSH. This radiograph was interpreted by Dr. John Parker, and Dr. Robert Harrison. Both Dr. Parker and Dr. Harrison are B-Readers, and both found the radiograph did not show any parenchymal abnormalities consistent with pneumoconiosis.

Petitioner applied for Social Security Disability alleging a disability as of 8/6/07. Petitioner identified his severe impairments as degenerative disc disease with history of lumbar spine surgery, spinal stenosis, lumbar radiculopathy, and arthritis of the right hip. On 2/23/09 the Social Security Administration determined that petitioner has been disabled under Sections 216(i) and 223(d) of the Social Security Act since 8/6/07. No part of petitioner's request for benefits was related to his pulmonary function.

C. DID AN OCCUPATIONAL DISEASE OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner claims he sustained an occupational disease that arose out of and in the course of his employment be respondent on 8/6/07. Respondent denies petitioner has an occupational disease that arose out of and in the course of his employment by respondent on 8/6/07. It is unrebutted that petitioner worked in the coal mines for 31 years and was exposed to coal dust, silica, roofing glue, diesel fumes, smoke from coal fires and other irritants. It is also unrebutted that for the majority of this time, and even after petitioner retired, petitioner has smoked at least 1/2 pack a day.

The arbitrator finds the reason petitioner last worked for respondent on 8/6/07 was not because the mine closed on that day, but rather because on that day he sustained an injury to his low back, that resulted in him being taken of work and undergoing surgical intervention in December of 2007. Petitioner received accident sickness benefits while authorized off work for this injury, and ultimately settled this claim for $14,056.60. Petitioner has been restricted from returning back to his regular duty work as a result of his back injury, and has permanent lifting restrictions related to his bilateral shoulder injuries.

During part of his employment with respondent petitioner treated with Dr. Gill. Petitioner began seeing Dr. Gill in 1999. During the 14 years that Dr. Gill treated petitioner prior to this hearing, he did diagnose petitioner with occasional sinusitis, allergic rhinitis due to pollen, but never diagnosed him with chronic bronchitis or any occupational disease. Dr. Gill also diagnosed petitioner with other respiratory conditions that he associated with petitioner's significant tobacco use. At no time during the period he treated petitioner before his deposition did Dr. Gill note in his records that the symptoms petitioner was presenting with were related to his work in the mine. If anything, Dr. Gill's records show that he had related petitioner's upper respiratory symptoms to his smoking, and on occasion pollen. Despite these findings in his records, during his deposition

Dr. Gill testified that petitioner has chronic bronchitis that was caused in part or aggravated by his exposures as a coal miner, and made worse by his long time smoking. However, when questioned on cross-examination Dr. Gill admitted that while treating petitioner he never diagnosed petitioner with chronic bronchitis or any other occupational disease. Throughout his records the arbitrator notes that petitioner's lungs were usually clear and he had no shortness of breath. At one point Dr. Gill assessed petitioner with hypoxia. When petitioner was evaluated by Dr. Prabhu for this condition he suspected that petitioner had sleep apnea, since this condition occurred only at night. Following a chest x-ray performed 8/30/08 that showed a granuloma, and a calcification from a previous inflammation in the lung, Dr. Gill was of the opinion that any infection can cause granuloma, and he believed it was histoplasmosis, a fungal infection due to bird droppings. There was some discussion that birds can be found near the silos of a coal mine, but no credible evidence was offered to support a finding that this is how petitioner developed this condition, since petitioner was also an avid hunter and had developed folliculitis while hunting. With respect to petitioner's respiratory functionality, as recently as 12/20/12 Dr. Gill measured petitioner's oxygen saturation and it was 96, which was normal. Petitioner also went to the hospital to do a 6 minute walk where his blood gas was measured at 98%, which was also normal.

Based on a thorough review of Dr. Gill's records, the arbitrator gives little weight to his opinions during his deposition that petitioner has chronic bronchitis that was caused in part or aggravated by his exposures as a coal miner, based on the fact that there is no diagnosis of chronic bronchitis or any other occupational disease in his medical records, and the fact that he admitted on cross examination that he never diagnosed petitioner with chronic bronchitis or any occupational disease. The arbitrator further finds no evidence in Dr. Gill's credible records to support a finding that any of petitioner's sinus and respiratory complaints were related to his work in the coal mine. In fact, more often than not, when petitioner would present with these symptom, Dr. Gill would attribute them to his tobacco use, and recommend that petitioner stop smoking.

While working in the coal mine petitioner was also treated at times by Dr. Prabhu, a pulmonologist. Dr. Prabhu also testified that petitioner had a long and significant smoking history and he counseled petitioner on more than one occasion to stop smoking. He was of the opinion that significant tobacco use is associated with the development of shortness of breath, cough and sputum production, and the most common cause of chronic bronchitis. Dr. Prabhu also opined that a significant smoking history predisposes an individual to upper respiratory infections. Dr. Prabhu testified that when he diagnosed petitioner with bronchitis, it was secondary to cigarette smoking. Dr. Prabhu assessed shortness of breath that was confirmed by a blood gas test that showed his oxygen level was running low. The arbitrator notes that this condition seems to have resolved by

12/20/12 when petitioner's oxygen levels were normal. Dr. Prabhu testified that he never prescribed petitioner any breathing medications and never charted in his records that petitioner had chronic bronchitis.

Dr. Castle reviewed all of petitioner's treating records and opined that petitioner does not suffer from any pulmonary disease or impairment as a result of his occupational exposure to coal mine dust. He also opined that petitioner does not have any evidence of any occupational pneumoconiosis including coal worker's pneumoconiosis, even though petitioner did work in or around the underground mining industry for a sufficient enough time to have developed coal worker's pneumoconiosis, if he were a susceptible host. Dr. Castle opined that another risk factor for the development of pulmonary disease is tobacco use, and petitioner had a history of smoking at least a pack of cigarettes a day for 42 years. Dr. Castle also opined that petitioner has a sufficient degree of obesity to cause him to develop significant symptoms of shortness of breath, as well as physiologic changes including resting and/or nocturnal hypoxemia, and sleep apnea. Dr. Castle also noted that petitioner did not demonstrate any disabling abnormality of blood gas transfer mechanisms. Dr. Castle also opined that a person can have a chronic cough with sputum production without necessarily having it emanate from deep within the lung itself or within the airways.

In addition to the opinions of Dr. Gill, Dr. Prabhu, and Dr. Castle, many other doctors simply interpreted petitioner's chest x-rays. Just three months before he retired, NIOSH came in and took an x-ray of petitioner's chest on 5/7/07. This radiograph was interpreted by Dr. John Parker and Dr. Robert Harrison, both B-Readers. Both Dr. Parker and Dr. Harrison found that the radiograph did not show any parenchymal abnormalities consistent with pneumoconiosis.

While petitioner was treating with Dr. Gill he had two x-rays on 12/7/07 and, 11/9/10. Each one showed a heart and pulmonary vasculature that was normal with lungs that remained expanded and clear. Each one also showed a calcified granuloma. No coal worker's pneumoconiosis was noted. Neither Dr. Haag or Dr. Sherrick are B-Readers.

Other than the chest x-ray performed by NIOSH on 5/7/07, and the two chest x-rays performed while petitioner was treating, all other chest x-ray interpretations were performed in anticipation of litigation. Petitioner had a chest x-ray performed 4/28/08 interpreted by Dr. Smith, and Dr. Cohen. Both are B-Readers. Dr. Smith's impression was pneumoconiosis with interstitial fibrosis of classification p/s, mid to lower zones involved, profusion 1/1. Dr. Cohen's impression was a little different in that he found the exam was positive for opacities of pneumoconiosis at profusion of 1/1, p/q shaped opacities.

Respondent had Dr. Castle and Dr. Meyer review the x-ray performed 4/28/08. Both are B-Readers, and both found no parenchymal abnormalities consistent with pneumoconiosis. Both also found granulomatous changes. Dr. Castle was of the opinion that the granulomatous changes were most likely due to histoplasmosis.

Petitioner also had Dr. Smith and Dr. Alexander review a chest x-ray performed 1/25/02. Dr. Alexander is also a B-Reader. Dr. Smith's impression was simple coal worker's pneumoconiosis with small opacities primary p, secondary s, bilateral mid to lower zones of a profusion of 1/0. Dr. Alexander's impression was different. His impression was coal worker's pneumoconiosis category p/p, 1/1.

Respondent had Dr. Castle and Dr. Meyer review the x-ray from 1/25/02. Dr. Castle found no parenchymal abnormalities consistent with pneumoconiosis, and a granulomatous most likely from histoplasmosis. Dr. Meyer also found it unremarkable other than the calcified granuloma in the right middle lobe.

Dr. Smith also reviewed the chest x-ray taken by NIOSH on 5/7/07. Dr. Smith's impression was simple coal worker's pneumoconiosis with small opacities primary p, secondary p, upper, mid and lower zones bilaterally, profusion of 1/0.

Dr. Meyer noted that the x-rays from 1/25/02 and 4/28/08 were only rated quality 2. He testified that this meant that one had scapula overlap and some mottle, and the other one was underexposed and mottle. Dr. Meyer testified that mottle gives a granularity that may stimulate background fine nodularity. He testified that the way one can distinguish the two is to actually look outside the lung parenchyma, look in the overly soft tissues, and if the same mottled or granular appearance is seen, you know it is due to technical factors, rather than due to a true intrinsic disease. Dr. Meyer opined that the presence of mottle in a film, if it is not recognized, results in over-reading of the film.

Based on the above, as well as the credible evidence, the arbitrator finds the most credible x-ray readings were performed by Dr. Parker and Dr. Harrison when they interpreted the chest x-ray dated 5/7/07 on behalf of NIOSH and found the radiograph showed no parenchymal abnormalities consistent with pneumoconiosis. The arbitrator relies on the opinions of these doctors' interpretations given the fact that this x-ray was taken and interpreted at the request of NIOSH, an agency who performs this monitoring program for the benefit of the coal mine worker in an attempt to prevent coal workers' pneumoconiosis through early detection of disease while the coal miner is still working in the mine. Given the fact that NIOSH is not a party to this claim, the arbitrator finds the readings of Dr. Parker and Dr. Harrison to be more persuasive than the interpretations of the B-Readers hired by both parties to this claim. The arbitrator also finds Dr. Parker's and Dr. Harrison's interpretation of the

5/7/07 x-ray to be more persuasive than the readings done on the films taken 1/25/02 and 4/28/08 since the x-ray taken 5/7/07 was a quality 1 and the others were a quality 2, which could lead to an inaccurate reading of the x-ray.

Having found that the petitioner does not have coal worker's pneumoconiosis by x-ray interpretation; that petitioner has not been diagnosed with any chronic bronchitis or any other occupational disease by his treating doctor, Dr. Gill; that petitioner has had normal physical examinations as they relate to his lungs, normal PFTs, normal blood gases, and normal diffusion capacity as performed by his treating doctor, Dr. Gill; that both Dr. Prabhu and Dr. Gill noted in their treatment records that petitioner's upper respiratory tract infections, bronchitis, sinusitis and allergic rhinitis were causally related to his 42 year smoking history and pollen; and that no treating doctor every documented in their treating records that any of petitioner's respiratory problems were related to his work as a coal miner, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment by respondent on 8/6/07. The arbitrator finds it significant that although all long time coal miner's are going to come out of the mine with some dust deposit trapped in their lungs, the majority will not have changes in their lungs that qualify for coal worker's pneumoconiosis. The arbitrator also finds it significant that the length of time petitioner has been a smoker exceeds the time he worked in the coal mine by at least 11 years, and the fact that petitioner's treating records often related the problems he was having to his tobacco use and obesity, and never to his coal mining work.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?
O. SECTIONS 1(d-f) AND SECTION 19(d) OF THE OCCUPATIONAL DISEASES ACT?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment by respondent on 8/6/07, the arbitrator finds these remaining issues moot.

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

Louis Harrison,
Petitioner,
vs.

15IWCC0785

NO: 08 WC 52161

Allparts Auto Parts, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of 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 March 20, 2013 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: OCT 23 2015
KWL/vf
O-10/13/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0785

HARRISON, LOUIS
Employee/Petitioner

Case# 08WC052161

ALLPARTS AUTO PARTS INC
Employer/Respondent

On 3/20/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0150 DAVENPORT & WHITE
WILLIAM WHITE
7667 W 95TH ST SUITE 101
HICKORY HILLS, IL 60457

2023 GRIFFIN, LORETTA LAW OFFICE
JOE DONNELLY SR
20 N CLARK ST SUITE 2725
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

15IWCC0785

LOUIS HARRISON
Employee/Petitioner

v.

ALLPARTS AUTO PARTS, INC.
Employer/Respondent

Case # 08 WC 052161

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 **Wheaton**, on **December 13, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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**

15IWCC0785

FINDINGS

On the date of accident, **October 3, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16,120.00**; the average weekly wage was $**310.00**.

On the date of accident, Petitioner was **64** 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 $**18,098.37** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $**34,938.87** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 206.46 per week for 29.857 weeks, commencing on 12-11-08 through 07-07-09 , as provided in Section 8(b) of the Act.

Petitioner is entitled to receive from Respondent the sum of $ 206.67 per week for a further period of 50 weeks, as provided in 8(d)(2) of the Act, as amended, because the injuries sustained caused of permanent compensation as Petitioner suffered a loss of 10% loss of use of a man as a whole.

No medical benefits are awarded after 07-07-09. All outstanding medical benefits before this date are awarded under the fee schedule.

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

03-18-13
Date

MAR 20 2013

ICArbDec19(b)

IN THE ILLINOIS WORKER'S COMPENSATION COMMISSION

LOUIS I. HARRISON,	)	
	)	
Petitioner	)	15IWCC0785
	)	
vs.	)	
	)	No. 08 WC 052161
ALLPARTS AUTO PARTS, INC.	)	
	)	
Respondent	)	

FINDINGS OF FACT

This matter was set for hearing before the Honorable Kurt Carlson on December 13, 2012 at the Illinois Workers' Compensation Commission venue located in Wheaton, Illinois. Both parties were present and represented by counsel. The Petitioner was the sole witness called to testify. The Petitioner testified as follows:

The Petitioner is Louis I. Harrison, Jr. He is 68 years of age. On October 3, 2008 he was employed at Allparts Auto Parts, Inc. His job duties included driving a delivery truck and picking up parts. Petitioner estimated that he worked for Allparts Auto Parts, Inc. for three years prior to October 3, 2008. On October 3, 2008 the Petitioner picked up parts at Stone Wheel and left at approximately 2:30 to return to the shop. While at the intersection of Route 83 and Midway Drive in Willowbrook, the Petitioner was involved in a motor vehicle accident. Petitioner was on Midway turning left to go southbound on Route 83. The intersection of Route 83 and Midway is controlled by a traffic light. Petitioner had the green light as he was proceeding. A school bus went through the red light going northbound on Route 83 and struck the side of the pick up truck the Petitioner

was driving just behind the driver's door. Petitioner described the collision as heavy and the damage as extensive. The truck Petitioner was in was pushed and spun there times. Petitioner testified that he was moved about the truck, slamming into the driver's door, then into the back seat and then into the windshield. Petitioner was wearing his seatbelt. There was only one impact between the vehicle Petitioner was driving and the school bus.

Petitioner had a prior back surgery in 1986 performed by Dr. Castro. Petitioner felt good thereafter. In 1993 the Petitioner had surgery on his right arm. Following the right arm surgery, he retired. Petitioner testified he had no problems after his prior surgeries. Several years prior to 2008, Petitioner began part-time work with Respondent.

Following the motor vehicle collision the Petitioner felt he was dazed and hurt. He moved his truck to the parking lot of a nearby Denny's. Petitioner could barely stand up after exiting his truck. Petitioner talked to the paramedics following the collision and advised them of his injuries to his back, legs, head and shoulder. The paramedics took the Petitioner to Hinsdale Hospital where he received emergency treatment and was released.

The following day, the Petitioner was seen by his family doctor, Dr. Crudup, in Burbank. Dr. Crudup referred the Petitioner to Dr. Schaible. Petitioner began treatment with Dr. Schaible. Dr. Schaible recommended no surgery. Petitioner had physical therapy but did not feel any improvement. Dr. Schaible ordered tests, including an MRI, and additional physical therapy. Eventually Dr. Schaible performed surgery to Petitioner's low back at Christ Hospital.

Petitioner was referred to Dr. Schaffer for a second opinion.

Following surgery, the Petitioner underwent additional physical therapy and was taking pain pills. Petitioner felt that the pain was just as bad as prior to the surgery. Dr. Crudup at this time referred the Petitioner to Dr. Harsoor for pain management. Despite Dr. Harsoor's treatment, Petitioner was still in a lot of pain. Thereafter, Dr. Crudup referred the Petitioner to Dr. Lippman who ordered a discogram. Eventually Dr. Lippman performed a fusion on the Petitioner from L3 to S2 which was performed at Christ Hospital.

Petitioner was referred to Dr. Jido for additional pain management. After the third round of physical therapy the Petitioner began to feel better. Petitioner's first surgery was performed by Dr. Schaible on January 11, 2010 and the second was performed by Dr. Lippman on September 29, 2010. Petitioner did not have any additional surgeries other than the two surgeries to his back.

Petitioner testified he never returned to work after the accident.

Petitioner was seen by Dr. Richard Noren on July 7, 2009 at Respondent's request for an Independent Medical Examination.

On direct examination, the Petitioner testified that the doctor's records were wrong where the records indicated that Petitioner was driving his own car or that he fell at work. Petitioner testified he has done no gainful employment since the date of accident. He is still in pain although it is not as bad. He performs exercises at home in the morning. Prior to the accident, Petitioner could bend to the floor but now he can't. Petitioner testified that he cannot do housework and has a cleaning lady come in three times a week. She helps with the housework and grocery shopping. Petitioner testified that he gained 60 pounds since the date of accident. Petitioner used a cane to ambulate at

the hearing. He testified he uses a walker at home. Additionally Petitioner has use of a TENS Unit.

Petitioner is a diabetic and takes pills for his condition.

Petitioner can hardly carry a gallon of milk. He tries to work household chores at home. He goes fishing. Prior to his accident, he would fish for 6 hours at a time. Now he will fish for 30 minutes and must sit on his bucket. Petitioner can stand for half an hour and sit for half an hour.

Petitioner was examined by Dr. Jeffrey Coe on March 8, 2011 at his attorney's request. The exam lasted 45 minutes to an hour. Petitioner testified that he was seen by Dr. Noren and that she (emphasis added) saw him for only 10 minutes.

On cross examination, the Petitioner testified that he was on disability of the date of accident and that he only worked part-time for Allparts. He was on disability as a result of his prior back and arm injury.

Petitioner testified that he did not continue to work after the accident and that any such indication in the medical records was an error.

Following Petitioner's fusion surgery, he was involved in another motor vehicle collision which did increase the pain in his back and legs.

Petitioner testified that the damage to the vehicles following the accident of October 3, 2008 was extensive and that any record in the medical records to the contrary is an error. Petitioner testified that he did not report to his doctors that he was retired and any such indication in the medical records is in error. Petitioner acknowledged that Dr. Schaible did not want to perform surgery upon him.

Petitioner testified that he weighed 175 pounds before the accident and that following the accident he now weighs 225.

On redirect examination, the Petitioner first testified that he had no instructions regarding work from Dr. Crudup. When again questioned by his attorney he acknowledged that Dr. Crudup told him he should not work. Petitioner never returned to work with Allparts. He did not look for work with anyone else. Following the surgery by Dr. Lippman, the Petitioner was involved in another motor vehicle accident which increased the pain in his back and legs.

At the close of the testimony, Petitioner offered exhibits 1 through 31 as listed on the Request for Hearing sheet. Respondent objected to the medical bills as to liability. Respondent waived its hearsay objection to Dr. Coe' s report but did not stipulate to his findings. Respondent offered exhibits 1 through 9 as detailed on Respondent's Trial Exhibit List. Petitioner waived any hearsay objections to Dr. Noren's report but did not stipulate to the findings therein.

Thereafter the parties had a discussion with the Arbitrator off the record and the matter was taken under advisement.

CONCLUSIONS OF LAW

CAUSAL CONNECTION

Based on the testimony alone this would appear to be a simple straight forward Workers' Compensation case. However, there are extensive medical records in this case which need to be reviewed in order to come to a proper and fully informed conclusion in this matter.

The Petitioner was referred by Dr. Carlos Crudup to Dr. Keith Schaible. Petitioner was seen by Dr. Schaible on September 23, 2009 and gave a history "Lewis came in. Apparently, he was involved in a motor vehicle last October 3rd and he has been in back pain ever since, as well as neck pain, sharp pain in his back, and it goes down in his leg, the right leg. He has had some physical therapy, which did not help, he has had no injections." (RX #3, PX G) Dr. Schaible examined the Petitioner as well as the MRI Scan of September 23, 2009 which Petitioner had brought and which showed post operative changes at L4-L5. Dr. Schaible did not see any evidence of any recurrent disc herniation. Dr. Schaible did not see any evidence of significant stenosis. Dr. Schaible further stated "I see no findings that would warrant any surgical intervention." On physical examination Petitioner was found to have symmetric strength. Petitioner was found to be able to walk on his heels and toes. In his report, under "Assessment and Plan", Dr. Schaible noted "Thus, I reassured him I did not see anything that would warrant any surgical intervention. I would pursue further conservative options."

An MRI of the Petitioner's lumbar spine was performed on September 9, 2009 at Advocate High Tek Medical Park. The impression from the MRI when compared to the September 12, 2004 MRI was noted: "Intervertebral disc and facet deterioration changes are present as described above. These are stable and unchanged when compared to the prior study. Again noted is a far left lateral herniated disc-osteophyte complex at the L3-L4 level." (RX4).

Petitioner returned to Dr. Schaible on November 24, 2009. Petitioner complained of persistent intractable back pain. In his report, Dr. Schaible wrote, "I told him upfront that I was unimpressed with his MRI scan. I did not feel that surgical intervention was

going to yield him much benefit. He has seen a second opinion, and he told me the second opinion states he should have surgery. I told him that I remain uncertain if surgical intervention if going to yield any improvement. Perhaps going ahead with a myelogram, post myelogram, CAT scan may be helpful and give us more information. He desires to set this up and I will see him back after that". (RX#6, PX #G).

Petitioner followed up with Dr. Schaible on December 15, 2009. Dr. Schaible's record states:

> "The patient comes in. He had his myelogram, post myelogram, CAT scan. It does demonstrate moderate stenosis for L4-5 less so at 3-4. He still remains quite insistent. This pain is quite unbearable and unmanageable. Taking Vicodin. He insisted on having surgery. I told him again, his level of stenosis is moderate and there is certainly some concern but surgical intervention may not yield the result he is looking for, that is reduction or improvement in his symptoms. We discussed the risks of infection, CSF leak, nerve injury, weakness, foot drop, failure to improve his pain, and potential need for additional surgery. He wanted to schedule this up after the first of the year pending his medical clearance." (RX#7, PXG).

Petitioner was seen on July 7, 2009 by Dr. Richard Noren at Respondent's request. Dr. Noren took a history from the Petitioner and examined him. Dr. Noren found that Petitioner's subjective complaints of pain were consistent with his apparent disability prior to the accident. Dr. Noren found significant multiple Waddell findings consistent with symptom magnification. Dr. Noren found a lack of effort by Petitioner in the testing of the motor groups. Dr. Noren felt that there was no further treatment warranted, Petitioner was at maximum medical improvement and he could return to his work as a part-time driver.

In spite of the findings of Dr. Noren and Dr. Schaible, the Petitioner went ahead with the surgery on January 11, 2010. Unfortunately, Petitioner's bilateral L4-L5 and L5-

S1 aminotomy with medical facetectomy and decompression pain did not improve following the surgery.

Petitioner was referred to Dr. Caleb Lippman who examined the Petitioner on June 1, 2010. Dr. Lippman wrote, "There are no indications right now for acute neurosurgical intervention". (Page 70 Advocate subpoena records) In spite of yet another doctor of Petitioner's choosing opining there was no need for another surgery, Petitioner chose to undergo the second surgery, performed Dr. Lippman, who must've changed his mind.

Following the second surgery, the Petitioner went to another doctor of his own choosing, Dr. Ebby P. Jido. Petitioner was seen by Dr. Jido on April 7, 2011. Dr. Jido noted the fusion of L3-L4, L4-L5 and L5-S1 by Dr. Lippman. Dr. Jido noted "He (Petitioner) did not obtain relief and recently had also an involvement in a motor vehicle accident with increasing pain in the back and legs. Currently his pain score is 6 out of 10 in intensity. He tried epidural injections in the past but it increased severely his blood sugar into the 400s and also did not give him any adequate relief." So following Petitioner's second surgery, another doctor of Petitioner's choosing found that Petitioner once again did not have relief from surgery. Additionally Dr. Jido noted the intervening accident worsened Petitioner.

There are numerous other inconsistencies between Petitioner's testimony and the medical records. These include the Petitioner's weight and his continuing to work following the accident. Several of Petitioner's own doctors noted he continued to work following the October 3, 2008 accident.

In determining the credibility of a witness the Arbitrator notes that credibility deals with more than just the issue of truthfulness alone. In determining the credibility of a witness, the Arbitrator must consider the witness's ability to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case. Many of the inconsistencies between the Petitioner's testimony and the recorded history have already been noted. Petitioner testified he was in intractable pain following the motor vehicle collision at issue yet the MRI taken following the accident and compared with a previous MRI in 2004 showed no structural differences. Additionally, three of Petitioner's treating doctors opined that Petitioner did not need surgery and / or that the surgeries performed were failures. Dr. Schaible consistently advised that surgery was not necessary yet upon the insistence of the Petitioner, but later relented. Dr. Lippman, upon seeing the Petitioner, advised that there was no neurological indication for surgery, yet relented as well. Dr. Jido found that neither surgery provided relief and documented an intervening motor vehicle accident, which increased the Petitioner's pain. Petitioner was already on disability at the time of his accident and alleged injury. Petitioner's doctors were most certainly in a qualified position to determine whether or not the surgeries were necessary and would be successful. His doctors proved correct; following both surgeries the Petitioner's condition did not improve. Petitioner's doctors noted that he had returned to work following the accident and was working the same schedule.

The Arbitrator notes that the records submitted by the Petitioner's attorney contained many troubling entries. In Dr. Crudup's report dated October 3, 2009 it is noted that the attorney, Bill White, requested that the doctor provide a letter that the

Petitioner was not in pain prior to this accident. This evidences an attempt to extract an opinion from a doctor which was not contemporaneous with the incident or treatment and which was requested to bolster Petitioner's position. As such the Arbitrator can give little weight to that opinion.

On December 8, 2008, Dr. Suneera Harsoor noted that the Petitioner acknowledged previous treatment for pain including chiropractic treatment after his previous spinal surgery. Dr. Harsoor also noted that the Petitioner continued to work three days a week. On page two of that same report Dr. Harsoor noted "he (Petitioner) will not be able to take any stronger medication because Vicodin knocks him out and his job involves driving and lifting weight." Later, in Dr. Harsoor's report dated September 20, 2010 she noted that the Petitioner had retired from work.

In his report dated April 7, 2011 Dr. Ebby Jido noted that following the two surgeries the Petitioner did not obtain relief from his back pain. Dr. Jido further noted that Petitioner was recently involved in yet another motor vehicle accident with increasing pain in his back and legs.

There is no single inconsistency that leads to the credibility problems in this case. When reviewing the medical records as a whole the Arbitrator noted that in both instances the Petitioner underwent the surgery against his doctor's advice and upon the Petitioner's insistence. Neither surgery brought relief, as predicted. The Petitioner's testimony conflicted with the medical documentation. Petitioner testified several times that he had no back problems following his back surgery in 1986 with Dr. Castro, yet in the array of current treating doctors it was noted that he had been receiving treatment and had been in pain. In Dr. Crudup's report, it was noted that Petitioner's attorney requested

a note stating that petitioner was not under any back pain prior to the October 3, 2008 accident. Dr. Crudup's response is qualified, simply noting that "no visits to our clinic for back pain before the above mentioned date."

After hearing Petitioner's testimony on December 13, 2012, the Arbitrator would have concluded he sustained a compensable work accident and related surgeries. However, after a careful review of the medical records the Arbitrator concludes that the Petitioner did indeed suffer a compensable accident but that neither surgery was reasonable or necessary. Both surgeries were performed at Petitioner's insistence and against the advice of, oddly enough, the doctors who eventually performed those surgeries. Both surgeons failed to offer any opinion as to why their advice against surgery had so drastically changed. Accordingly, based on the medical evidence as a whole, and the record as a whole, the Arbitrator finds that neither surgery was reasonable or necessary. Based upon the diagnostic testing, the Arbitrator finds that Petitioner's surgeries were unreasonable and unnecessary. Accordingly, the Arbitrator concludes that the Petitioner is entitled to 10% man as a whole as an award for the permanency he suffered as a result of his injury and is therefore entitled to 50 weeks of compensation X $206.67, the minimum PPD rate for an accident occurring on October 3, 2008, for a total of $10,333.50. The Arbitrator further finds that the Petitioner was taken off work staring on December 11, 2008 by Dr. Crudup. As of the date of the Independent Medical Exam by Dr. Richard Noren on July 7, 2009 Petitioner was able to return to work as a part-time driver. Based inconsistencies in the medical records and the unreasonableness of the treatment, including the two surgeries, the Arbitrator finds that the opinions of Dr. Noren, taken together with the original opinions of Dr. Schaible and Dr. Lippman, that the

Petitioner was capable of returning to work as of July 7, 2009 and that Dr. Noren's opinions are more credible that Dr. Schiable's or Dr. Crudup's with regard to return to work.

The parties have stipulated that the Respondent has paid numerous medical bills as listed on the attachment to the Request for Hearing sheet. Additionally the Respondent claims a credit of $34, 938.87 under Section 8(j) of the Act. The Arbitrator concludes based upon the above findings and conclusions that Respondent was not liable for any medical treatment after July 7, 2009. Accordingly there is no additional medical awarded.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cesar Martinez,
Petitioner,
vs.

NO: 12WC 11967

CTA,
Respondent,

15IWCC0786

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the arbitrator filed February 23, 2015, is hereby affirmed and adopted.

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

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

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

DATED:
o102015 OCT 27 2015
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARTINEZ, CESAR
Employee/Petitioner

Case# **12WC011967**

CTA
Employer/Respondent

15IWCC0786

On 2/23/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0230 FITZ & TALLON LLC
PATRICK A TALLON
PO BOX 6040
WOODRIDGE, IL 60517

0515 CHICAGO TRANSIT AUTHORITY
ELIZABETH L MEYER
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

☐	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
REGARDING THE NATURE AND EXTENT OF THE INJURY

CESAR MARTINEZ
Employee/Petitioner

Case #12 WC 11967

v.

15IWCC0786

CTA
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 18, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

FINDINGS

- On March 27, 2012, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries to his left knee and low back that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $60,580.00; the average weekly wage was $1,164.80.
- At the time of injury, the petitioner was 38 years of age, single with two children under 18.

- Necessary medical services were provided by the respondent.

- The parties agreed that the respondent paid $29,079.41 in temporary total disability benefits.

- The parties agreed that the respondent paid or will pay for all the related medical services provided to the petitioner.

- The parties agreed that the petitioner is entitled to temporary total disability benefits for 37-3/7 weeks from March 28, 2012, through July 24, 2012, and from January 31, 2014, through June 22, 2014.

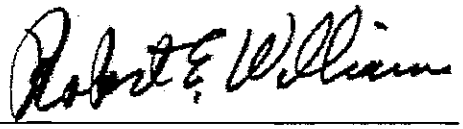
ORDER:

- The respondent shall pay the petitioner the sum of $695.78/week for a further period of 26.5 weeks, as provided in Section 8(d)2 & 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 1% loss of use of man as a whole and 10% loss of use of his left leg.

- The respondent shall pay the petitioner compensation that has accrued from March 27, 2012, through February 18, 2015, 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

February 23, 2015
Date

FEB 2 3 2015

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

There is no AMA impairment rating or evidence concerning the impact of the petitioner's injury in regard to his occupation, age or future earning capacity, as delineated in Section 8.1(b)(i) through (iv) of the Act, nor can any effect be reasonably inferred from the evidence. Regarding Section 8.1(b)(v), the petitioner complains of an ill feeling in his leg when wakening, knee pain, struggling with daily activities, standing difficulties, leaning to his right, sloughing when sitting and inactivity. The petitioner had a left knee plica excision on January 31, 2014, by Dr. Bach. A valid FCE demonstrated his physical tolerances at the medium to heavy level. Dr. Bach noted no effusion or tenderness at the petitioner's last medical visit on June 16, 2014, and a range of motion of 0 to 130 degrees. The treating medical records do not corroborate the petitioner's testimony.

The respondent shall pay the petitioner the sum of $695.78/week for a further period of 26.5 weeks, as provided in Section 8(d)2 and 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 1% loss of use of man as a whole and 10% loss of use of his left leg

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paul Garrison,
Petitioner,

vs. NO: 08WC 29057

Freeman United Coal Mining Company,
Respondent,

15IWCC0787

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, causation, permanent partial disability, legal error, evidentiary error, Section 1(d), Section 1(f) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 10, 2015, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: OCT 27 2015
o102115
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARRISON, PAUL
Employee/Petitioner

Case# **08WC029057**

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

15IWCC0787

On 2/10/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

15IWCC0787

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

PAUL GARRISON,
Employee/Petitioner

v.

FREEMAN UNITED COAL MINING COMPANY,
Employer/Respondent

Case # 08 WC 29057

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 **Springfield**, on **1/22/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/30/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $**51,491.68**; the average weekly wage was $**990.22**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment be respondent on 8/30/07. Petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

2/8/15
Date

ICArbDec p. 2

FEB 10 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 50 year old coal miner, alleges he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/30/07. Petitioner alleges injuries to his lung and/or heart due to the inhalation of coal mine dust, including but not limited to coal dust, rock dust, fumes and vapors for a period in excess of 32 years. Petitioner alleges the nature of his injury as shortness of breath and exercise intolerance. Petitioner has an unrelated conditions that include multiple sclerosis, degenerative arthritis in his hips bilaterally, and low back problems.

Petitioner testified that he worked in the coal mines for 30 to 34 years, with all but the last year underground. During this time he was exposed to coal dust, silica dust, trowel fumes, and diesel fumes. Petitioner last worked for respondent on 8/30/07 because this was the day the mine shut down. At the time of the shutdown petitioner was working as a gob hauler. He testified that in this position he breathed in coal dust. Petitioner has not sought any other employment since he left the mine.

After graduating from high school petitioner worked for about six months with concrete. Thereafter, he started mining at Consolidation Coal Company on 6/2/75. Petitioner was hired as a timber man and worked on machines at the face of the mine. Petitioner served in this capacity for about 13 months.

On 7/26/76 petitioner began working for respondent as a shuttle car operator. This job required petitioner to take coal from the miners at the face of the mine to the belt, to be taken out of the mine. Petitioner testified that the mine is dirtier at the face. Petitioner worked in this job for eight months. Thereafter, petitioner began working as a continuous miner operator. In this job he would cut the coal from the face of the mine. Petitioner testified that this exposed him to a lot of coal dust from the face of the mine. Petitioner did this job for about 3 to 4 years. Petitioner then transferred to the job of a repair trainee, and then repairman. These jobs required petitioner to repair equipment at the face of the mine. Petitioner worked in this job for about three years. Petitioner's next job was as a utility man. In this job petitioner was part of the crew that kept all supplies at the face of the mine and kept everything clean. Petitioner served in this job for about a year. Thereafter, petitioner returned to the job of a continuous miner for eight years. After this petitioner began having health problems associated with multiple sclerosis. As a result he went outby. There he moved parts in and out of the mine and watered down the roads in the mine. Petitioner performed this job for two years. Petitioner's last job before the mine closed was as a gob hauler. This job required petitioner to haul gob, a byproduct of the washed coal. Petitioner would haul the gob in the truck to an area on the mine property, about 2 miles from the mine, where it would be dumped. Petitioner testified that there was a lot of coal dust in the gob, and there was a lot of dust on the road from the mine to the dump area. Petitioner performed this job for about 13 months.

Petitioner testified that he first noticed breathing problems in the late 1980s. He stated that he noticed shortness of breath and wheezing while he was working as a continuous miner. Petitioner testified that from this date forward until he left the mine his symptoms worsened even more. He further testified that after he left the mine until the date of trial his breathing problems got worse. Petitioner testified that he can only walk on level ground for about 200 feet before he gets winded. Petitioner testified that he does not take any breathing medications. He said his activities of daily living are very limited. Petitioner testified that his multiple sclerosis does not affect his respiratory system.

Petitioner testified that he reported his breathing problems to Dr. Bleyer. Petitioner is not a smoker now, but started smoking at 21 years old and stopped for good about 5 to 7 years ago. Petitioner smoked about 1 to 1-1/2 packs of cigarettes a day.

Petitioner testified that if the mine had not closed and he was laid off, he would have continued working for respondent. After being laid off on 8/30/07 petitioner completed the union panel form stating that he was available for work, and identified the job he was willing to do in other mines as a gob hauler.

On 3/24/08 petitioner underwent a chest x-ray performed by Dr. Henry Smith, D.O., a B-reader. The quality of the film was grade 1. The impression was mild pneumoconiosis with interstitial fibrosis p/s, mid to lower zones, 1/0.

On 5/12/09 Dr. Wiot reviewed the x-rays of petitioner dated 3/24/08 at the request of the respondent. He noted that the films were of acceptable quality by ILO standards (quality -1). Dr. White was of the opinion that there was no evidence of coal worker's pneumoconiosis. He noted a mild elevation of the lateral aspect of the left hemidiaphragm, but was of the opinion that this was not a manifestation of coal dust exposure. He attributed the elevation of the lateral aspect of the left hemidiaphragm to possibly dysphysiologic, which is not attributable to dust exposure.

On 7/23/10 the evidence deposition of Dr. Jerome Wiot, a B reader and a board-certified diagnostic radiologist, was taken on behalf of respondent. Dr. Wiot testified that he's been board-certified in radiology since 1959. He testified that he has been a B reader since the first exam was given. He testified that he currently reads about 60 or 70 films a day. Dr. Wiot began in academia as an assistant professor of radiology in 1959, and eventually was elevated to a full professor in 1966. Dr. Wiot was director of the Department of Radiology at University Hospital from 1968 to 1992. He was also Chairman of the Department of Radiology at the University of Cincinnati Medical Center from 1973 to 1992. He testified that these two facilities were the same. Dr. Wiot is a past president of the American Board of Radiology. Dr. Wiot testified when he was a

trustee of the board he was part of a group that developed the first questions for the written portion of the board examination for the B reader. Dr. Wiot is also a past president of the American College of Radiology. Dr. Wiot would teach those enrolled in the B reader program how to read x-rays properly, and consistently.

Dr. Wiot opined that coal worker's pneumoconiosis and silicosis invariably begin in the upper lung fields, more often on the right side. He testified that asbestos begins always in the bottom of the lungs. He was of the opinion that when coal worker's pneumoconiosis progresses it will move to the mid-and the lower zones, but it always begins on the top. Dr. Wiot opined that coal worker's pneumoconiosis and silica don't cause pleural changes. Dr. Wiot was of the opinion that CAT scans are useful in the assessment of lung diseases, but there isn't currently a classification scheme in the ILO system. Dr. Wiot was of the opinion that CT's are standard in the diagnosis of lung disease. Dr. Wiot opined that one must consider perfusion, opacity type, lung zones and film quality for an accurate diagnostic reading of a chest x-ray for coal worker's pneumoconiosis.

On cross-examination Dr. Wiot agreed that at this point the United States Department of Labor does not accept digital x-rays for purpose of B readings. Dr. Wiot agreed that CT scans are not currently accepted for B readings by NIOSH or the Department of Labor under the B readings system. He was of the opinion that CT's would never become the standard because the degree of radiation is about 100 times greater than those of chest x-rays. He noted that if you're going to do a CT scan of a coal miner on a yearly basis while he's working in the coal mines this increases the chances that this degree of radiation could cause him to have a malignancy or leukemia or something like that. Dr. Wiot opined that you cannot read a chest x-ray and say that it is unquestionably coal worker's pneumoconiosis if it is simple coal worker's pneumoconiosis, since there are other conditions that would cause nodules in the lungs. Dr. Wiot agreed that when coal miners work in the coal mine environment for 10, 20, 30 or maybe even more years, and then leave the coal mine, they are all going to come out with some cold mine dust deposit in their lungs, but they won't all have tissue reaction to the coal dust. He was of the opinion that if there's enough tissue reaction to the coal dust there will be coal worker's pneumoconiosis that can be seen radiographically. Dr. Wiot testified that the basic unit of coal worker's pneumoconiosis is called a macule, or nodule, that represents a deposition of coal mine dust surrounded by scarring with perhaps an associated focal emphysema. Dr. Wiot was of the opinion that this scarring and emphysema of coal worker's pneumoconiosis is permanent and has no normal function, even though the impairment may not be able to be measured by pulmonary function testing. Dr. Wiot agreed that coal worker's pneumoconiosis can be progressive with continued exposure, and tends not to be after the exposure ends. Dr. Wiot agreed that simple coal worker's pneumoconiosis can progress to a life-threatening condition called progressive massive fibrosis. He stated that emphysema can result in core pulmonale, a heart condition caused

by increased pressure in the pulmonary arteries. Dr. Wiot agreed that there is no treatment for coal worker's pneumoconiosis. He also agreed that a person can have coal worker's pneumoconiosis by x-ray and still have a normal physical exam of the chest, a normal pulmonary function testing, and normal arterial blood gas testing. Dr. Wiot agreed that petitioner had sufficient exposure to cause coal worker's pneumoconiosis in a susceptible host. Dr. Wiot testified that a coal miner who has coal worker's pneumoconiosis may have a fairly thick blanket of dust deposits within his lungs, but the dust deposit may not have the macule. He stated that is all dependent upon the individual.

On redirect examination Dr. Wiot was of the opinion that coal worker's pneumoconiosis invariably begins in the upper lung fields. He was of the opinion that if it begins on one side it will begin on the right side, and as it progresses, it moves to the mid and then the lower zones. Dr. Wiot opined that asbestosis always begins in the bottom of the lungs and only when it moves up does it move to the mid, and then into the upper zones. Dr. Wiot opined that the vast majority of coal workers' have, as their primary opacity, a rounded opacity, primarily Qs and Ts. He testified that he has seen some of them with Ps and Rs. Dr. Wiot opined that determining a negative film from one that is at the very first category of revealing a disease is the most difficult to determine when reading x-rays. Dr. White opined that CT scanning is very beneficial for evaluating lung disease. Dr. Wiot testified that normal vascular markings can sometimes be mistaken for the presence of a nodule on an x-ray film, and that can lead to a reading of a film as positive for coal worker's pneumoconiosis, if the reader does not have the experience of reading chest x-rays.

On 10/18/11 petitioner presented to Dr. Bleyer, his primary care physician, for a health maintenance evaluation. Petitioner reported that he exercised regularly, and it included walking 1 mile a day.

On 2/28/12 petitioner underwent an examination prior to his total left hip arthroplasty on 3/6/12. On physical examination petitioner demonstrated no increased work of breathing or signs of respiratory distress. His lungs were clear to ascultation. His heart exam was also normal. Dr. Bleyer noted that petitioner had already undergone a total right hip arthroplasty.

On 8/15/12 Dr. Smith performed another x-ray of petitioner's chest. The impression was simple coal worker's pneumoconiosis with small opacities primary p, secondary s, mid and lower zones bilaterally, profusion 1/0. The quality of the film was grade 1.

On 8/16/12 petitioner underwent an examination performed by Dr. Glennon Paul at Central Illinois Allergy & Respiratory Service, Ltd, at the request of his attorneys. Petitioner gave a history of being a coal miner for 33 years. He stated that he worked at two different coal mines. He reported that all his work was in

the underground mine except for the last 14 months. Petitioner noted that he worked every type of underground job in the mine. He complained of shortness of breath on exertion for the past 10 years. He stated that he could walk about a block before he felt shortness of breath. Petitioner had a past history of a left hip replacement in 2011; a right hip replacement in 2006; multiple sclerosis for 13 years, for which he takes Avonex by injection once a week; takes Valium three times a day for his anxiety; and takes Flomax. Petitioner noted that he had been a 30 pack a year cigarette smoker, who quit about six months ago.

Dr. Paul performed a physical examination of the chest and noted bilateral rhonchi throughout both lung fields with lower greater than upper. He noted that this means there was just some congestion through his wind pipes throughout his lungs that would give a rhonchial sound, which is a vibration sound when he exhales. In addition to a physical examination, Dr. Paul had petitioner undergo pulmonary function studies that were within normal limits, with the exception of a carbon monoxide diffusing decreased to 56% of predicted. Petitioner also showed borderline low findings compatible with an early restrictive lung disease. Chest x-rays revealed multiple small nodules and fibrous fissures throughout both lung fields compatible with coal worker's pneumoconiosis. Dr. Paul's impression was simple coal worker's pneumoconiosis, and a borderline restrictive lung disease with a decreased carbon monoxide diffusing capacity.

On 12/29/12 Dr. Christopher Meyer, a board-certified radiologist and B reader, read a PA and lateral chest x-ray of petitioner taken 3/24/08. His findings were that the lungs were well expanded without fine irregular, fine nodular, or large opacities. He noted that the lungs were clear and the thoracic aorta was mildly ectactic. He noted that the cardiac silhouette was normal in size, and that the bones and soft tissues were unremarkable. He noted degenerative changes of the right first costochondral junction. His impression was no radiographic findings of coal worker's pneumoconiosis. He noted a normal chest x-ray. Subsequent to his completion of the ILO B reading form, he reviewed the B reading and narrative report supplied by Dr. Smith regarding the same examination. He noted that he did not agree with Dr. Smith's interpretation. Specifically, he was of the opinion that there were no findings of interstitial fibrosis, p/s opacities. He was of the opinion that the lungs were clear, and it was a normal PA and lateral chest x-ray.

On 12/29/12 Dr. Meyer also reviewed a PA and lateral chest x-ray for petitioner dated 8/15/12. His findings were that the lungs were clear, and the mediastinum, cardiac silhouette, and soft tissues were unremarkable. He also noted degenerative changes at the right first costochondral junction. His impression was normal chest x-ray with no radiographic findings of coal worker's pneumoconiosis. Subsequent to completing his ILO B reading form, he reviewed the B reading and narrative reports of Dr. Smith regarding this examination. He did not agree with Dr. Smith's interpretation. He specifically found that there were no findings

of interstitial fibrosis, no p/s opacities, and the lungs were clear. He was of the opinion it was a normal chest x-ray.

On 5/16/13 Dr. Jeffrey Selby examined petitioner at the request of respondent. Dr. Selby took an occupational and medical history; performed a physical examination; ordered, interpreted, and performed various laboratory tests; and then came up with a final assessment. Petitioner gave a history of working for Consolidation Coal at an underground mine in June 1975, for 14 months. His jobs included timber man, utility man, and shuttle car operator. Petitioner reported that on 7/26/76 he started working for respondent underground at Crown 2 mine. His jobs included shuttle car operator, continuous miner operator, repairman, mine examiner, utility man, parts runner, general labor, rock duster, and roof bolter. Petitioner reported that in May of 2006 he started working on the surface where he ran a gob hauler, as well as working as dozer operator and loader operator. Petitioner's last day worked was when the mine shut down. His job on that day was running a gob hauler. Petitioner's chief complaint was his multiple sclerosis. He also reported trouble breathing and weakness due to his multiple sclerosis. He stated that he noticed shortness of breath on exertion for the last two years. He denied coughing. He stated that he wheezes about every other day, but not at night. Petitioner stated that a year ago he could walk 1 mile per day. Petitioner gave a history of a right hip replacement in 2006, and a left hip replacement in 2012. Petitioner stated that he never used an inhaler. Dr. Selby noted a smoking history of one pack of cigarettes per day for approximately 30 years.

Dr. Selby performed a physical examination. He also performed certain laboratory testing. Petitioner's resting oxygen saturation on room air was 95%; his carbon monoxide breath analysis was 3 ppm; a complete blood count showed white count 4940, hemoglobin of 13.7, and platelet count of 180,000; a comprehensive metabolic profile showed an abnormal BUN rating of 24, carboxy hemoglobin of 3% which was normal; and a normal EKG. A chest x-ray with B Reading showed a grade 2 quality film due to scapula overlay. There were no parenchymal or pleural abnormalities noted that were consistent with pneumoconiosis. The film was also negative for coal worker's pneumoconiosis. Petitioner refused to undergo a CT scan of the chest at his attorneys', Culley & Wissore, direction. Pulmonary function testing showed forced vital capacity of 4.69 L or 103% of predicted, a forced expiratory volume in one second (FEV1) of 3.7 L or 100% of predicted, and an FEV1/FVC of 79%. No improvement was noted post bronchodilator. Petitioner's lung volumes demonstrated a total lung capacity of 6.46 L or 96% of predicted, and a residual volume of 1.177 L or 77% of predicted. Diffusion capacity was 22.3 or 83% of predicted. DLCO/VA was 3.58 or 91% of predicted. Dr. Selby's overall interpretation was a normal spirometry without change post bronchodilator, normal lung volumes, normal diffusion capacity. Petitioner was then placed on a Bruce protocol and completed 41 seconds of stage III, or six

minutes and 41 seconds of total exercise time. His oxygen saturation remained between 96 and 98% throughout the exercise test. Petitioner's reason for stopping with shortness of breath, sciatic pain, and out of energy. He denied any chest pain, chest pressure, or dizziness during or after the exercise. Dr. Selby also reviewed chest x-rays of petitioner dated 3/24/08 and 8/15/12. He noted that they were of diagnostic quality and were negative for coal worker's pneumoconiosis.

On 11/11/13 the evidence deposition of Dr. Paul was taken on behalf of petitioner. Dr. Paul is the medical director of St. John's respiratory therapy and clinical assistant professor of medicine at SIU medical school. Dr. Paul specializes in allergy and pulmonary diseases. He has written a book on asthma. Dr. Paul regularly performs chest x-rays and pulmonary function tests, about 15 to 20 day. Dr. Paul testified that he has treated coal miners for coal mine induced lung disease since the 1970s. He also examined coal miners for federal black lung claims, as well as state black lung claims. Dr. Paul is not a B reader.

Dr. Paul believed that petitioner's decreased breath sounds could be attributable to emphysema and bronchitis. With respect to petitioner's carbon monoxide diffusing capacity decrease, Dr. Paul was of the opinion that this could suggest one of two things, ventilation perfusion abnormalities associated with emphysema, or alveolar capillary block, which you see in coal worker's pneumoconiosis. Dr. Paul was of the opinion that since petitioner's residual volume was decreased, and his total lung capacity was borderline decreased, that would go along with coal worker's pneumoconiosis and the possibility that petitioner may have some fibrosis starting up in his lungs. Dr. Paul was of the opinion that the fibrosis and borderline restricted disease suggested that petitioner's coal worker's pneumoconiosis might be progressing. Dr. Paul opined that petitioner has coal worker's pneumoconiosis caused by coal dust. He further opined that petitioner has borderline restrictive lung disease caused by his coal dust environment. He also attributed petitioner's moderate decreased diffusing capacity to his coal worker's pneumoconiosis and probably to the development of pulmonary fibrosis.

In light of his diagnosis of coal worker's pneumoconiosis, decreased diffusing capacity, and restrictive lung disease, Dr. Paul opined that petitioner could not have any further exposure to the environment of a coal mine without endangering his life. Dr. Paul opined that cigarette smoking does not cause restrictive lung disease, or reduced diffusing capacity. He further opined that petitioner's smoking history did not play any significant role in his findings of restrictive lung disease. Dr. Paul opined that petitioner has physiologically significant pulmonary impairment caused by cold dust environment. Dr. Paul testified that in order to have pneumoconiosis one must have, in addition to coal mine dust deposited the lungs, a tissue reaction to it, called scarring or fibrosis. Dr. Paul was of the opinion that the scarring of coal worker's pneumoconiosis cannot

perform the function of a normal healthy lung tissue. He believed that if you have coal worker's pneumoconiosis you have some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not.

Dr. Paul was of the opinion that it is possible to have an injury or disease in your lung, shortness of breath, and a lobe of a lung that was surgically removed, despite having normal pulmonary function test results. Dr. Paul was of the opinion that a person could be well below the predicted normal range of pulmonary function tests and still be within the normal range. Dr. Paul was of the opinion that a pulmonary function test will tell you the type of abnormality, whether obstructive or restrictive and how severe it is, but won't tell you the etiology. He was of the opinion that a person can have coal worker's pneumoconiosis that's radiographically significant but not have any shortness of breath, a normal pulmonary function test, normal blood gases, and normal physical examination of the chest. Dr. Paul was of the opinion that further exposure to coal dust can progress coal worker's pneumoconiosis to a point where it involves the heart in a condition called core pulmonale. He further opined that even though a coal worker leaves the coal mine his coal worker's pneumoconiosis can still progress.

Dr. Paul was of the opinion that coal dust, 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 glues used in the roof bolting process, and welding fumes can injure the lungs. Dr. Paul was of the opinion that obstructive lung disease can be multi-factorial in origin. He believed that the inhalation of coal mine dust can result in shortness of breath, chronic cough, emphysema, and chronic bronchitis.

Dr. Paul opined that chronic bronchitis is one of the chronic obstructive pulmonary diseases. He believed that one can have chronic bronchitis and have normal pulmonary function testing, normal blood gas testing, and a normal physical exam of the chest. However, if that person has further exposure to coal mine dust, it can be a progressive disease to the point where it begins to develop as a fixed obstructive pulmonary defect.

On cross-examination Dr. Paul admitted that he has seen dozens of individuals at the request of petitioner's attorneys, Culley and Wissore. Dr. Paul testified that petitioner did not relate to him that he had any cough or sputum, and did not require any assistance when he saw him. Dr. Paul testified that petitioner was not taking any breathing medications when he saw him, and had never taken any breathing medication. Dr. Paul was of the opinion that a 30 pack years of smoking was a significant smoking history. He also was of the opinion that smoking can cause emphysema. Dr. Paul admitted that he did not review any medical records of petitioner's. Dr. Paul testified that he was not aware that petitioner was receiving Social Security disability at the time he saw him. Dr. Paul was of the opinion that it is unlikely that simple pneumoconiosis will progress

once the exposure ceases, but did not believe it was unlikely with respect to petitioner because he already had a decreased diffusing capacity and some early restrictive lung changes. Dr. Paul noted that petitioner's total lung capacity was 83% which was borderline low. His residual volume was 74%, which is low. His forced vital capacity and forced expiratory volume in one second was borderline, but the ratio of the two was normal. Dr. Paul testified that coal worker's pneumoconiosis affects the lower lung zones equally with the other lung zones. When confronted with the fact that he had testified in the past that it affects the lower lung zones more commonly, Dr. Paul testified that there was a study that just came out that shows that they are the same in the lower as in the upper. Dr. Paul admitted that he was not certified in pulmonary disease.

On redirect examination Dr. Paul testified that although he is not certified in pulmonary disease, he has done pulmonary and allergy work for the last 40 years. Dr. Paul testified that he was the director of respiratory therapy at two hospitals. He testified that he was not certified in pulmonology or pulmonary disease because they didn't have a pulmonology department when he began practicing.

On 7/16/14 the evidence deposition of Dr. Christopher Meyer, a radiologist and B reader, was taken on behalf of respondent. Dr. Meyer did a residency in diagnostic radiology beginning in July 1988 through June 1992. Dr. Meyer is board-certified in radiology since 1992. In 1998 he became an associate professor of radiology at the University Hospital in Cincinnati Ohio. Dr. Meyer is currently Vice Chair of Finance and Business Development, and professor of diagnostic radiology at University of Wisconsin Hospital and Clinic, in Madison Wisconsin. Dr. Meyer is in clinical radiology 50% of the time, reads chest x-rays and CT scans 2 to 3 days a week, spends 20% doing research and writing, and spends one day of administrative time. Dr. Meyer spends his nights and weekends devoted to B Reading. Dr. Meyer is now on the ACR Pneumoconiosis Task Force, which is engaged in redesigning the B reader course and exam, and submitting cases for the training module and exam.

Dr. Meyer reads about 200-250 chest x-rays a week, and 20 to 40 chest CT scans. Dr. Meyer testified that the round opacities increase in size from P, Q, to R, with R being the largest. For irregular opacities the sizes increase from S, T, to U, with U being the largest. Dr. Meyer testified that coal worker's pneumoconiosis is described by small round opacities. He opined that it is an upper zone predominant process.

On cross-examination Dr. Meyer agreed that NIOSH does not accept CT scans for the purpose of making the readings. He admitted that the exposure of the CT to an analog x-ray is 100 times more radiation in the CT scan, but newer CT scans can be as low as 50 times or less radiation. Dr. Meyer testified that if an x-ray is reviewed for coal worker's pneumoconiosis and there are abnormalities seen that are consistent with coal dust exposure, those abnormalities would be pretty much the same as the abnormalities you would see if silicosis

were the disease that you are concerned about. Dr. Meyer went on to state that with coal worker's pneumoconiosis, the nodules are smaller and a little less distinct than those with silicosis, but the distribution is the same. Dr. Meyer agreed that making the distinction between 0/1, and 1/0 opacities is one of the most difficult processes of the entire B reader form, and there certainly can be disagreement amongst two B readers as to whether they think they're seeing small opacities or not. For this reason Dr. Meyer was of the opinion that one must make sure that the individual who is interpreting the examinations has ample experience reading them to be able to sort out what is the background variation in normal. Dr. Meyer was of the opinion that it would be possible for a person to appreciate the existence of coal worker's pneumoconiosis on a CT that may have been missed or that wasn't quite as readily apparent on a standard analog chest x-ray. Dr. Meyer agreed that all long time coal miners are going to come out of the mine with some dust deposits trapped in their lungs. However, the majority of those will not have changes in their lungs that qualify for coal worker's pneumoconiosis. Dr. Meyer was of the opinion that it is not possible to have coal worker's pneumoconiosis without having a tissue reaction to the coal dust. Dr. Meyer agreed that coal worker's pneumoconiosis can be considered a progressive disease and in some coal miners can progress even after the coal miner leaves the exposure. Dr. Meyer also agreed that if a person has coal worker's pneumoconiosis at any time in their life, inasmuch as the only thing that causes coal worker's pneumoconiosis is coal mining exposure, it would be true that they probably had that coal worker's pneumoconiosis at some level when they left the coal mine. Dr. Meyer was also of the opinion that in general, coal worker's pneumoconiosis would appear first radiographically or pathologically, and then later as it becomes more significant, would begin to manifest itself in pulmonary function abnormalities or clinical abnormalities. Dr. Meyer was of the opinion that coal worker's pneumoconiosis at the level of 1/0, simple coal worker's pneumoconiosis, may take 10 years or more to develop, and the worker may not know he has it until he gets a B reading that tells him he's got it. Dr. Meyer was of the opinion that a certain amount of dust can come from the ambient conditions that we all live in, in an urban society now. Dr. Meyer was of the opinion that it is very rare to find coal worker's pneumoconiosis opacities in the mid and lower lung zones, and not in the upper lung zones. Dr. Meyer testified that about 20 to 30% of the chest x-rays he reads for pneumoconiosis are positive.

On 11/4/14 the evidence deposition of Dr. Jeffrey Selby, a pulmonologist, was taken on behalf of the respondent. Dr. Selby has been board-certified in pulmonary disease and internal medicine since 1980 and 1984, respectively. Dr. Selby has been a B Reader since 1985. Dr. Selby said that he had less than 5 or 10 people under his care with coal worker's pneumoconiosis. Dr. Selby also does work in the occupational disease area, doing evaluations to determine the presence or absence of occupational lung disease, the nature of it and severity, and a general chest examination in conjunction with that. He testified that in the tri-state area he would

much more likely be doing something related to environment such as coal mining or asbestos exposure. Dr. Selby spends 1% of his time on the occupational aspect versus the clinical practice. Since the late 1980s Dr. Selby has performed independent medical examinations and record reviews for respondents from time to time. He estimated that number to be less than 10 per year. He testified that in regards to occupational disease work, he looks at approximately 30 cases for claimants or for employers.

Dr. Selby opined that when he examined petitioner's O2 saturation it was considered normal or at the very low edge of normal. His forced vital capacity was normal, his forced expiratory volume in one second was normal, his diffusion capacity was normal, and his total lung capacity was normal. Dr. Selby was of the opinion that if an individual suffers a decline in their diffusion capacity because of dust exposure and some scarring that results from that, it is permanent. Dr. Selby testified that petitioner did reasonably well on the Bruce protocol testing. He stated that it was right on the doorstep of maximal. He noted that petitioner's oxygen saturation during the testing was excellent, that petitioner's pulmonary function ability were normal, and there was no significant heart or lung disease limiting his exercise. He testified that there was no evidence of obstruction, restriction, or diffusion impairment. Dr. Selby opined that petitioner had no pulmonary dysfunction impairment.

Based on petitioner's occupational medical history, physical examination, and various laboratory data, Dr. Selby opined that petitioner does not suffer from any respiratory or pulmonary abnormality as a result of coal mine dust inhalation or coal mine employment. He further opined that petitioner does not suffer from coal worker's pneumoconiosis. Dr. Selby opined that petitioner has the respiratory or pulmonary capacity to perform any and all of his previous coal mine duties, including his last job operating a gob hauler. Dr. Selby opined that petitioner has mild anemia and that could contribute to his shortness of breath. Dr. Selby was of the opinion that petitioner's main medical problem was his multiple sclerosis, and that it contributes to his poor sense of well-being and activity inhibition. He noted that petitioner was obese and deconditioned, leading to exercise intolerance. He was aslso was of the opinion that petitioner's protuberant abdomen could cause a profound degree of shortness of breath. Dr. Selby opined that petitioner has a severe degree of primary and secondary cigarette smoke exposure, protruding to possible current and future lung disease, that could be causative factor of exercise limitation.

On cross-examination Dr. Selby agreed that for a person to have coal worker's pneumoconiosis, they must have a tissue reaction in addition to having coal mine dust in their lungs. He also agreed that the tissue reaction is called scarring or fibrosis, and that around the coal mine dust in the scarring that develops there will be a halo of emphysema around the scarring. Dr. Selby was of the opinion that the scarring of coal worker's pneumoconiosis cannot perform the function of a normal, healthy lung tissue. Dr. Selby agreed that a person

can have shortness of breath and have pulmonary function tests within the range of normal. Dr. Selby agreed that it is possible that a person could sustain an injury or damage to their lungs, lose from 110% of predicted down to 85% of predicted, and still be within the range of normal, and have some injury or pulmonary problem. Dr. Selby was of the opinion that scarring in the lungs tends toward restrictive. Dr. Selby admitted that coal worker's pneumoconiosis does not have a cure, and if they have continued exposure it is a chronic slowly progressive disease that can progress to massive fibrosis or cor pulmonale. Dr. Selby was of the opinion that the vast majority of coal worker's pneumoconiosis cases do not progress after exposure to coal dust diseases if they leave the mine with category 1 pneumoconiosis. Dr. Selby agreed that it is possible for a person to have radiographically significant coal worker's pneumoconiosis and have normal findings on physical exams of the chest, normal pulmonary function tests, and arterial blood gas tests. Dr. Selby agreed that CT scans are not officially recognized by NIOSH.

On redirect examination Dr. Selby testified that he reviewed petitioner's medical records through 8/30/12, and he did not see any pathological evidence of pneumoconiosis in any of these records. He noted that when petitioner saw Dr. Gelber on 4/15/10, over two years after he last worked in the mine, a respiratory system review revealed no cough, wheezing, sputum, or shortness of breath. Dr. Selby was of the opinion that multiple sclerosis can be a progressive disease. He was of the opinion that the drugs petitioner was taking for his multiple sclerosis would have side effects such as shortness of breath, depression, weakness, fever, fatigue, skin reactions and cause marrow suppression. Dr. Selby was of the opinion that petitioner does not have progressive massive fibrosis or cor pulmonale. Dr. Selby was of the opinion that it's almost impossible for simple pneumoconiosis to progress once the exposure ceases.

Respondent offered into evidence the records of NIOSH regarding the B Readings of petitioner's chest x-rays taken on 5/7/07. Two different B readers read these x-rays. One identified the film quality as 1, and the other identified the film quality as 2-underexposed. The first B reader who identified the film quality as 1 reviewed the x-rays taken on 5/07/07 on 6/23/07. He saw no parenchymal abnormalities consistent with pneumoconiosis, plural abnormalities consistent with pneumoconiosis, or any other abnormalities.

The second B Reader who reviewed the 5/7/07 x-ray and identified the film quality as a 2-underexposed, noted parenchymal abnormalities consistent with pneumoconiosis, no plural abnormalities consistent with pneumoconiosis and no other abnormalities. With respect to the parenchymal abnormalities consistent with pneumoconiosis the B Reader identified small opacities profusion of 0/1, and shape q/t in the upper, middle and lower zones.

A chest x-ray taken 5/26/75 was reviewed by two different readers, one an A reader and one a B Reader. The A Reader reviewed the film on 6/5/75 and identified the film as being completely negative. The B Reader reviewed the film in July 1975 and also found that it was completely negative. Both readers identified the film quality as a 2.

Respondent offered into evidence medical records of petitioner's from 11/13/00 through 1/10/15 from Koke Mill Medical Center. These records were primarily for treatment of petitioner's multiple sclerosis, left hip arthroplasty, and right hip arthroplasty. On 5/21/13 petitioner noted shortness of breath during exertion, but no shortness of breath or wheezing. His assessment of respiratory effort was noted as "no increased work of breathing or signs of respiratory distress". His lungs were clear to ascultation. On 1/15/14 petitioner noted on the intake form that he had no cardiovascular, or respiratory symptoms. On 1/16/14, 5/16/14, and 11/18/14 petitioner's pulmonary and cardiovascular exam were normal.

In late 2007 petitioner completed an application for Social Security Disability. As part of his application he wrote the statement wherein he noted that "I was diagnosed with multiple sclerosis in May 1999. Since that time I have continued to work. In April 2002 I changed to a less physically demanding job to continue working. Then as my MS progressed again I changed to a less demanding job on 8/14/06. Since 8/30/07 my condition has become bad enough that I am unable to work. I suffer from all the symptoms that are typical of MS. These are extreme weakness of both legs and left arm, problems with blurred and double vision, leg spasms, fatigue, balance and motor skill problems. I have problems with memory and I'm easily confused. I have also been having problems with depression and mood swings. All of these conditions get much worse with heat, cold and stress. I am unable to sleep well because of leg spasms. On 5/16/06 I had my right hip replaced and am now having pain in my left hip." During his interview with Social Security petitioner was asked what illnesses, injuries, or conditions limited his ability to work. He replied multiple sclerosis, right hip replacement, left hip hurting, depression, possible black lung. Petitioner also completed a function report. In this report he noted that before his illnesses, injuries, or conditions he could do yard work, ride a bicycle, boat, fish, and travel. He also noted that he could do any type of work that required physical activity, and follow orders. He indicated that since these illnesses, injuries, or conditions he can no longer do these things. He noted that he used to be able to cook a full meal, but now can't stand very long and can't multitask. He reported problems with cooking directions. He noted that sometimes he mows with a riding mower for up to an hour, if it's not too hot. He noted that he does not do house or yard work because of fatigue, weakness, and leg spasms. He noted that extreme heat and cold will cause all his multiple sclerosis symptoms to worsen. Petitioner noted that he is easily confused when working with numbers. He stated that because of his balance problems he cannot ride a

bicycle, and cannot ride a motorcycle because of his weak legs. He stated that because of his weak legs he cannot get in and out of the boat. Petitioner reported having trouble walking any distance. He stated that he can't lift, squat, kneel, or climb stairs because of his leg weakness. He identified his MS symptoms as vision problems, completing tasks, concentration, and understanding instructions. He also stated that his motor skills had been affected when he uses his hands. Petitioner noted that he uses a walker when he gets out of bed in the morning to get to the bathroom to get his legs loose and working. He also noted that he uses a cane several days a week when he goes outside, and at all times when his MS comes out of remission. He indicated the same with respect to his ankle foot orthotic brace. Petitioner's claim for SSDI was granted on 12/20/07. The onset of disability was identified as 8/30/07.

Respondent offered into evidence the medical records of petitioner from Springfield Clinic from 1999 through 1/13/15. On 6/8/99 Dr. Gelber definitively diagnosed petitioner with multiple sclerosis. Most of petitioner's treatment at the Springfield Clinic during this period was with Dr. Gelber for his multiple sclerosis. On 6/19/00 Dr. Gelber gave petitioner work restrictions related to his multiple sclerosis. On 2/15/02 petitioner described his symptoms of multiple sclerosis as leg spasms, physical weakness, and severe fatigue. Petitioner also complained of urinary urgency and frequency. As early as 10/4/01 petitioner was struggling with the issue of going on disability based on his conditions that included multiple sclerosis, urinary incontinence, and their various symptoms. On 4/18/02 petitioner told Dr. Gelber that he was not doing as well as he was a year ago, and appeared to be weaker and walking with more difficulty. Dr. Gelber believed that petitioner was going through an acute exacerbation. Petitioner's condition appeared to deteriorate when he was off his corticosteroids. Petitioner did well until about mid-2004 when he reported to Dr. Gelber that he had deteriorated. He said he was more unsteady on his feet, with increased fatigue and difficulty walking. Thereafter petitioner's condition improved after being given IV Solu-Medrol. On 10/6/05 petitioner's cardiovascular and respiratory examination was normal. In 2006 petitioner underwent a right hip replacement. On 10/4/07 petitioner felt that he was fatigued and his weakness got to the point where he could no longer work a full day, and felt that he was putting himself at a safety risk. In November 2007 petitioner informed Dr. Gelber that he would be applying for disability. On 12/19/07 petitioner's cardiovascular and lung examinations were normal. After petitioner was granted SSDI benefits and stopped working, his MS condition improved and stabilized. However, petitioner continued with bouts of depression and anxiety. On 5/7/09, 4/15/10, 2/23/12, 8/30/12, 2/28/13, 3/12/13, and 8/29/13 petitioner's cardiovascular and pulmonary exams were normal. On 11/3/11, 5/27/14, and 8/28/14 petitioner's cardiovascular examinations were normal. In March 2012 petitioner had his right hip replaced. On 7/1/13 petitioner underwent an epidural steroid injection into his lumbar spine. On 6/4/13 a repeat injection was recommended.

C. DID AN OCCUPATIONAL DISEASE OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?
O. SECTIONS 1(D)-1(F) OF THE OCCUPATIONAL DISEASE ACT.

Petitioner claims he sustained an occupational disease that arose out of and in the course of his employment be respondent on 8/30/07. Respondent denies petitioner has an occupational disease that arose out of and in the course of his employment by respondent on 8/30/07. It is unrebutted that petitioner worked in the coal mines for 30-34 years and was exposed to coal dust, rock dust, fumes and vapors for a period in excess of 32 years. It is also unrebutted that from the age of 21, to about 5-7 years ago, petitioner smoked about 1 to 1-1/2 packs of cigarettes a day. Petitioner has unrelated conditions that include multiple sclerosis, degenerative arthritis in his hips bilaterally, and low back problems.

The arbitrator finds the reason petitioner last worked for respondent on 8/30/07 was because the mine closed on that day. Petitioner testified that he would have returned to work on 8/31/07 but for the fact that the mine had closed. Petitioner testified that after the mine closed and he was laid off he completed the union panel form stating that he was available for work as a gob hauler.

All petitioner and respondent medical experts opined that when coal miners work in the mines for 10, 20, 30 or even more years, when they leave the mine they are all going to have some coal mine dust deposits in their lungs, but they all will not have tissue reaction to that coal dust and develop coal worker's pneumoconiosis. They also all agreed that if there is enough tissue reaction to the coal dust there will be coal worker's pneumoconiosis that can be seen radiographically, and that a person can have coal worker's pneumoconiosis by x-ray and still have a normal physical exam of the chest, normal pulmonary function testing, and normal arterial blood gas testing.

In the case at bar petitioner underwent many chest x-rays that included those taken by his examining doctors, those taken by respondent's examining doctors, and those taken by NIOSH B-Readers while he was working in the mine. Although any doctor can read an x-ray, there are certain doctors that are certified as B-Readers, who have undergone extensive training and testing in order to accurately and consistently read chest x-rays for coal worker's pneumoconiosis. Based on the stringent training and testing needed to become a B-Reader the arbitrator finds those doctors with B-Reader credentials to be the most qualified to read x-rays for the presence of coal worker's pneumoconiosis.

The arbitrator finds it significant that the first NIOSH B-Reader, Dr. Wiot, Dr. Meyer and Dr. Selby, all B-Readers, found no radiographic evidence of coal worker's pneumoconiosis in petitioner. Whereas, all those who read the chest x-rays and found petitioner had coal worker's pneumoconiosis, their findings all differed. Dr.

Smith, a B-Reader, found it in the mid to lower zones, the second NIOSH B-Reader found it in the upper middle and lower zones on an quality 2 film that was underexposed, and Dr. Paul, not a B-Reader, found it throughout both lung fields. Given the inconsistencies by those that found radiographic evidence of coal worker's pneumoconiosis, the arbitrator gives greater weight to the 3 B-Readers who found no radiographic evidence of coal worker's pneumoconisis.

The arbitrator also finds the opinions of Dr. Wiot to be the most persuasive given the fact that he has been a B Reader since 1959 and would teach those enrolled in the B Reader program how to read x-rays properly and consistently. Dr. Wiot was of the opinion that determining a negative film from one that is at the very first category of revealing a disease is the most difficult to determine, when reading chest x-rays. He also testified that normal vascular markings can sometimes be mistaken for the presence of a nodule on an x-ray film, and that can lead to a reading of a film as positive for coal worker's pneumoconiosis if the reader does not have the experience in reading chest x-rays. Dr. Wiot opined that coal worker's pneumoconiosis invariably begins in the upper lung fields, more often on the right side.

The arbitrator also finds the opinions of Dr. Meyer to be quite persuasive given the fact that Dr. Meyer is a B-Reader and board certified radiologist who reads 200-250 chest x-rays a week. He also opined that coal worker's pneumoconiosis is a predominant upper zone process, and that the most difficult part of the entire B Reader form is making the distinction between 0/1 and 1/0 opacities, and that it is very rare to find coal worker's pnuemoconiosis opacities in the mid and lower lung zones, and not in the upper lung zones.

The arbitrator gave the least amount of weight to the opinions of Dr. Paul as it relates to the reading of the petitioner's chest x-rays for the presence of coal worker's pneumoconiosis given the fact that Dr. Paul is not a B-Reader. Dr. Paul was of the opinion that coal worker's pneumoconiosis affects the lower lung zones equally with other zones. However, on cross examination, he admitted that in the past he had testified that if affects the lower lung zones more commonly. His reason for this change in opinion was a new study that he had read.

In addition to all petitioner's chest x-rays and pulmonary examinations, the arbitrator finds it significant that in the records of petitioner's primary care physicans at Koke Mill Medical Center, from 11/13/10 through 1/10/15, there was only one instance, on 5/21/13, that petitioner noted shortness of breath during exertion, but no shortness of breath or wheezing. Petitioner's diagnosis that day was no increased work of breathing or signs of respiratory distress, and his lungs were clear to ascultation. During all other examinations, where petitioner's lungs and cardiovascular systems were checked, those findings were normal. In fact, on his intake form dated 1/15/14 petitioner himself indicated that he had no cardiovascular or respiratory symptoms.

The respondent also entered into evidence the medical records from Springfield Clinic from 1999 through 1/13/15. Each time his lung and cardiovascular systems were checked the findings were normal. The arbitrator finds this evidence significant given the fact that petitioner testified that he first noticed breathing problems in the late 1980's that included shortness of breath and wheezing, and got worse until the day he left the mine on 8/30/07. He then went on to testify that after leaving the mine his shortness of breath and wheezing got even worse. Having reviewed the all credible medical records offered into evidence the arbitrator finds petitioner's claims of breathing problems since the late 1980's that significantly worsened until today, to be totally unsupported by the credible treating medical records which show only one complaint of any shortness of breath or wheezing during this period.

The arbitrator also finds it significant that petitioner has had multiple sclerosis since 1999 and that in late 2007 stated that it had become so bad that he was unable to work, and thus applied for Social Security Disability. Petitioner noted in his application that he had to change his jobs in the mines to less physical and demanding jobs because of his multiple sclerosis. He made no mention that these job changes were due to any breathing problems. He also noted that he suffers from all the symptoms of multiple sclerosis that include extreme weakness of both legs and left arm, fatigue, balance problems, and motor skill issues. He noted that he has problems with memory and is easily confused, and suffers from depression. Petitioner also noted that he underwent a right hip arthroplasty in 2006 and is going to have a left arthroplasty. He mentioned possible black lung in his application, but did not elaborate on that illness at all. Petitioner detailed all the things he could not do as a result of his multiple sclerosis, hip replacement, pending hip replacement and depression, but nothing specific as it related to his possible black lung. Petitioner was granted Social Security Disability.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment by respondent. Although petitioner worked in the mines long enough to have some coal mine dust deposits in his lungs, the arbitrator finds the petitioner does not have any tissue reaction to the coal dust, or coal worker's pneumoconiosis. The arbitrator bases this finding on the opinions of Dr. Wiot, Dr. Meyer, and Dr. Selby, finding them more persuasive than those of Dr. Smith and Dr. Paul. The arbitrator first notes that Dr. Paul is not a B-Reader, and finds those who have been certified as B-Readers better qualified to read x-rays for coal worker's pneumoconiosis than those who do not have these credentials, given the fact that B-Readers must go through extensive training and testing, especially as it relates to determining a negative film from one that is at the very first category of this disease, which is what petitioner is alleging.

With respect to the opinions of Dr. Meyer, Dr. Wiot, Dr. Selby and Dr. Smith, who are all B-Readers, the arbitrator finds the opinions of Dr. Wiot the most persuasive given the fact that Dr. Wiot is not only a B-Reader and certified radiologist, but has been a radiolgist since 1959, a B-Reader since the first test was given, was a part of a group that developed the first questions for the written portion of the board examination for the B-Reader, and would teach those enrolled in the B-Reader program on how to read x-rays properly and consistently. Dr. Wiot still reviews also 60-70 x-rays a day.

Having found petitioner has failed to prove by a preponderance of the credible record that he has radiographic evidence of coal worker's pneumoconiosis; that the petitioner's testimony is less than credible given the fact that he testified that since 1980's his breathing problems have continued to worsen, and all his treating records for a period of over 15 years only include one complaint of any shortness of breath; that on his own intake form on 1/15/14 petitioner noted that he had no cardiovascular or respiratory problems; that petitioner has multiple sclerosis with symptoms that include weakness in both leg, fatigue, and inability to perform most physical activities; that petitioner has a severe degree of primary and secondary smoke exposure due to smoking 1 to 1-1/2 packs of cigarettes for over 20 years, that could account for any shortness of breath; and that pulmonary testing showed no significant pulmonary disease; the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupation disease that arose out of and in the course of his employment by respondent on 8/30/07.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment be respondent on 8/30/07, the arbitrator finds these remaining issues moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kathleen Brennan-Nash,
Petitioner,

vs.

NO: 11WC 21004

City of Chicago,
Respondent,

15IWCC0788

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 10, 2014, 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: OCT 27 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

o102015
CJD/jrc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRENNAN NASH, KATHLEEN
Employee/Petitioner

Case# **11WC021004**

11WC021005
14WC023656

CITY OF CHICAGO
Employer/Respondent

15IWCC0788

On 12/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2208 CAPRON & AVGERINOS PC
MICHAEL ROM
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

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

15IWCC0788

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

Kathleen Brennan Nash
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 11 WC 021004

Consolidated cases: 11 WC 021005;14 WC 023656

An *Application for Adjustment 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 **10/29/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0788

FINDINGS

On **9/16/10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**70,991.90**; the average weekly wage was $**1,365.22**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

- Respondent shall pay the Petitioner the sum of $669.64/week for a further period of 40 weeks as provided in Section 8(d)2 of the Act because the injuries sustained caused 8% loss of use of a man.
- Respondent shall pay reasonable and necessary medical services as provided in Section 8(a) and 8.2 of the Act as stipulated to by the parties.
- Respondent shall be given a credit for any and all payments made pursuant to 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.

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

Kathleen Brennan-Nash,
Petitioner,

vs. NO: 11WC 21005

City of Chicago,
Respondent,

15IWCC0789

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 10, 2014, 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: OCT 27 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

o102015
CJD/jrc
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRENNAN NASH, KATHLEEN
Employee/Petitioner

Case# **11WC021005**

11WC021004
14WC023656

CITY OF CHICAGO
Employer/Respondent

15IWCC0789

On 12/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2208 CAPRON & AVGERINOS PC
MICHAEL ROM
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

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

15IWCC0789

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

Kathleen Brennan-Nash
Employee/Petitioner

Case # 11 WC 21005

v.

Consolidated cases: 11 WC 21004; 14 WC 23656

City of Chicago
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **October 29, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0789

FINDINGS

On **12/16/10**, Respondent **was** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the 12/16/10 injury, Petitioner earned **$70,991.91**; the average weekly wage was **$1,365.23.**

On the date of the 12/16/10 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 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 $7,487.18 under Section 8(j) of the Act.

ORDER

SEE CASE NUMBER 11 WC 21004

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

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

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

Sandra Pagliai,
Petitioner,
vs.

NO: 10WC 14813

The American Coal Company,
Respondent,

15IWCC0790

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 exposure, statute of limitation, causal connection, permanent partial disability, evidentiary error in Section 1(d) and Section 1(f) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 21, 2015, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: OCT 27 2015
o102115
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PAGLIAI, SANDRA
Employee/Petitioner

Case# **10WC014813**

THE AMERICAN COAL COMPANY
Employer/Respondent

15IWCC0790

On 1/21/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

1662 CRAIG & CRAIG
KENNETH F WERTS
PO BOX 1545
MT VERNON, IL 62864

15IWCC0790

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

SANDRA PAGLIAI
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # 10 WC 014813

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 **Herrin**, on **November 13, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 **November 14, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$52,604.74**; the average weekly wage was **$1,359.30**.

On the date of accident, Petitioner was **58** 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.

Carl Lee
Signature of Arbitrator

1/13/15
Date

JAN 21 2015

STATE OF ILLINOIS)
) SS:
COUNTY OF WILLIAMSON)

15IWCC0790

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Sandra Pagliai,
Employee/Petitioner

v. Case #10 WC 014813

The American Coal Company,
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner was 63 years old at the time of arbitration. She graduated from Herrin High School. She worked for 30 years in coal mining with all of those years being underground. During her coal mining career in addition to coal dust Petitioner was exposed to silica dust, roof bolting glue fumes, smoke from coal fires and diesel fumes.

Petitioner's last day of exposure in the coal mine was November 13, 2009, at Respondent's Galatia mine. She was 58 years old on that date and her job classification was miner operator. Petitioner was exposed to and breathed coal mine dust on that last date of employment. Petitioner testified that she quit the mine that day because she just could not take it anymore. She testified that when she went home that night the coal dust in her chest was killing her, and she decided it was enough. She testified that she left for health reasons. She testified that she intended to work longer. Petitioner testified that she has looked for work since leaving the coal mine, but it was difficult to find a job and she has not had any regular employment since leaving the mine. She testified that she never actually applied for work with any employer after she left the coal mine.

Petitioner's first job out of high school was as a respiratory therapist in Fort Worth, Texas. She then moved to Herrin and worked at Herrin Hospital for about four years as a respiratory therapist before going into the mines. Petitioner testified that the nursing training she received back in the early 70s would not cross over into the field today because now those type of positions must be certified. She never received a certification because it was not required at that time. She started working in the coal mine in 1978. She worked for Freeman as a belt shoveler, shuttle car operator, roof bolter and continuous miner operator. In these jobs at Freeman she was continually exposed to dust. She left the job at Freeman in 1987 when the mine shut down. She was off work for a year and then took a job with Kerr McGee in December 1988. At Kerr McGee she was a ram car driver, roof bolter and continuous miner operator. At some point, Kerr McGee became American Coal, which is the Respondent in this matter.

Petitioner was a continuous miner operator for the last 15 years that she worked for Respondent. The continuous miner cuts the coal off of the wall of the mine and moves it by conveyor inside the machine onto the car behind it.

Petitioner testified that she first noticed breathing problems about 2004. At that time she was running the continuous miner. She noticed that her chest would be heavy. When she went home at night it felt like an elephant sitting on her chest, and she would spit up coal dust. Those problems continued up until she left the mine. Petitioner testified that now she can walk on level ground at a normal pace about six blocks without shortness of breath. She can climb about 20 stairs before she has to rest. Petitioner testified that from the time she noticed breathing problems to the time she left the mine, they got worse. She testified that the breathing problems have gotten a little worse since she left the mine.

Petitioner does not take any breathing medications. She testified that if she does any yard work, she has to work a little and then stop and rest. She testified that she has seen her treating doctor, Dr. James Alexander for breathing problems. She testified that they have had discussions about her ability to work in the dust. She testified that she was always honest and forthright in sharing with him the medical problems she had.

Petitioner has never smoked cigarettes. Petitioner testified that in 2012 she had some issues with trouble breathing. A CAT scan was performed and spots were seen on her lung. She testified that they did a biopsy of her lymph nodes and found that they were filled with coal dust. Petitioner was not taking any medicine for any type of condition as of the time of arbitration.

Petitioner testified that if she were offered a job in a coal mine today she would not take it due to the problems she had and is still having with breathing in the coal dust. She testified that she was in fact offered a position back at the mine, and she turned it down. Petitioner testified her retirement from the mine was not the result of a disability.

She testified that from time to time through the years she underwent screening by NIOSH for black lung. The last screening was on May 4, 2007. Petitioner occupies her time by taking care of her parents and doing volunteer work at the food pantry in Johnston City one day per week. In the summertime she likes to do yard work.

Petitioner was seen by Dr. Glennon Paul on December 10, 2010. (Petitioner's Exhibit No. 1, Deposition Exhibit No. 2). Dr. Paul is board certified in internal medicine and asthma, allergy and immunology (Petitioner's Exhibit No. 1, Deposition No. 1). Dr. Paul is not a B-reader. (Petitioner's Exhibit No. 1, p. 40). He testified that he reads 100 chest x-rays per week. He interprets about the same number of pulmonary function tests per week. (Petitioner's Exhibit No. 1, pp. 7-8). Dr. Paul saw Petitioner one time at the request of her counsel. He did not render any treatment to her. (Petitioner's Exhibit No. 1, p. 32). Dr. Paul testified that over the last five years he has seen an average of 50 patients per year for Petitioner's counsel. (Petitioner's Exhibit No. 2, pp. 9-10).

Petitioner complained of mild shortness of breath and cough generally in the morning. (Petitioner's Exhibit No. 1, p. 32). Dr. Paul did not know if Petitioner had any sputum.

(Petitioner's Exhibit No. 1, p. 33). Dr. Paul did not ask her if she was taking any breathing medication. (Petitioner's Exhibit No. 1, p. 33). Dr. Paul testified that Petitioner's cough was significant enough in his opinion to diagnose chronic bronchitis. (Petitioner's Exhibit No. 1, p. 9). Dr. Paul testified that the seven percent fall in the FEV1 with methacholine was consistent with chronic bronchitis. (Petitioner's Exhibit No. 1, pp. 9-10).

Dr. Paul testified that Petitioner has coal workers' pneumoconiosis, chronic bronchitis, obstructive lung disease and a restrictive defect which were all caused by coal dust exposure. (Petitioner's Exhibit No. 1, pp. 10-11). Dr. Paul testified that based on the diagnoses of coal workers' pneumoconiosis, chronic bronchitis, obstructive lung disease and restrictive disease, Petitioner could not have any further exposure to the environment of a coal mine without endangering her health. (Petitioner's Exhibit No. 1, pp. 11-12). Dr. Paul testified that Petitioner has clinically significant pulmonary impairment and radiographically apparent pulmonary impairment caused by coal dust. (Petitioner's Exhibit No. 1, p. 12). Dr. Paul testified that Petitioner would be medically precluded from working as a coal miner. He testified that she would be capable of light duty. (Petitioner's Exhibit No. 1, pp. 13-14).

Dr. Paul testified that if one has 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 spirometry or not. (Petitioner's Exhibit No. 1, pp. 15-16). Dr. Paul testified that the scarring of pneumoconiosis can be both obstructive and restrictive. He testified that a person can have coal workers' pneumoconiosis that is radiographically significant but not have shortness of breath. (Petitioner's Exhibit No. 1, p. 19).

Dr. Paul did not ask Petitioner whether she retired from coal mining on the advice of a physician or whether she retired because she could no longer perform her job duties. (Petitioner's Exhibit No. 1, p. 39). Dr. Paul testified that simple coal workers' pneumoconiosis usually does not progress once a person leaves the mine. (Petitioner's Exhibit No. 1, pp. 39-40).

Dr. Paul did not know the date of the chest x-ray that he reviewed. He testified that B-readers do not read profusion. He did not know what B-readers consider opacities. (Petitioner's Exhibit No. 1, p. 40).

Dr. Paul testified that in light of his testing and that of Dr. Selby, Petitioner had an obstructive ventilatory defect. (Petitioner's Exhibit No. 2, p. 6). Dr. Paul testified that on pulmonary function testing the ratio of FEV1 to forced vital capacity is not the only thing that determines why someone has an obstructive defect. He testified that Petitioner had a decreased FEF 25/75 that went down to 46% of normal. He testified that the FEF 25/75 is the first thing you see fall in someone who has an obstructive ventilatory defect. (Petitioner's Exhibit No. 2, p. 7).

Dr. Henry K. Smith, board certified radiologist and NIOSH B-reader, interpreted Petitioner's chest x-ray of October 22, 2008, as positive for pneumoconiosis, category 1/0 with P/P opacities in all lung zones. Dr. Smith made an identical interpretation of chest x-rays dated March 2, 2010, and April 7, 2011. (Petitioner's Exhibit No. 5). Dr. Robert Cohen, B-reader and board certified pulmonologist interpreted chest x-ray of April 7, 2011, as positive for

pneumoconiosis, category 1/0 with P/P opacities in all lung zones. (Petitioner's Exhibit No. 1, p. 6). Dr. Michael Alexander, board certified radiologist and B-reader, interpreted chest x-ray of March 2, 2010, as positive for pneumoconiosis, category 1/0 with P/P opacities in the mid and upper lung zones bilaterally. (Petitioner's Exhibit No. 7). Records from NIOSH were admitted into evidence. A chest x-ray taken on December 5, 2006, was interpreted as negative for pneumoconiosis by an A-reader and a B-reader. A chest x-ray taken on May 4, 2007, was interpreted by two B-readers as being negative for pneumoconiosis. (Respondent's Exhibit No. 8).

Dr. Cristopher Meyer reviewed chest x-rays of Petitioner dated October 22, 2008, and February 2, 2010. He testified that the films were of diagnostic quality although the 2008 examination was quality 2 because of underexposure. (Respondent's Exhibit No. 1, p. 40). He testified that the underexposure on that film accentuated the parenchymal markings and could lead to overreading. (Respondent's Exhibit No. 1, p. 41). He testified that on the 2008 film the lungs were clear. He found no radiographic evidence of coal workers' pneumoconiosis. Likewise, Dr. Meyer found the lungs to be clear on the 2010 film and found no evidence of coal workers' pneumoconiosis. (Respondent's Exhibit No. 1, p. 41).

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. (Respondent's Exhibit No. 1, p. 19). 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 on the original committee that designed the training program which is called the B-reader 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-reader program. (Respondent's Exhibit No. 1, p. 32). Dr. Meyer testified that the radiologists have about 10% higher pass rate on the B-reading exam than other specialties. 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-reading training and examination is making the distinction between a 0/1 and 1/0 film. (Respondent's Exhibit No. 1, pp. 34-35).

Dr. Meyer testified that the B-reader looks at the lung to decide whether there are any small nodular opacities or any linear opacities and based on the size and appearance of those 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, pp. 28-29). 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 dominant process. (Respondent's Exhibit No. 1, pp. 22-23). The last component of the lung involvement for the small opacities 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 defines the density of the small opacities in the lung. (Respondent's Exhibit No. 1, p. 30).

Dr. Jeff Selby examined Petitioner on April 7, 2011, at the request of Respondent's counsel. (Respondent's Exhibit No. 2, p. 7). Dr. Selby has been board certified in internal medicine and pulmonary disease since 1980 and 1984, respectively. (Respondent's Exhibit No.

2, p. 3). Dr. Selby has been a B-reader since 1985. (Respondent's Exhibit No. 2, p. 3). Dr. Selby does general pulmonary work, both inpatient and outpatient. He has a small percentage of his practice that is in occupational lung disease. He sees and treats patients who have lung disease on a daily basis. (Respondent's Exhibit No. 2, p. 4). Dr. Selby has occasion to see individuals who have the disease process coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 5).

Petitioner's chief complaint when she saw Dr. Selby was being a little short of breath with exercise. She reported that her shortness of breath was minimal and did not interfere with anything. She coughed occasionally and had wheeze sometimes at night. (Respondent's Exhibit No. 2, p. 9). Petitioner gave a history of some bronchitis, three times in the last 10 to 15 years, but none in the last four or five years. The only medication she took was Mobic once in a while for arthritis. (Respondent's Exhibit No. 2, p. 10). Dr. Selby testified that chronic bronchitis is coughing and spitting phlegm three months consecutively for two or more consecutive years. Based upon the history related by Petitioner, she did not have chronic bronchitis (Respondent's Exhibit No. 2, p. 30).

Petitioner's chest exam was normal with good airflow and clear breath sounds. Dr. Selby reviewed chest x-ray taken as part of his examination on April 7, 2011. He testified that there were no parenchymal or pleural abnormalities consistent with pneumoconiosis. He testified that there was no evidence of pneumoconiosis. (Respondent's Exhibit No. 2, p. 12). Dr. Selby also reviewed a chest x-ray from an outside facility dated February 2, 2010. He testified that it was negative for parenchymal or pleural changes and was a normal film. (Respondent's Exhibit No. 2, p. 14). Dr. Selby testified that it would be very unlikely for a susceptible host for coal workers' pneumoconiosis to spend 20 years in the coal mine and then first develop radiographic evidence in the last couple years of her employment. (Respondent's Exhibit No. 2, p. 30).

Pulmonary function testing was performed as part of Dr. Selby's examination. The overall interpretation was normal spirometry without significant improvement post bronchodilator, normal lung volumes and normal diffusion capacity. (Respondent's Exhibit No. 2, pp. 12-13). Dr. Selby testified that one looks to the ratio of the FEV1 to FVC to determine whether an obstruction is present. In Petitioner's case, her ratio was 84%. Under the predicted values, her predicted was 82% and the lower limit of normal would be something less than 82%. The ratio of 84% rules out presence of an obstruction in Petitioner. (Respondent's Exhibit No. 2, pp. 16-17). Dr. Selby testified that on the results from the testing by Dr. Paul all of the flow volume loops appear to be wavy, which would be inconsistent with a valid test. The standard for validity for spirometry requires consistent maximal effort, which would indicate no wavy volume time curves or flow volume loops, and the next best forced vital capacity and FEV1 must be within 5%. (Respondent's Exhibit No. 2, pp. 17-18). Setting aside the question of validity, the testing performed by Dr. Paul did not indicate a restriction. (Respondent's Exhibit No. 2, p. 18). Dr. Selby testified that if lung volumes are available, they will trump spirometric values. Lung volumes taken by Dr. Paul and Dr. Selby were normal, thus ruling out a restriction. (Respondent's Exhibit No. 2, pp. 20-21).

Dr. Selby testified that Petitioner had a negative response to methacholine challenge testing and she did not have evidence of reactive airways disease. (Respondent's Exhibit No. 2,

pp. 18-19). Dr. Selby testified that the diffusion capacity measures how well the lung extracts oxygen from the air to get it into the bloodstream and how well it extracts carbon dioxide from the bloodstream to exhale it back into the air. Petitioner's diffusion capacity was normal when adjusted for alveolar volume. (Respondent's Exhibit No. 2, pp. 21-22). Dr. Selby testified that the exercise testing indicated completely normal lung function for the exercise test. The testing did not reveal any ventilatory limit to exercise or any pulmonary abnormality. He testified that the testing revealed that her exercise tolerance was excellent. (Respondent's Exhibit No. 2, pp. 27-28).

Dr. Selby reviewed the pathology report from a mediastinoscopy performed on August 20, 2012. In that report there was reference to abundant black pigment and anthracotic pigment, which is not pneumoconiosis. Dr. Selby testified that it is the accumulation of coal dust or other kinds of carbon material through Petitioner's life, which is seen in almost everybody alive in America. (Respondent's Exhibit No. 2, pp. 28-29). The pathology report did not reveal any indication of coal workers' pneumoconiosis for Petitioner. (Respondent's Exhibit No. 2, p. 29). Dr. Selby testified that the hallmark for coal workers' pneumoconiosis on pathology is the coal macule with the surrounding fibrosis. There was no mention of the coal macule on the pathology report. (Respondent's Exhibit No. 2, pp. 29-30).

Dr. Selby concluded that Petitioner did not suffer from any respiratory or pulmonary abnormality as a result of coal mine dust inhalation or coal mine employment. She does not suffer from coal workers' pneumoconiosis. Dr. Selby testified that Petitioner had the respiratory and pulmonary capacity to perform any and all previous coal mine employment duties, including her last job running a continuous miner. (Respondent's Exhibit No. 2, p. 31).

Dr. Selby testified that the scarring of coal workers' pneumoconiosis cannot perform the function of normal, healthy lung tissue. By definition, if a person has pneumoconiosis, she would necessarily have impairment in the function of her lung at the very site of the scarring, whether that impairment could be measured by spirometry or not. (Respondent's Exhibit No. 2, p. 104). He testified that pulmonary function tests identify the kind of abnormality one has, whether it is obstructive or restrictive, and how severe it is, but not the etiology of it. (Respondent's Exhibit No. 2, p. 106). Removal from any further exposure to coal dust is the only treatment for coal workers' pneumoconiosis. There is no cure for it. (Respondent's Exhibit No. 2, p. 108). He testified 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 arterial blood gas tests. Dr. Selby testified that if a miner leaves the mine with category 1 pneumoconiosis and does not have any more exposure, in the vast majority of cases, the pneumoconiosis will not progress. (Respondent's Exhibit No. 2, pp. 109-110).

Dr. Selby disagreed with the literature cited in the Federal Register of December 2000 concerning the incidence of obstructive lung disease for coal mine dust inhalation. He testified that global literature is being applied to a specific region of the country, and it was never intended for that. He testified that these are international studies where there is hard coal, and there is not any hard coal in the tri-state area where he practices. Dr. Selby's experience is in the tri-state region and in that region he sees nothing near the degree of obstruction purely from coal

mine exposure that is purported to occur in the literature cited in the Federal Register. (Respondent's Exhibit No. 2, pp. 113-114). Dr. Selby testified that in his experience of treating hundreds or thousands of coal miners over the last 25 years or so, it rarely occurs that someone has chronic obstructive pulmonary disease purely from coal mining. (Respondent's Exhibit No. 2, p. 115).

Dr. Selby testified that all the medical records he reviewed on Petitioner provided him review of systems respiratory, physical exam findings, complaints, and diagnoses. Dr. Selby considers having complete medical records on a patient very valuable in evaluating that individual for the presence of a lung disease. (Respondent's Exhibit No. 2, pp. 123-124). Dr. Selby testified that in going through those various office visits from various physicians over 16 years, the diagnosis of coal workers' pneumoconiosis, chronic obstructive pulmonary disease, chronic bronchitis, or obstructive lung disease did not appear anywhere in those records. (Respondent's Exhibit No. 2, pp. 124-125).

Dr. James Alexander has been in family practice in Harrisburg, Illinois since July 1991. (Petitioner's Exhibit No. 3, pp. 4-5). Dr. Alexander treats coal miners and former coal miners. He has provided pre-employment physicals, injury evaluations, acute care and some family care to workers at several coal mines in the area. (Petitioner's Exhibit No. 3, p. 5). Dr. Alexander has been Petitioner's personal physician for the last 10 years or so. (Petitioner's Exhibit No. 3, p. 6).

Dr. Alexander testified that based on all his treatment and all the data he had available, Petitioner suffered from obstructive lung disease. He testified that obstructive lung disease would include chronic obstructive pulmonary disease and chronic bronchitis. It would also include emphysema. He testified that it would not include coal workers' pneumoconiosis. (Petitioner's Exhibit No. 3, pp. 9-10). Dr. Alexander testified that Petitioner's obstructive lung disease, chronic bronchitis, COPD and emphysema were caused, at least in part, or aggravated in part by her years as a coal miner. He testified that in light of COPD, if she were to return to the environment of a coal mine, her disease would progress. He testified that same would be true for the emphysema and chronic bronchitis. (Petitioner's Exhibit No. 3, pp. 10-11).

Petitioner was seen for an upper respiratory infection on January 8, 2004. (Petitioner's Exhibit No. 3, pp. 14-15). On September 10, 2004, she complained of sinus drainage. Her lungs were clear on that date and she was diagnosed with allergic rhinitis. (Petitioner's Exhibit No. 3, pp. 15-16). She was diagnosed with sinusitis on October 26, 2004. (Petitioner's Exhibit No. 3, p. 18). On March 21, 2005, physical examination of the chest revealed that she had some congestion. She was diagnosed with influenza and with bronchitis. (Petitioner's Exhibit No. 3, p. 19). She was again diagnosed with bronchitis on March 28, 2005. (Petitioner's Exhibit No. 3, pp. 19-20). On May 6, 2005, Petitioner complained of cough and congestion. She had some wheezes. Dr. Alexander diagnosed her with reactive airways disease with bronchitis. (Petitioner's Exhibit No. 3, pp. 20-21). Petitioner was seen on November 6, 2006, for congestion and cough. She had bronchitis at that time and was wheezing. (Petitioner's Exhibit No. 3, p. 25). On April 21, 2008, Petitioner complained of cough and congestion and had some wheezes. The assessment was seasonal allergies with bronchitis. (Petitioner's Exhibit No. 3, pp. 31-32).

Dr. Alexander testified that all of his office visits up to April 2008, were reviewed and in the notes for same there was never a diagnosis of chronic obstructive pulmonary disease, chronic bronchitis or emphysema. At that point in time, his opinion as to whether she suffered any permanent functional impairment from her exposure at the mine from a pulmonary standpoint was that she had not. Dr. Alexander had no reports from pulmonary function testing performed on Petitioner. (Petitioner's Exhibit No. 3, pp. 36-37). Dr. Alexander did not know whether the testing by Dr. Paul or Dr. Selby was valid. (Petitioner's Exhibit No. 3, p. 39). Dr. Alexander testified that Petitioner's forced vital capacity must be 80% or better for it to be normal. Her forced expiratory volume in one second would have to be 80% to be considered normal. (Petitioner's Exhibit No. 3, p. 44). Dr. Alexander testified that on Dr. Selby's testing the forced vital capacity was 81% of predicted and the FEV1 was 85% of predicted. Dr. Alexander testified that if normal is 80% and better, then these were normal, but he did not think this was normal testing for her. (Petitioner's Exhibit No. 3, pp. 45-46).

When Petitioner was seen on October 8, 2010, she had no shortness of breath or dyspnea. (Petitioner's Exhibit No. 3, pp. 49-50). On February 10, 2011, Petitioner had no shortness of breath, no cough, no sputum and no wheezing. Lungs were clear to auscultation without wheeze, rhonchi, rales or crackles. The assessment was sinusitis. (Petitioner's Exhibit No. 3, pp. 52-53). Dr. Alexander testified that having gone through the office notes through December 8, 2011, Petitioner had not been diagnosed with either chronic bronchitis or chronic obstructive pulmonary disease or emphysema. Petitioner had a chest x-ray done on December 8, 2011, that was interpreted by Dr. Youssef as showing no active cardiopulmonary disease and no active infiltrate (Petitioner's Exhibit No. 3, p. 57). When seen on June 11, 2012, July 17, 2012, and August 13, 2012, Petitioner reported she had no shortness of breath. (Petitioner's Exhibit No. 3, pp. 59, 61-62). During Dr. Alexander's course of treatment there was never a diagnosis made of chronic obstructive pulmonary disease, chronic bronchitis or emphysema. (Petitioner's Exhibit No. 3, pp. 63-64).

Dr. Alexander testified that sinusitis can be aggravated by the exposures in the coal mine. He testified that the exposures in the coal mine could have aggravated her rhinitis. (Petitioner's Exhibit No. 3, pp. 65-66). Dr. Alexander testified that those aggravations she had when she went to work were temporary aggravations. (Petitioner's Exhibit No. 3, p. 74). He testified that within a reasonable degree of medical certainty it was his opinion that she did not suffer a permanent functional impairment from those aggravations prior to 2009. (Petitioner's Exhibit No. 3, p. 78).

Medical records from Harrisburg Medical Center were admitted into evidence. Petitioner had a plain chest x-ray taken on February 1, 2002. The reason for taking the film was "pre-employment." The film was interpreted by Dr. Youssef as revealing no abnormality, and he assigned a 0/0 profusion rating. (Respondent's Exhibit No. 4, p. 46). Petitioner underwent another chest x-ray on December 5, 2006. Dr. Youssef assigned a profusion of 0/0. (Respondent's Exhibit No. 4, p. 29).

Medical records of Dr. Richard Schaede were admitted into evidence. Petitioner was seen on March 16, 1992. The assessment on that date was sinusitis and bronchitis. She was prescribed Amoxcillin for same. (Respondent's Exhibit No. 5, p. 11). Petitioner was seen on

January 11, 1995, at which time she related cough with chills of one week duration. The assessment was bronchitis. She returned to the office on January 18, 1995, complaining of pain in the left chest over the left shoulder that began that morning. Examination of the chest revealed her lungs to be clear. (Respondent's Exhibit No. 5, p. 7). Petitioner was seen in Dr. Schaede's office on March 11, 1997, when she reported having suffered a sinus infection since January 1. She related cough and nasal congestion. The assessment was sinusitis and bronchitis. (Respondent's Exhibit No. 5, p. 5). Petitioner was referred to Dr. James McGhee on May 11, 1999, for evaluation of nasal congestion. She reported that the problem had been constant beginning two weeks prior following mowing her yard. She related that she had a non-productive cough and occasional sore throat. In review of systems cardiovascular, shortness of breath with exertion was noted. The lungs were noted to be clear to auscultation. The doctor's impression was chronic polypoid rhinosinusitis and possible allergic rhinitis. She was treated with medication that included Prednisone, Ceftin and Flonase nasal spray. (Respondent's Exhibit No. 5, pp. 47-48). She returned to Dr. McGhee on June 8, 1999 and reported she had improved a great deal since the prior visit although she still noted difficulty breathing through the right side of her nose. (Respondent's Exhibit No. 5, p. 42). Petitioner returned to Dr. McGhee on June 29, 1999. It was noted in his report that she had undergone allergy testing, and it was charted that she was positive to almost all allergens tested with several being severely reactive. Dr. McGhee's impression was severe allergic rhinitis and chronic polypoid rhinosinusitis. (Respondent's Exhibit No. 5, p. 40). Petitioner was seen through the emergency room on March 28, 2002, at Marion Memorial Hospital with complaint of cough and sore throat with sinus drainage. Diagnosis at that time was recurrent bronchitis. Examination respiratory revealed that her airway was clear and that she had unlabored breathing and a non-productive cough. (Respondent's Exhibit No. 5, pp. 25-32).

Medical records of Dr. Robert Miller were admitted into evidence. Dr. Miller is a board certified thoracic surgeon. In a letter dated August 7, 2012, to Dr. Dani Tazbaz, Dr. Miller confirms that he had a consultation with Petitioner for hilar and mediastinal lymphadenopathy. Physical examination of the chest revealed the lungs to be clear. (Respondent's Exhibit No. 6, pp. 9-10). On August 20, 2012, Petitioner underwent a mediastinoscopy with biopsy. Specimens were taken from the precarinal and subcarinal lymph nodes. The pathology report generated as a result of the procedure records the presence of anthracotic pigment without malignant neoplasm. In the microscopic description, the pathology report notes abundant black pigment, consistent with anthracotic pigment but no coal macules. (Respondent's Exhibit No. 6, pp. 4-7).

Petitioner was seen by Dr. Dani Tazbaz on June 20, 2012, by way of referral from Dr. Alexander for bilateral hilar lymphadenopathy. Petitioner had no cough and had occasional wheezing. If she took her time, she could walk three to four minutes. Physical examination of the chest revealed her lungs clear to auscultation without wheeze or crackle. (Respondent's Exhibit No. 7, pp. 21-22). Petitioner underwent bronchoscopy at the hands of Dr. Tazbaz on June 22, 2012. (Respondent's Exhibit No. 7, pp. 18-20). The pathology report for the bronchoscopy was for the most part unrevealing. (Respondent's Exhibit No. 7, pp. 15-17). Petitioner was seen in follow up to the bronchoscopy on June 27, 2012. On that date Petitioner complained of a dry cough but no wheezing or shortness of breath. Physical examination of the chest revealed no auscultation or crackles. (Respondent's Exhibit No. 7, p. 11). Petitioner

returned to see Dr. Tazbaz on July 27, 2012. On that date she denied cough or wheeze. Physical examination of the chest revealed the lungs clear to auscultation. (Respondent's Exhibit No. 7, p. 8). Petitioner was seen again by Dr. Tazbaz on September 6, 2012, at which time she complained of dry cough. Physical examination of the chest revealed her lungs clear to auscultation. (Respondent's Exhibit No. 7, p. 5).

June Blaine is a vocational rehabilitation counselor. She conducts vocational assessments, schedules job placement and makes recommendations and follows individuals that are involved with training programs. She has been in vocational rehabilitation for 31 years. (Petitioner's Exhibit No. 4, pp. 4-5). Ms. Blaine met with Petitioner and asked her questions regarding her background, education and work history. Petitioner was given the Wide Range Achievement, Revision 4. The testing includes a reading recognition section, a sentence comprehension section and a math computation section. (Petitioner's Exhibit No. 4, pp. 6-7). Ms. Blaine testified that on the vocational testing Petitioner scored college level in word reading and sentence comprehension and almost grade 12 in math. (Petitioner's Exhibit No. 4, p. 8).

Petitioner's counsel asked Ms. Blaine to assume that Petitioner was precluded from working as a coal miner anymore because of a work related disease. She was also asked to construe any limitations that Petitioner might have physically most strongly in favor of the coal company and assume that except for the fact that she could not work as a coal miner anymore, she could do whatever else a person her age could do. (Petitioner's Exhibit No. 4, p. 7). Petitioner graduated from high school in 1969 and did not complete any type of formal training after high school. She did report some on the job training when working at a hospital and then also when she received her mining papers. (Petitioner's Exhibit No. 4, p. 8).

Ms. Blaine testified that after high school Petitioner worked as a nurse's aide where she completed on the job training in the respiratory therapy department. (Petitioner's Exhibit No. 4, p. 8). Ms. Blaine testified that today respiratory therapy work in a hospital requires a bachelor's degree and possibly master's hours. A respiratory therapy assistant would require an associate's degree at a minimum. She would not be allowed to perform respiratory therapy-related work based on on-the-job training. Her medical training would not have any transferability to work in the medical field now without further training and certification. Ms. Blaine testified that Petitioner's coal mine work did not provide her with transferable skills. (Petitioner's Exhibit No. 4, pp. 9-11). Ms. Blaine testified that Petitioner could work at an entry level position for minimum wage, which would be $8.25 to $9.00 per hour. (Petitioner's Exhibit No. 4, p. 12). Ms. Blaine testified that there is also an issue regarding whether employers will hire people to work full-time. She testified that given the entirety of the data that she had concerning Petitioner, it was her opinion that if Petitioner were able to find work it would be at the 32-hour per week or below level. (Petitioner's Exhibit No. 4, pp. 12-13).

Ms. Blaine testified that when she conducts a vocational assessment in cases before the Workers' Compensation Commission, she customarily asks the attorney to provide an Application for Adjustment of Claim, medical, and employment and educational history for the individual. She requests the medical so she can get an understanding of what has happened in the case and what restrictions the individual may have. She does not know another attorney other than Petitioner's counsel who she works for on a routine basis that tells her not to review

medical records. (Petitioner's Exhibit No. 4, p. 15). To Ms. Blaine's knowledge, Petitioner had not applied for any jobs or made a job search after leaving the coal mine. Ms. Blaine testified that Petitioner's chances of employment would have been greater in 2009. She testified that Petitioner did not request help in finding a job. (Petitioner's Exhibit No. 4, pp. 16-17). Ms. Blaine did not review any medical records of Petitioner. She was asked to assume that Petitioner had coal workers' pneumoconiosis and was precluded from returning to work in the coal mine. She did not know who made that diagnosis or who precluded her from working in the coal mine. (Petitioner's Exhibit No. 4, pp. 17-18).

The Arbitrator gives little weight to Ms. Blaine's opinions since she failed to review any medical records or reports to determine limitations on Petitioner's employability. If an expert's opinion lacks a factual basis, the opinion deserves little weight. Doser v. Savage Manufacturing & Sales, 142 Ill. 2d 176, 195-196 (1990). See also Hoff v. Springfield Coal, 14 IWCC 0871 and Hinojosa v. Fresh Express, 13 IWCC 0493.

Conclusion of Law

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

Issue (f): Is Petitioner's current condition of ill-being causally related to her occupational exposure?

Petitioner has failed to prove by a preponderance of the evidence that she has an occupational disease arising out of and in the course of her employment.

The Arbitrator finds the x-ray interpretations by Drs. Meyer and Selby and by NIOSH to be more credible than the interpretations by Drs. Smith, Alexander and Cohen. The readings by Petitioner's experts were not consistent. While Drs. Smith and Cohen found opacities in all lung zones, Dr. Alexander only noted opacities in the mid and upper lung zones bilaterally. The chest x-ray interpretations by NIOSH confirm that Petitioner did not have pneumoconiosis as of the chest x-ray taken on May 4, 2007. The NIOSH B-readings were the only independent interpretations. The Arbitrator finds the NIOSH B-readings to be the most credible as NIOSH is concerned with making sure the B-reading is accurate as the employee's rights to move to a less dusty job are dependent on the interpretation. Dr. Selby testified that it would be very unlikely for a susceptible host for coal workers' pneumoconiosis to work for 20 years in the coal mine and then first develop radiographic evidence of pneumoconiosis in the last couple of years of her employment. The pathology report from the mediastinoscopy performed on August 30, 2012, did not reveal any indication of coal workers' pneumoconiosis for Petitioner.

Dr. Paul testified that Petitioner had chronic bronchitis, obstructive lung disease and a restrictive defect which were all caused by coal dust exposure. Dr. Selby testified that the overall interpretation of the pulmonary function testing performed as part of his examination was normal spirometry without significant improvement post bronchodilator, normal lung volumes and normal diffusion capacity. Dr. Selby testified that on the results from the testing by Dr. Paul, all of the flow volume loops appeared to be wavy which would be inconsistent with a valid

test. Dr. Selby testified that setting aside the question of validity, the testing performed by Dr. Paul did not indicate a restriction. Normal lung volumes on testing by Dr. Paul and Dr. Selby ruled out presence of restriction in Petitioner. Dr. Selby also noted that Petitioner had a negative response to methacholine challenge testing, and she did not have evidence of reactive airways disease. Dr. Selby testified that the definition of chronic bronchitis is coughing and spitting phlegm for three months consecutive for two consecutive years. He testified that based upon the history Petitioner related to him, she did not have chronic bronchitis. Dr. Paul did not know if Petitioner had any sputum production with her cough. The Arbitrator finds the testimony of Dr. Selby to be more credible.

Although Petitioner testified that she had breathing problems while working in the mine, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that her breathing complaints are causally related to her coal mine dust exposure. Petitioner has failed to prove that her current condition of ill-being is causally related to her employment with Respondent.

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

Petitioner testified that she first noticed breathing problems about 2004 when she was running a continuous miner. She testified that when she went home at night it felt like an elephant was sitting on her chest and she would spit up coal dust. She testified that her breathing problems have gotten a little worse since leaving the mine. Dr. Alexander never related any of Petitioner's pulmonary complaints to her coal mine dust exposure. Petitioner told Dr. Selby that her shortness of breath was minimal and did not interfere with anything. Dr. Selby testified that the exercise testing performed as part of his examination indicated completely normal lung function for the exercise test. The testing did not reveal any ventilatory limit to exercise or any pulmonary abnormality. He testified that the testing revealed that Petitioner's exercise tolerance was excellent. Dr. Selby testified that Petitioner had the respiratory and pulmonary capacity to perform any and all of her previous coal mine employment duties. The Arbitrator concludes that Petitioner failed to prove a timely disablement as defined in Section 1(e) of the Occupational Diseases Act.

Petitioner's claim for compensation is denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gustavo Zambrano,

Petitioner,

vs. NO: 12WC 32105

APL Logistics,

Respondent,

15IWCC0791

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, medical, prospective medical, 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. 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 12, 2015, is hereby affirmed and adopted.

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

15IWCC0791

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: OCT 2 7 2015
o102215
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

ZAMBRANO, GUSTAVO
Employee/Petitioner

Case# **12WC032105**

APL LOGISTICS
Employer/Respondent

15IWCC0791

On 3/12/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1922 SALK, STEVEN B & ASSOC LTD
FRANK I GAUGHAN
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

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

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)

Gustavo Zambrano
Employee/Petitioner

v.

APL Logistics
Employer/Respondent

Case # **12** WC **32105**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox and Ottawa**, on **1/14/15 and 2/26/15**. 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 relating to his back causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What 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 _____

15IWCC0791

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.

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

In the year preceding the injury, Petitioner earned $**24,960.00**; the average weekly wage was $**480.00**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of any amounts paid for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**5,523.39**.

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

ORDER

Petitioner has failed to meet his burden of proof with regard to the issues of causation, TTD and prospective medical care. Accordingly, the Petitioner's claim for benefits is denied.

The Petition for Penalties and Attorney Fees is denied.

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

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

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

Signature of Arbitrator

3/11/15
Date

MAR 12 2015

FINDINGS OF FACT

Petitioner was working for Respondent as a fork lift driver. On August 17, 2012, he suffered an undisputed injury after being struck by a forklift. Petitioner was primarily struck on his right lower leg and foot. He was transported to Provena St. Joseph's medical center on the day of the incident and offered a consistent history of injury. There was a right foot laceration with concern for nerve injury. Petitioner followed up with Dr. Urbanosky with a chief complaint of right ankle, neck, and back pain. Petitioner was thought to have a possible sural nerve injury with a lumbar strain diagnosed.

Petitioner underwent a lumbar MRI on September 7, 2012 which was read as having moderate findings at L3-4 through L5-S1.

Petitioner treated with Dr. John Kane and ultimately underwent an EMG on October 5, 2012. The EMG found evidence of lesion on the right sural nerve.

Petitioner presented to Dr. Engle at Medicos Pain and Surgical Specialists on October 9, 2012 and was diagnosed with an annular tear secondary to a disc herniation at L4-5 with annular tear at L3-4. Petitioner returned to Dr. Kane on October 22, 2012 and a surgical procedure was recommended for the sural nerve injury to the foot.

Petitioner underwent foot surgery on October 31, 2012 for decompression, repair of full thickness laceration and repair of the sural nerve.

Petitioner underwent an epidural steroid injection on November 19, 2012 at Ambulatory Surgical Care for his lumbar pain and also undertook physical therapy at Marque Medicos at this time.

Petitioner underwent an independent medical examination by Dr. Michael Kornblatt on January 3, 2013 whereupon the doctor found Petitioner to have suffered soft tissue injuries to the lumbar and cervical spine which had resolved. Petitioner had preexisting lumbar degenerative disease but this was not caused or aggravated by work and Petitioner was capable of full duty according to Dr. Kornblatt.

Petitioner began treatment with Dr. Erickson at the end of December 2012 and by March 4, 2013 Dr. Erickson recommended lumbar surgery in the form of a fusion. Dr. Erickson performed L4-5 fusion surgery on March 8, 2013 and underwent post-surgical therapy thereafter. Petitioner's pain did not subside post-surgery and he underwent a series of injections under the care of Dr. Engle. Due to ongoing complaints of pain, Dr. Erickson eventually recommended a sacroiliac fusion which he believes will help alleviate Petitioner's pain. Petitioner testified he wishes to proceed with the surgery as he has daily discomfort with activity. Petitioner has been under light duty work restrictions and currently works under a restricted basis at his original location. However, it was explained that Respondent sold the location and this is under new management at this time.

Testimony of Dr. Erickson

Dr. Erickson testified at deposition on July 22, 2014 and summarized his course of treatment to date. Dr. Erickson claimed he reviewed the original EMG study of October 5, 2012 where he found S1 nerve

15IWCC0791

involvement. However, the doctor noted that surgery was ultimately performed at L4-5 for right sided complaints. In this regard, the doctor noted that the MRI results were not significant in correlating any of Petitioner's pain complaints (Dr. Erickson dep. pg. 16). Dr. Erickson went on to explain that the course of injections failed to resolve Petitioner's complaints of pain (Dr. Erickson dep. p. 18). The doctor explained that Petitioner's leg pain was reduced post-surgery, however, back pain persisted and the doctor explained that he believed there was a sacroiliac joint pain causing Petitioner's symptoms (Dr. Erickson dep. pg. 46-50). The doctor maintained a ten pound work restriction for Petitioner at this time. Dr. Erickson noted Petitioner was capable of driving with no specific prohibition in this regard. However, the doctor also explained his facility provided transportation to Petitioner for all examinations for reasons that are not entirely clear (Dr. Erickson dep. pg. 65). Dr. Erickson again reaffirmed that the MRI was negative for any proof of sacroiliac pain or spine pain and that the basis for care was based entirely on subjective complaints (Dr. Erickson dep. pg. 73). While the doctor noted numbness over Petitioner's right foot, it was clarified this is the location Petitioner was struck by the forklift and that this source of pain was addressed in the original foot surgery on October 31, 2012 (Dr. Erickson dep. pg. 77). The doctor confirmed there is no nerve impingement pursuant the MRI and no weakness or reflex deficit to otherwise justify these subjective complaints of back pain (Dr. Erickson dep. pg. 78-80). Dr. Erickson went on to explain that he was somewhat "suspicious" of the EMG findings and "not sure" of the source of Petitioner's pain, but nevertheless proceeded with lumbar fusion surgery. Dr. Erickson believes Petitioner would benefit from sacroiliac fusion surgery based on the continued subjective complaints of pain (Dr. Erickson dep pg. 81-83).

Deposition Testimony of Dr. Michael Kornblatt

Dr. Michael Kornblatt testified via evidence deposition on March 24, 2014. He is the independent medical examiner for Respondent and performed his first exam on January 3, 2013. Dr. Kornblatt explained his physical examination as well as review of records. He confirmed his review of the MRI films where he found no disc herniation and only mild degenerative changes (Dr. Kornblatt dep. pg. 12). Dr. Kornblatt diagnosed a strain and soft tissue injury (Dr. Kornblatt dep. pg. 13). Dr. Kornblatt went on to explain that there should have been no fusion at L4-5 based entirely on subjective complaints of pain. He supported his opinion with the modest findings on the CT scan and MRI scan (Dr. Kornblatt pg. 17). Dr. Kornblatt went on to explain that he predicted very little benefit from any surgery (Dr. Kornblatt dep. pg. 18).

Dr. Kornblatt's addendum report of December 8, 2014 memorialized his review of his prior exams as well as treatment records from Dr. Engle and Dr. Erickson since Dr. Kornblatt's last examination. Dr. Kornblatt concluded Petitioner does not present with indications for sacroiliac joint surgery and that such a fusion as recommended by Dr. Erickson is unreasonable and presents a poor prognosis for Petitioner who has failed back syndrome. Dr. Kornblatt also indicated that any treatment for sacroiliac joints including any injections previously administered to said joints would be unrelated to the work incident of 2012. The doctor also concluded that a spinal cord stimulator would be unnecessary in this case and unrelated to any work injury (Res. Exhibit #5).

CONCUSIONS OF LAW

1. With regard to the issue of causation relating to Petitioner's current back condition, the Arbitrator finds that the Petitioner has failed to meet his burden of proof. In support of this finding, the Arbitrator relies on the medical evidence. The Arbitrator notes Petitioner in this case suffered an undisputed accident on August 17, 2012 when a forklift struck his right lower extremity. Petitioner underwent emergency care and continued treating for lingering complaints of foot and low back pain. Petitioner underwent a series of traditional diagnostic tests in the form of MRI and EMG studies along with a discogram. The findings in these diagnostic tests did not present any evidence of a herniated disc or spinal condition in any obvious objective fashion. This is consistent with the testimony of both doctors, Dr. Kornblatt as well as Dr. Erickson, with regard to their review of the diagnostic studies.

It is telling that Dr. Erickson acknowledges in his testimony that the diagnostic tests on the MRI could easily evidence a degenerative condition and did not find any particular positive findings to warrant or support his decision for surgical intervention. Dr. Erickson's purpose for his fusion surgery performed on March 8, 2013 was based largely on subjective complaints of Petitioner. Petitioner was struck in the right lower extremity when this injury occurred and underwent an undisputed surgery to the sural nerve in the lower extremity. This appears to be the most logical source of Petitioner's extremity pain and therefore, any alleged referred pain from the spine does not appear to be the appropriate source of Petitioner's lower extremity complaints based upon a review of the complete medical chart.

With regard to the spine pain, clearly Dr. Erickson proceeded with spine surgery based on subjective complaints, with his own admission that the diagnostic tests performed lead him to be "suspicious" and also "not sure" of the diagnostic findings (Dr. Erickson deposition transcript Pg. 80-81). Also telling is the fact that Dr. Erickson's testimony reveals Petitioner's back pain was no better after the surgery (Dr. Erickson deposition transcript Pg. 83). This fact confirms Dr. Kornblatt's prediction prior to the Petitioner's surgery, that surgical intervention would provide very little benefit to the Petitioner.

Based on the above, the Arbitrator finds persuasive the opinions of Dr. Kornblatt with regard to the Petitioner's back condition – i.e. that he had reached maximum medical improvement on January 3, 2013, which was the date of Dr. Kornblatt's IME. Petitioner's back condition beyond that date is not related to his August 17, 2012 accident.

2. Based on the findings with regard to the issue of causation, the Arbitrator further finds that no TTD benefits are warranted after January 3, 2013. Respondent shall pay any TTD owing up that date and shall receive a credit for any TTD already paid. This finding is limited solely with respect to the Petitioner's back condition at the time of the arbitration and does not preclude Petitioner from receiving any future benefits that may be related to his right lower extremity.

3. With regard to the issue of medical expenses, the Arbitrator finds that the Petitioner is entitled to any medical expenses incurred prior to January 3, 2013. Any medical expenses beyond that date, are found to be unrelated to Petitioners' August 17, 2012 accident and are denied. This conclusion is based on the Arbitrator's findings with regard to the issue of causation. Furthermore, the Arbitrator finds that the surgery performed by Dr. Erickson on March 8, 2013 was unreasonable and unnecessary. As indicated above, Dr. Kornblatt had pointed out that the negative diagnostics prior to surgery did not justify the

fusion performed to the lumbar spine and the predicted outcome of Dr. Kornblatt came to fruition -to the detriment of Petitioner. Even Dr. Erickson's basis for surgery was not so much on the findings from the objective tests, but primarily on the Petitioner's subjective complaints, that continued to be present even after the surgery. Given all these facts, the claim for medical expenses beyond January 3, 2013 is denied.

4. Based on the findings above, the Petitioner's claim for prospective medical care is denied.

5. In accordance with the findings above, the Petition for Penalties and Attorney Fees is denied. Based on Dr. Erickson's admission and the opinions of Dr. Kornblatt, Respondent had a reasonable basis to deny the spine surgery performed. Respondent has an equally strong basis to deny any further surgery to the sacroiliac joint as prescribed by Dr. Erickson. There is too great a concern for poor outcome based on the failed spine surgery already performed. It is noted that Respondent has paid medical bills in this case of $46,821.00 and has paid 17 and 2/7ths weeks of TTD benefits after the injury. The Arbitrator finds Respondent to have met their obligation for such benefits and accordingly, there are no grounds for a penalty assessment against Respondent as they reasonably relied on an IME physician who accurately predicted the poor outcome of the prescribed surgery. As such, the Arbitrator concludes that penalties and attorney fees are not warranted in this case.

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

Brad Johnson,

Petitioner,

vs. NO: 09WC 15538

Dynamex,

Respondent,

15IWCC0792

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, medical, wage rate, employee/employer relationship, jurisdiction and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 18, 2014, 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 $37,200.00. 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: OCT 2 8 2015
o102215
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JOHNSON, BRAD
Employee/Petitioner

Case# **09WC015538**

DYNAMEX COURIER
Employer/Respondent

15IWCC0792

On 12/18/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & PALERMO
LEANDRO ALHAMBRA
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1739 STONE & JOHNSON CHARTERED
PATRICK DUFFY
111 W WASHINGTON ST SUITE 1800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Brad Johnson
Employee/Petitioner

v.

Dynamex
Employer/Respondent

Case # 09 WC 15538

Consolidated Cases:

15IWCC0792

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Carolyn Doherty, Arbitrator of the Commission, in the city of Chicago, on November 6, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. **Was there an employee-employer relationship?**

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

D. **What was the date of the accident?**

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

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

G. **What were Petitioner's earnings?**

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

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

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

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

_____ TPD _____ Maintenance __X__ **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 2, 2008, Respondent ***was*** operating under and subject to the provisions of The Act.
- On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.
- On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.
- Timely notice of this accident ***was*** given to the Respondent.
- Petitioner's current condition of ill-being ***is*** causally related to the accident.
- In the year preceding the injury, Petitioner earned $62,400.00; the average weekly wage was $1,200.00 .
- On the date of the accident, Petitioner was 40 years of age, ***single*** with 1 children under 18.
- Petitioner ***has*** received all reasonable and necessary medical services.
- Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.
- Respondent shall be given a credit of $ 0.00 for TTD, $ 0.00 for TPD, $ 0.00 for maintenance, and $ 0.00 for other benefits, for a total credit of $ 0.00 .
- Respondent is entitled to a credit of $ 0.00 under Section 8(j) of the Act.

ORDER

- Respondent shall pay to Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injury pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.
- Respondent shall pay Petitioner temporary total disability benefits of $800.00/week for 1-5/7 weeks, commencing April 10, 2009 through April 21, 2009, as provided in Section 8(b) of the Act.
- Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the right leg, as provided in Section 8(e) of the Act.

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

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

Carolyn Doherty
Signature of Arbitrator

12/15/14
Date

DEC 18 2014

15IWCC0792

FINDINGS OF FACT

The Arbitrator initially notes that the primary dispute in this matter arises from the issue of whether Petitioner was an independent contractor or an employee of Respondent Dynamex on the alleged date of accident. ARB EX 1. Petitioner testified that he began working as a courier for Dynamex on November 7, 2000. Petitioner saw an ad in the paper, walked in and applied. According to Petitioner, he interviewed with HR personnel and was hired later that day after a background check. Petitioner worked thereafter driving a truck making deliveries for Respondent.

Petitioner alleges an accident date of December 2, 2008. Petitioner testified that he reported to work every day at a warehouse in Carol Stream, Illinois, owned by Respondent's customer, Office Depot. Respondent operated an office within the Office Depot warehouse. Petitioner testified that his hours were set by Glen Van, a manager for Dynamex. Petitioner testified that he could not come in at a different time and could not make his own schedule. Mr. Johnson was required to be at the loading dock at 6:00a.m. and would be off the by 7:30 am to make his deliveries. He reported to his supervisor every morning. At the time of the accident, Petitioner's supervisor was Bill Simpler. Petitioner testified that his route was assigned by Dynamex and he was given a manifest of deliveries every day. While he was out making deliveries, Petitioner is required to report to a dispatcher in the event that someone is not there to receive the delivery so that Dynamex can log it in and then tell the driver what to do. Once Petitioner was finished with his route, he was required to report to the dispatcher.

Petitioner testified that if he was sick and could not come into work, he would have to call in to Dynamex and notify them. Petitioner also testified that Dynamex required three weeks advance notice for vacation requests. Vacation days were subject to approval of the dock supervisor.

At the time of the accident, Petitioner was required to lease a Dodge Sprinter truck. The truck bore the logos of Dynamex and Office Depot. The signage was not removable. Petitioner testified that he was not allowed to use the truck to make deliveries for other companies. Petitioner testified that he drove the truck home and then back to work each day. Petitioner was also subject to truck inspections, which were supervised by an Office Depot supervisor and a Dynamex supervisor. Petitioner testified that during the inspections, the supervisors would check if the truck was clean, if anything was on the front seat, and that all the tags were present.

Dynamex provided Petitioner with a certificate of insurance. Dynamex was named as the insured on the certificate. Dynamex required its drivers to follow specific instructions in the event the driver got into an accident. Dynamex also gave Petitioner specific claim forms to fill out in the event an insurance claim was filed. If Petitioner was in an accident he was instructed not to contact the insurance company directly, but rather to report the accident to Tim Walters, Dynamex Driver Relations.

Petitioner was required to wear a uniform. Petitioner was required to wear black or blue work pants and a red polo shirt with the logos of Office Depot and Dynamex. Petitioner was also prohibited from wearing gym shoes. Dynamex also required its drivers to sign a substance abuse policy. Petitioner signed a substance abuse policy on 10/8/2004. Dynamex also required Petitioner to sign a medical confidentially agreement. This was signed by Petitioner on 4/4/2003.

As part of his job duties, Petitioner was required to lease a mobile cast unit. A Mobile cast unit is a handheld computer which keeps track of delivery times, signatures, and orders. Bi-weekly deductions of $15 to $20 were deducted from Petitioner's pay for the lease of the mobile cast unit. The mobile cast unit was required in order to do the delivery route.

When Petitioner was initially hired for the job, he was required to undergo training with another driver. Training lasted approximately three days. Petitioner was trained on how to work the mobile cast, set the route, and learn the area. Petitioner also testified that he was required to attend meetings called by Dynamex once or twice a month. These meetings were called by his supervisors.

Petitioner testified during the year prior to the accident he was paid $240 per day ($1200 per week). Petitioner was paid on bi-weekly basis. Deductions were taken out for the truck lease, mobile cast, cell phone, vehicle insurance and occupational insurance. Petitioner purchased occupational insurance through Dynamex. Petitioner paid 100% of the occupational insurance premium. Petitioner was responsible for purchasing gas and maintenance of the truck. On cross-examination Petitioner confirmed he received 1099 forms from Dynamex and filed a Schedule C on his tax returns.

When he was initially hired Petitioner signed an independent contractor agreement on November 7, 2000. According to Petitioner, the November 2000 contract was not effective at the time of his December 2008 work accident. Petitioner testified that he signed at least two (2) new contracts after he was initially hired in November 2000. Under the agreement Petitioner had the right to accept or reject deliveries and assign deliveries. Petitioner was also required to display Dynamex placard during deliveries and remove the placard during the time period when he was allowed to use the truck for personal use or while working for another company. However, Petitioner testified that he is no longer allowed to make deliveries for other companies in the truck. In addition, the current truck signs are permanently affixed to the truck and cannot be removed.

On redirect Petitioner agreed that he had discretion to refuse a delivery route; however, if he refused a delivery he would lose his job. Petitioner testified that at the time of his accident, he did not have the option to use his own truck or lease a different model of truck from a third party. Dynamex required Petitioner to lease a Dodge Sprinter truck, otherwise he could not do the route. Additionally, Petitioner was required to lease a Mobilecast unit and Nextel phone for the route. Petitioner testified that he could not purchase his own Mobilecast nor use his own cell phone for the route. The Sprinter truck, Mobilecast unit and cell phone were leased from and provided by Dynamex.

Christopher Alvarado testified on behalf of Respondent. Alvarado is employed by Dynamex as a Regional Operations Manager for the Central United States. He started this position on January 22, 2014. Prior to this position, Alvarado served as a Regional Operations Manager for the Western Region with Dynamex. Alvarado was not Petitioner's supervisor at the time of the accident and did not work in the same facility as Petitioner at the time of the accident. Alvarado testified that Dynamex purchases special equipment for the drivers and then leases it back to them. Such equipment includes uniforms, vehicles, and Mobilecast units.

Alvarado testified that the uniform requirement and the Dodge Sprinter lease requirement were "customer driven" by Office Depot. Alvarado also testified that the mandatory vehicle inspections were also "customer driven." The mandatory vehicle inspections were also done for general DOT or highway requirements. Alvarado also testified that the requirement that Petitioner start at 6:00 a.m. was also "customer driven."

With respect to the routes, Alvarado testified that if a particular route opened up this was communicated to the drivers and would be available if anybody would want it. Alvarado also denied that attendance at the drivers' meetings was mandatory. Furthermore, Alvarado stated that the requirement for Petitioner to sign a substance abuse policy was again "customer driven."

With respect to payments, Alvarado testified that deductions for technology lease fees, radios, scanners, phones, insurance, and uniforms were taken from the driver's check. Alvarado estimated that these deductions amounted to approximately $200.00 a month. Alvarado's estimate of the deduction did not include the deduction for the truck lease.

On cross-examination, Alvarado admitted that he was not Mr. Johnson's supervisor and did not work at the same facility as Mr. Johnson on the date of accident. Alvarado admitted that he had no knowledge of whether Mr. Johnson was required to sign any new contracts after the November 7, 2000 contract. Alvarado also admitted that he had no knowledge whether the November 2000 contract was in effect at the time of Petitioner's accident. Alvarado agreed that the contract stated that Dynamex "shall assume exclusive commercial possession control and use of the vehicle" while being operated for courier purposes. Alvarado also admitted that Petitioner was required to submit daily manifests, bills, and documentation required by paragraph 7 of the agreement. Alvarado once again testified that these requirements were "customer driven." However, Alvarado admitted that Dynamex is required to follow and enforce requests of its customer, Office Depot.

With respect to the substance abuse policy, Alvarado once again testified that this was a "customer driven" policy. The arbitrator notes that the logo on the substance abuse policy is that of Dynamex.

Alvarado admitted on cross that his estimate of the deductions taken from Johnson's payment did not include the amount taken out for the vehicle lease. Alvarado admitted that he did not know the exact lease agreement signed by Petitioner.

Alvarado admitted that the HIPAA form that Johnson was required to sign was done at the requirement of Dynamex. Alvarado also admitted that the mandatory vehicle inspections were conducted by a Dynamex supervisor along with an Office Depot personnel. In addition to the mandatory inspections performed with Office Depot, Dynamex also performed mandatory DOT vehicle inspections. Finally, Alvarado admitted that if a driver refused to lease a scanner, truck, or phone then they would not be able to perform the job.

With regard to the accident, Petitioner testified that he was working as a courier for Respondent, Dynamex, on December 2, 2008. At that time, he was in the back of his truck loading a box of paper, which weighed approximately 30lbs when he slipped. Petitioner testified that he went down and landed on his right knee and may have hit his knee on a box of paper. Petitioner testified that this occurred at 6:30a.m. and it was snowing that day.

Following the accident, Petitioner continued his daily work. He noticed that as the day went on his knee began to swell. Petitioner went home that evening and iced his knee and took Aleve. Petitioner testified that he notified Tim Walters about the accident 4-5 days after the accident. Tim Walters' position with Dynamex was in Driver Relations. History in the medical records indicates that patient 4 days while at work was carrying some boxes in the back of his truck, slipped and turned, twisted right knee. X-rays were taken and were negative for a fracture. Diagnosis at that time was a sprain of the right knee. Petitioner was instructed to elevate his knee and given a prescription for Naprosyn. He was also given a referral to an orthopedic specialist. Petitioner continued to work full duty.

Petitioner was seen by Dr. Branovacki on February 19, 2009. At that time, he continued to complain of occasional popping, catching, clicking, and other mechanical symptoms. The examination revealed mild swelling of the knee and a positive McMurray's sign. Dr. Branovacki ordered an MRI of the right knee. The MRI was done on March 9, 2009 and revealed a complex tear of the medial meniscus involving the posterior horn and body.

Petitioner followed up with Dr. Branovacki on March 26, 2009. Dr. Branovacki's note indicates that the MRI confirmed a medial meniscus tear which he described as quite large. At that time, Dr. Branovacki recommended knee arthroscopy.

Petitioner underwent surgery on April 10, 2009. Dr. Branovacki performed a right knee arthroscopy with partial meniscectomy, chondroplasty, and injection of steroid. The pre-operative diagnosis and post-operative diagnosis was the same – right knee medial meniscus tear. The surgery was an out-patient procedure and Petitioner was sent home. Later that evening, Petitioner presented at Palos Community Hospital's emergency room with severe right

knee pain. History indicates that Petitioner had been taking Vicodin, but the medication was not working. Petitioner was given Dilaudid and instructed to follow-up with his orthopedic surgeon.

Petitioner was last seen by Dr. Branovacki on April 16, 2009. The examination revealed full range of motion. The medical note indicated that Petitioner was to do therapy on his own and he was to see Dr. Branovacki on an as-needed basis.

Petitioner testified that since the surgery, his knee swells up approximately 3-4 times a year. These flare ups last approximately three days. Petitioner ices his knee and takes Aleve to relieve the pain. Petitioner also testified that his knee hurts every day and feels stiff especially when he gets out of a truck.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

Issue (A): Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

On December 2, 2008, Petitioner and Respondent were operating under the Illinois Workers' Compensation Act. Respondent is in the courier business and Petitioner was engaged in work for Respondent that day.

Issue (B): Was there an employee-employer relationship?

The Arbitrator finds that on December 2, 2008, the relationship between Petitioner and Respondent was one of employee/employer. In so finding, the Arbitrator puts greater weight on the testimony of Petitioner, Brad Johnson than on the testimony of Mr. Alvarado. The Arbitrator notes that Alvarado was not Petitioner's supervisor and worked in a completely different region at the time of the Petitioner's accident. Alvarado was unable to answer questions to the specific nature of the relationship between Johnson and Dynamex on or around the date of accident. For example, Alvarado did not know the know specifics of the vehicle lease agreement Petitioner entered and did not know whether subsequent contracts were signed by the Petitioner.

The courts have articulated a number of factors to consider in determining whether an individual is an employee or independent contractor. The two most important factors are whether the purported employer has a right to control and the nature of the work performed by the alleged employee in relation to the general business of the employer. *Ware v. Industrial Comm'n* 318 Ill. App. 3d 1117, 1122 (2000). Additional factors the courts consider are method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities and whether income tax is withheld. (Id.)

The right to control the manner in which the work is done is considered the most important factor in analyzing employment relationship. *Roberson v. Industrial Commission* 225 Ill. 159 (2007). In *Roberson,* the Court found an elements of control where the contract gave P.I.&I "exclusive possession, control and use" of Roberson's truck, Roberson was required to notify P.I.&I if he had an accident and was provided a camera to photograph any damage, required drivers to call in daily to report their status, perform pre-trip inspections, maintain a DOT logbook and post P.I. & I logos on his truck. (*Id.* at 184-6).

Similar to the *Roberson*, the case at bar has significant elements of control. Like *Roberson*, the contract gave the employer exclusive possession, use and control of the vehicle while being used for courier purposes. (Rx7, pg 1 sec. 3). Dynamex also controlled many aspects of Johnson's work. He was required to display Dynamex placards. (*Id.* p. 2 sec. 8). The 6 a.m. start time was set by the employer and Johnson was required to attend meetings. He was required to report to a dispatcher while making deliveries and after he finished his route. Petitioner was required to rent and use a mobile radio, data unit (*Id.*, p. 2 sec 5). Petitioner was required to wear a uniform which

had the Employer's logo on it. Petitioner's was subject to mandatory vehicle inspections. Petitioner was required to sign HIPPAA form and substance abuse policy. Dynamex required Petitioner to give three weeks notice for vacation requests, which was subject to the employer's approval. The employer dictated what type of truck and equipment was to be used by the driver. Petitioner was given strict guidelines on how to report an accident/insurance claim.

The Arbitrator's finding of employment relationship is further supported by the nature of the work Petitioner performed for Respondent. Specifically, Petitioner's work was intimately related to Respondent's business. The Respondent is in the courier business delivering office supplies for its customers; the driver's work, likewise was making deliveries for the company's customer. Petitioner worked exclusively for Respondent since November 2000 and did not have his own customers. Petitioner could chose the route he would be assigned but once assigned had to complete the assigned route without deviation and was unable to refuse specific deliveries. It is undisputed that the Sprinter truck, Mobilecast and cell phone were required for Petitioner to perform deliveries for Respondent. Petitioner paid for the costs and expenses of operating the truck; however, it is also undisputed all of the mandatory equipment was required by Dynamex and leased to Petitioner. The parties agreed that Petitioner could obtain or purchase the mobile cast unit on his own but that the unit was expensive and operated only through the use of Respondent's operating system. Petitioner was also unable to use his own truck to make deliveries or to use the leased truck to make deliveries for another company.

While noting that Petitioner was paid as an independent contractor, signed independent contractor agreements and that either party could terminate the employment, the Arbitrator finds that Dynamex asserted significant control over Brad Johnson. Mr. Alvarado repeatedly testified that the requirements placed on Johnson were "customer driven." Nevertheless, the Arbitrator notes that Dynamex carried out the "customer driven" requirements and imposed them on Petitioner. While analyzing the factors used to determine the employment relationship, the Arbitrator is not persuaded by the argument that the control exercised by Dynamex was customer driven. Finally, the Arbitrator finds the purchase of an occupational accident policy equally unpersuasive.

Based on the foregoing, the Arbitrator finds that Respondent exercised significant control over Petitioner's work and that combined with the nature of Petitioner's work supports the finding of an employment relationship under the Act. Accordingly, the Arbitrator finds that on December 2, 2008, the relationship between Petitioner and Respondent was one of employee/employer.

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

At the time of the accident Petitioner was loading his truck. He was carrying a box in the back of his truck, slipped and struck his knee on a box of paper. Petitioner testified that it was snowing that day. The box Petitioner was carrying weighed approximately 30 pounds. Petitioner's description of the accident at trial is consistent with the accident history documented in the emergency room record. (Px1). The Arbitrator finds that Petitioner sustained an injury arising out of and in the course of Petitioner's employment by Respondent. This finding is based upon Petitioner's credible testimony as supported by the medical records.

Issue (D): What was the date of accident?

Based on Petitioner's credible testimony and the medical records, the date of accident was December 2, 2008.

Issue (E): Was timely notice of the accident given to Respondent?

The Arbitrator finds that timely notice of the accident was given to Respondent. According to Petitioner's unrebutted testimony, he notified his supervisor, Tim Walters, of the accident four or five days after it occurred.

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

Petitioner's current condition of ill-being is casually related to the injury. This is based on Petitioner's credible testimony and the records of Palos Community Hospital and Midwest Orthopaedic. (Px1 &2).

The medical records show an accident history consistent with Petitioner's testimony at trial. Petitioner's treating physicians relate by history Petitioner's complaints to this trauma. Thus, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the December 2, 2008, work injury.

Issue (G): What were Petitioner's earnings?

Petitioner's average weekly wage is $1200. Respondent provided a printout of the net payments made to Petitioner after deductions of equipment lease was taken. The documents however, did not provide information to Petitioner's gross earning. Furthermore, Arbitrator notes Respondent's witness, Chris Alvarado, was unable to testify with certainty about the exact dollar amount of the deductions. Thus, the Arbitrator gives greater weight to the testimony of Petitioner, Brad Johnson. Petitioner credibly testified that during the 52 weeks prior to his accident he was paid $240 per day or $1200 per week.

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

Petitioner sustained a torn meniscus as a result of the slip in fall. This diagnosis was confirmed by the MRI and surgical findings. Based on the medical records, Petitioner's treatment was reasonable and necessary. The Arbitrator finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injury pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any. The parties stipulated that no Section 8(j) credit is owed. ARB EX 1.

Issue (K): What TTD benefits are in dispute?

Petitioner was taken off work from the April 10, 2009, the date of the surgery, through April 21, 2009. Petitioner opted to do a home exercise program and returned to work full duty for Respondent on April 22, 2009. Accordingly, Petitioner is entitled to 1-5/7 weeks of TTD.

Issue (L): What is the nature and extent of the injury?

The date of accident was December 2, 2008. No AMA evidence was presented or considered. Petitioner testified that he experiences flare ups to the knee. These flare ups occur about three to four times per year. His knee swells and hurts for at least three days. To relieve his pain Petitioner takes Aleve and ices it down. Petitioner experiences stiffness in his knee when he wakes up in the morning and when he gets out of his truck. Petitioner testified "I just wake up and it's hurting..." There is no evidence to support future loss of earnings as Petitioner has returned to full duty work for Respondent and Petitioner's age has no effect. Those factors are given little weight.

Based on the medical records as supportive of Petitioner's credible testimony, the Arbitrator finds that as a result of the December 2, 2008, work injury Petitioner sustained a 25% loss of use of the right leg.

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

Wendi Mathison,
Petitioner,

vs.

NO: 11WC 34355

Costco Wholesale,
Respondent,

15IWCC0793

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 December 18, 2014, is hereby affirmed and adopted.

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

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

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

DATED: OCT 2 8 2015
o102215
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MATHISON, WENDI
Employee/Petitioner

Case# **11WC034355**

COSTCO WHOLESALE
Employer/Respondent

15IWCC0793

15IWCC0793

On 12/18/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5314 CARAS & ASSOCIATES
DEAN J CARAS
320 W ILLINOIS ST SUITE 2216
CHICAGO, IL 60654

0210 GANAN & SHAPIRO PC
MICHELLE L LaFAYETTE
210 W ILLINOIS ST
CHICAGO, IL 60654

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

Wendi Mathison
Employee/Petitioner

v.

Costco Wholesale
Employer/Respondent

Case # **11WC 34355**

Consolidated cases:

15IWCC0793

An *Application for Adjustment 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 **June 3, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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, 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 $**64,363.00**; the average weekly wage was $**1,237.75**.

On the date of accident, Petitioner was **29** 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 **$45,831.74** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**45,831.74**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**825.17**/week for **55-4/7** weeks, commencing **September 30, 2010** through **October 23, 2011**. Respondent shall be given a credit of **$45,831.74** for temporary total disability benefits that they have paid to Petitioner.

Respondent shall pay Petitioner permanent partial disability benefits of $**669.64**/week for **225** weeks, because the injuries sustained caused a **45%** loss of use, person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

December 17, 2014
Date

DEC 18 2014

ADDENDUM

15IWCC0793

IN SUPPORT OF HIS DECISION WITH REGARD TO ISSUE (L) "WHAT IS THE NATURE AND EXTENT OF THE INJURY?", THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT:

On September 15, 2010, Petitioner was employed by Respondent as a bakery manager. On that day, as she was stacking and moving freight for Respondent, she experienced intense pain in her lower back. The items that Petitioner stacked and moved weighed from 25 to 60 pounds. (PX #1)

On September 15, 2010, Petitioner saw Sonal N. Bhatt, M.D., at Concentra Medical Center. The records show that he diagnosed Petitioner with a lumbar strain and gave the following order: "Off work rest of shift with limited activity as follows: No lifting over 5 lbs.; No prolonged standing and/or walking longer than tolerated; No bending greater than 0 times per hour; No pushing and/or pulling over 5 lbs of force." (PX #1)

On September 17, 2010, Petitioner saw Dr. Bhatt at Concentra Medical Center. He released Petitioner to return to work with the following restrictions: No bending greater than 0 times per hour; No pushing and/or pulling over 5 lbs of force. (PX #1)

On September 21, 2010, Petitioner again saw Dr. Bhatt at Concentra Medical Center. He released her to return to work with the following restrictions: No lifting over 5 lbs; No prolonged standing and/or walking longer than tolerated; No bending greater than 0 times per hour; No pushing and/or pulling over 5 lbs of force. Dr. Bhatt also ordered an MRI of Petitioner's lumbosacral spine. (PX #1)

On September 23, 2010, Petitioner attended a physical therapy appointment at Concentra Medical Center and reported that she continued to have severe symptoms of pain in her lumbar

spine radiating to her lateral thighs, and occasionally radiating to her feet. Petitioner told Karen Hwang, PT, the following: "I can't do the exercises because it is too painful." (PX #1)

On September 30, 2010, Petitioner saw Steven E. Mather, M.D. at M&M Orthopaedics, Ltd., where he conducted a physical examination, reviewed MRI results, took petitioner off work and prescribed a Medrol Dosepak and Vicodin. The MRI showed disc degeneration at L3-L4, L4-L5, an acute disc herniation centrally and left at L4-L5, and some mild desiccation at L5-S1. (PX #1)

On November 9, 2010, Petitioner received a lumbar epidural steroid injection at the L4-L5 level and on and November 23, 2010, Petitioner received a lumbar epidural steroid injection at the L5-S1 level. Dr. Jay Kiokemeister administered the injections at Kendall Pointe Surgery Center. (PX #1)

On November 29, 2010, Petitioner began a regimen of physical therapy at Accelerated Rehabilitation Centers. (PX #1)

In a letter dated January 25, 2011, Dr. Mather stated that Petitioner has failed supervised physical therapy and epidural steroid injections. Dr. Mather recommended an L4-L5 discectomy and fusion. (PX #1)

On February 15, 2011, Petitioner underwent a CT myelogram of her lumbar spine at Future Diagnostics. Dr. Gregory Ostrowski's impression included, *inter alia*, spondylitic changes most prominent at the L3-L4 and L4-L5 levels and a left posterior disc protrusion at each of three levels: L3-L4, L4-L5 and L5-S1. (PX #1)

On April 27, 2011, Steven Mather, M.D. performed the following surgery on Petitioner:

1. Laminectomy of L3, L4 and L5 with decompression of nerve roots and excision of disc herniation of L4-L5.

2. Posterolateral fusion of L3, L4 and L5.

3. Posterior lumbar interbody fusion of L3, L4 and L5.

4. Spine graft apex titanium pedicle screw system of L3, L4 and L5.

5. SpineCraft ORIO interbody cage of L3-L4 and L4-L5.

6. Local bone graft with Infuse allograft. (Bone from bone bank used.)

(PX #1)

Petitioner was required to wear a custom LSO brace for 12 weeks post-operatively. Petitioner completed 4 weeks of work conditioning program from September 12, 2011 through October 7, 2011, and had a Functional Capacity Evaluation ("FCE") on October 11, 2011. (PX #1)

On October 13, 2011, Petitioner saw Dr. Mather. He reviewed her FCE results. He recommended a 40-pound lifting restriction. (PX #1)

On October 23, 2011, Petitioner returned to work with such lifting restrictions. Petitioner continued to follow up with Dr. Mather through September 13, 2012, and remained on a 40-pound lifting restriction. (PX #1)

On February 14, 2013, Dr. Mather gave Petitioner a Work Status note with a permanent lifting restriction of 25 pounds. (PX #1) Petitioner is currently working in a different position at Costco within the above outlined restriction.

Petitioner still experiences pain in her low back. She is taking three types of pain medication on a daily basis: Celebrex, Nabumetone and Nucynta. Petitioner testified that she had, and still has, numbness in the hip down to the mid thigh. Petitioner was 33 years old with one dependent child on the date of the hearing. Recently, she developed a cyst on the scar

tissue on her low back/sacrum. Such cyst had to be drained with a needle. She is following up with Dr. Mather for treatment of the cyst.

On cross-examination, Petitioner testified that she originally returned to work as a Deli Manager for Respondent and that the lifting requirements for a Deli Manager are the same as those for a Bakery Manager. Petitioner testified that she requested a transfer within the company to Seattle, Washington, because she has family living there. Petitioner testified that she was having difficulty doing the job of Deli Manager with a 25-pound restriction.

Petitioner began working at the Seattle location as an Inventory Control Manager. She now works as an Administrative Manager. Petitioner testified that her move to Seattle, Respondent's headquarters, could open up career possibilities for her. Petitioner also testified that she would like to advance at Respondent, but felt that her work restrictions may limit her choices. Petitioner testified that she did not have a job accommodation meeting with Respondent before she began performing the duties of an Administrative Manager. She did, however, have a job accommodation meeting with Respondent before she began performing the duties of an Inventory Control Manager. Petitioner testified that, currently, she monitors herself and will ask for help if she needs help. Petitioner testified that Dr. Mather declared her to be at MMI (maximum medical improvement). She only sees her Primary Care Physician these days. Petitioner testified that, presently, she experiences pain in the back and numbness down the leg.

CONCLUSIONS OF LAW:

Based on the foregoing, the Arbitrator finds that as a result of the accidental injury of September 15, 2010, Petitioner has sustained a permanent loss of use of her person as a whole to the extent of 45%. The post-accident MRI revealed disc degeneration at L3-L4, L4-L5, an acute disc herniation centrally and left at L4-L5, and some mild desiccation at L5-S1. The CT myelogram showed spondylitic changes most prominent at the L3-L4 and L4-L5 levels, and a left posterior disc protrusion at each of three levels: L3-L4, L4-L5 and L5-S1. The treatment Petitioner received for her low back condition consisted of medication, physical therapy, epidural steroid injections and laminectomy/three-level fusion/fixation of hardware surgery/bone graft. Currently, Petitioner experiences low back pain and numbness down the leg. At the time of the hearing, Petitioner was 33 years old with a dependent child. She takes three types of pain medication. Dr. Mather has imposed a permanent lifting restriction of 25 lbs. Respondent has accommodated Petitioner's restriction.

Signature of Arbitrator

12-17-14
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary H. Shanklin,
Petitioner,

vs.

NO: 13WC 15900

City of Springfield,
Respondent,

15IWCC0794

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, 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 29, 2014, 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.

OCT 2 8 2015

DATED:
o102115
CJD/jrc
049

Joshua D. Luskin

Ruth W. White

Dissenting Opinion

I must respectfully dissent. Petitioner credibly testified that she began feeling "discomfort" in her hands and wrists in 2009 but could tolerate it and continued to work. Petitioner testified that

she was promoted from laborer to a foreman in August 2012 but that the physical nature of her job and her job responsibilities did not change.

Petitioner saw Dr. Watson on October 16, 2012, with complaints of bilateral hand pain with numbness and tingling, which had become constant. This caused her to have difficulty sleeping at night and problems performing her work duties. Dr. Watson inquired about Petitioner's job and was told that she spent most of her day using shovels or rakes. She also used a crowbar and hammers occasionally. Dr. Watson noted that "it appears that she does a large variety of different types of work...involving significant power gripping." An EMG/NCV on October 23, 2012, revealed bilateral carpal tunnel syndrome, right greater than left, and Dr. Watson recommended surgery.

Petitioner called two witnesses to testify. Robert Painter worked with Petitioner since 2003 and was her foreman until he retired. He described Petitioner's job duties and testified that 90% of her time was involved in heavy physical labor. Petitioner told him that her hands were hurting all the time. Robert Williams worked with Petitioner for 15 months and testified that Petitioner did the same work even though she was a foreman and that she "[leads] by example." He estimated that 90% of their work is heavy work. On cross-exam, he agreed that their work varied from day to day. On redirect, he testified that everything they do requires constant use of the hands (grasping, flexion and extension of wrists).

Petitioner testified that although she had been prescribed medication for her feet related to diabetes, she never had been prescribed it for any problems with her hands and arms. Petitioner testified that between 85 and 90% of her time over the years has been spent using her hands to grasp materials.

Although Dr. Watson did not have a very detailed description of Petitioner's duties, such as the exact number of hours she performed each activity each day, he had sufficient information to form a valid causation opinion. He testified that Petitioner told him that most of her days were spent using shovels, rakes, crowbars, hammer, and "a large variety of different sorts of construction tasks that involve power gripping." This is consistent with the testimony of Petitioner and her witnesses and also the written job descriptions.

Respondent's Section 12 physician, Dr. Koo, minimized Petitioner's physical labor and hand activities by picking out those aspects of her job description that were minimal (like flagging and directing others) because she just couldn't believe that Petitioner was able to do heavy manual labor with long fingernails and soft hands. However, Petitioner's witnesses testified that she did actually perform the same work they did. Dr. Koo admitted that the type of work listed on the written job description could be a contributing factor in Petitioner's conditions but she didn't believe the job description accurately reflected what Petitioner actually did.

Regarding her fingernails and soft hands, Petitioner testified that she does get her nails done because "on the weekends I want to look like a lady" and that she wears gloves when she works but also has a cream from her dermatologist to burn the calluses off her hands. She testified that she just keeps working when a nail breaks off and that, "I don't care, you know, I've been doing this work a long time."

In my opinion, although Petitioner's tasks were varied it is clear that she did have a hand-intensive job. The written job descriptions indicate that, as a Laborer, her job involved 85% grasping and 30% repetitive motions of the wrists, hands, or fingers. Even if Petitioner's job did become somewhat less stressful as a foreman, this job still required 55% grasping, 65% repetitive motions of the wrists, hands, and/or fingers, and is "subject to vibration of the extremities or whole body."

Although Petitioner's diabetes could undoubtedly be a causal factor in her carpal tunnel syndrome, I would find that she has also proven that her strenuous hand-intensive work activities were also a contributing factor. Therefore, I would reverse the Arbitrator's decision and would find

15IWCC0794

that Petitioner sustained a repetitive trauma accident arising out of and in the course of her employment and that her condition of ill-being is causally related to her employment. I would also find that she is entitled to benefits including medical expenses, temporary total disability, and permanent partial disability.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHANKLIN, MARY H
Employee/Petitioner

Case# **13WC015900**

CITY OF SPRINGFIELD
Employer/Respondent

15IWCC0794

On 10/29/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% 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:

1189 WOLTER BEEMAN AND LYNCH
RANDALL A WOLTER
1001 S SIXTH ST
SPRINGFIELD, IL 62703

0332 LIVINGSTONE MUELLER ET AL
DENNIS O'BRIEN
PO BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

15IWCC0794

☐ 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

MARY H. SHANKLIN,
Employee/Petitioner

v.

CITY OF SPRINGFIELD,
Employer/Respondent

Case # **13** WC **15900**

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 **Springfield**, on **10/9/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/16/12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $**74,529.52**; the average weekly wage was $**1,433.26**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner's claim for compensation is denied based on the arbitrator's finding that the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands due to repetitive work activities that arose out of and in the course of her employment by respondent that manifested itself on 10/16/12.

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

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

Signature of Arbitrator

10/28/14
Date

OCT 29 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 53 year old labor foreman, alleges she sustained an accidental injury 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 10/16/12. Petitioner has worked for respondent as a laborer since 2003. In 2012 petitioner became foreman. Petitioner was diagnosed with type 2 diabetes mellitus about 10 years ago. She testified that she is insulin dependent and has not always had her diabetes controlled.

Petitioner testified that she was hired by respondent as a laborer in 2003. She testified that she became a foreman in 2012, but could not recall when. She testified that she does the same duties now that she did in 2003 that include asphalt, concrete, attending to carpenters, and shoveling snow. She testified that from 2003-2008 she shoveled asphalt to cover the lakeside roads. She testified that asphalt started to slow down when the staff was cut in 2011. After the asphalt job diminished in 2011 petitioner started doing building work, moving heavy desks, relocating offices to different buildings, roofing different buildings, delivering shingles and applying shingles to the roof. From 2003-2012 petitioner did some snow shoveling with a snow blower and some by hand at the security property, management center, annex, and training center.

Petitioner testified that when pulling asphalt she would shovel 1-2 tons by hand, and later 3-4 tons. With respect to the meter pit hole she would pour concrete and use rebar. She did not dig any holes. She might help with form before pouring concrete. She would use a jackhammer to remove concrete on sidewalks and roads.

Petitioner testified that she performed heavy labor 90% of the day since she was hired in 2003. Petitioner did not describe the frequency or specifics of the heavy labor she performed.

Petitioner testified that she started having problems with her hands in 2009. She testified that at time she felt discomfort in her hands. She testified that her symptoms worsened from 2009 to 2012.

Petitioner testified that the jobs she does requires the use of several different tools each day, and she performs several different tasks per day. She testified that her tasks change from day to day.

On 9/17/09 petitioner presented to Dr. Watson for recheck of her left arm pain. She stated that it was gradually worsening. She reported that the pain radiated from the neck to the hand and was associated with numbness. Dr. Watson assessed C5 radiculopathy and left carpal tunnel syndrome based on EMG. Dr.Watson offered a carpal tunnel release at that time.

On 9/21/09 petitioner was seen in neurologic follow-up by Dr. Warach. Petitioner had reported persistent intermittent posterior cervical neck pain with radiation into the left arm with no improvement. He noted that she reported occasional numbness and tingling in the left hand. He noted that the EMG had revealed left carpal

tunnel syndrome and she was using a left wrist splint for her left carpal tunnel with reduction of the numbness and tingling in her left hand. Dr. Warach noted that petitioner has a history of diabetes mellitus.

On 8/11/11 petitioner was referred to Dr. Speck because of her poorly controlled type 2 diabetes mellitus that was complicated by sensory neuropathy. She reported that she has had diabetes for at least 10 years. Petitioner stated that she was taking glimepiride, Levemir and Novolog (2x day). Petitioner reported that she has a home glucose meter but does not test frequently. When she does her levels are in the mid 200's. She reported that she had recently been diagnosed with diabetic neuropathy and was placed on gabapentin a month prior. She reported that she had a colectomy due to chronic constipation. She stated that certain medications cause her constipation to become worse. Dr. Speck assessed type 2 diabetes with neurological complications uncontrolled; Type 2 diabetes mellitus that is insulin requiring; diabetic sensory neuropathy; and thyroid hormone in the past. Dr. Speck prescribed a new insulin program.

On 2/1/12 petitioner followed-up with Dr. Speck. She reported that she had a 2 unit blood transfusion 4 days ago, and was going to be seen by a gastrointestinal specialist at Barnes. Petitioner's blood sugar that day was in the 300s. She admitted that she was still not testing regularly. Dr. Speck's assessment remained unchanged. On 2/21/12 petitioner presented to Priority Care HSHS Medical Group. Her glucose reading that day was 347. On 5/26/12 her glucose reading was 500.

On 10/16/12 petitioner returned to Dr. Watson with bilateral hand pain with numbness and tingling that had become constant. She completed an injury report form that stated "I use to throw asphalt with a shovel from behind a truck bed. My former boss, Robert Painter use to spread it along with me. Usually 4-5 times a week @ 8 hrs per day. My hands began to hurt but I worked with the pain in my wrist." Petitioner noted that she takes Novolog, Lantus, and Glimepride for her diabetes, Gabapentin for the neuropathy in her feet, and Lisinopril for her high blood pressure. She also reported that she took Buspirone and Triliprix. She stated that she was having difficulty sleeping and performing her duties as a construction worker. She reported that she spends most of her day using shovels and rakes. She also reported that she uses a crowbar, and occasionally uses a hammer to apply shingles. Dr. Watson noted that it appeared that petitioner did a large variety of different types of work that all involve significant power gripping. Dr. Watson noted that petitioner had nerve testing done 3 years ago, but her symptoms had persisted most recently over the past 6 months and had become much more intense. Petitioner wanted it surgically corrected. An examination revealed a positive Tinel's test and Phalen's test bilaterally. Dr. Watson's impression was bilateral carpal tunnel syndrome. He recommended repeat nerve conduction studies. He did not restrict her from work.

On 10/23/12 petitioner underwent nerve conduction studies performed by Dr. Trudeau. The results revealed bilateral median neuropathies at the wrists, moderately severe on either side, right greater than left.

On 11/6/12 petitioner returned to Dr. Watson. Her condition was unchanged. Her repeat nerve conduction studies revealed bilateral carpal tunnel syndrome. Dr. Watson recommended bilateral carpal tunnel syndrome release surgeries with the right first. He did not restrict her from work.

On 12/17/12 petitioner underwent a Section 12 examination performed by Dr. Koo at the request of the respondent. In addition to medical records and an accident report, Dr. Koo reviewed a detailed job description for "laborer" dated 6/6/12 including position attribute worksheet outlining the physical activities. Petitioner reported that she had worked for respondent since March of 2005. She stated that she worked 40 hours a week with some overtime, but rarely. She noted that she was promoted to foreman on 8/13/12 and does the same work now as she did before becoming foreman. Petitioner complained of numbness/tingling and some burning pain in both hands, and that her right and left long fingers occasionally get locked. She also stated that her hands have been losing strength for a little over a year or even two years. She reported that she has done construction work for 27 years. She stated that her symptoms were probably ongoing before being promoted to foreman. Dr. Koo noted that petitioner had long acrylic nails. Petitioner complained of night pain, weakness in grip strength and pain when brushing or combing her hair. She stated that she had been dropping things and had swelling in her hands. She also reported pain in her hands when driving. Petitioner stated that she may pull asphalt with the rake and tampering machine. For the first five years she pulled asphalt 4-5 days a week, 8 hours a day, but now only does it periodically, and only 1-2 times a week for 4-6 hours total. She stated that she spreads concrete on her knees with a trowel or other equipment, which requires both hands and rocking back and forth. Petitioner performed this activity primarily in the first 5 years. She also reported that she used a crow bar, shovel and rakes to dig meter pit holes. She would "wreck out" forms. Petitioner testified that she did these things in the first five years of her occupation. She reported that she has worked with an operator putting in 10" diameter culverts that are 20' long. She also carries pipes and lifts and grabs 8 hours a day. Most recently petitioner had been moving offices, primarily lifting boxes onto a cart and loading them on a truck before unloading them. She did this for a week or so. She mentioned working on culverts that were 4" in diameter and 10' long where she would have to put a strap around the culvert to stabilize it while the operator moved it. She reported that when she worked with asphalt in the parking lot she would have to take a shovel to shovel it out. She also performed 8 hours of milling sometimes, and since 2008 and 2009 has worked with an operator, so it is more intermittent. During her first five years she used a shovel for digging and did much more physical labor. She

would pick up bags of shingles. She remembered doing this on 10/12/12 and dropping the bag because her hands were weak. She reported that she lifts more bulky things now.

Following an examination and record review, Dr. Koo assessed bilateral moderately severe carpal tunnel syndrome. Dr. Koo noted that petitioner reported that most of her manual labor was performed in the first five years of her employment, more so in the beginning and less in the last 2 1/2 to 3 1/2 years. She reported that her symptoms began 1-2 yrs ago. Dr. Koo noted that petitioner is an insulin dependent diabetic with peripheral neuropathy affecting her feet. She further noted that her BMI was 32.6, which is obese. She was in disbelief that someone could perform the kind of labor she claims on a daily basis and still be able to support her acrylic nails. She noted that her hands were soft and had not callused. She also diagnosed bilateral trigger digits of both long fingers that could be a result of her diabetes. She was of the opinion that petitioner's bilateral carpal tunnel and trigger digits would be primarily related to her obesity and insulin dependent diabetes. She noted that while the type of work petitioner describes would definitely be considered hard manual labor, she did not have a good grasp of how much actual hard repeated grasping she performed. She did not see how stabilizing the culverts with an operator who moved them with a machine or did true hard repeated hand grasping, would be considered a repetitive trauma type work that would cause bilateral carpal tunnel syndrome or bilateral long finger trigger digit. Dr. Koo was of the opinion that working with trowels, jackhammers, and smoothing out tar and cement would certainly be repetitive activities that could cause bilateral carpal tunnel syndrome if they were performed on a daily basis for at least 4 hours per day for 2 1/2 years, but she had no accurate assessment of exactly how much hand intensive labor she did the last 2 years prior to her symptoms developing. She noted that petitioner stated that she performed manual labor in the first few years, but her symptoms did not really start until the last 2 1/2 years. Dr. Koo was of the opinion that petitioner's diabetes seemed to be fairly severe and that she required insulin and oral medication to control it. She also noted that she was obese. She was of the opinion that these factors, by themselves, would be certainly enough to cause a bilateral carpal tunnel syndrome and trigger digits. Dr. Koo was of the opinion that unless she was shown a detailed job description showing that petitioner performed repeated hard grasping in the two years prior to the development of her carpal tunnel syndromes, she was going to attribute petitioner's bilateral carpal tunnel syndrome and trigger digits to her diabetes and obesity,

On 1/20/13 Dr. Koo drafted an Addendum report after reviewing petitioner's two most recent job descriptions, and work records from 2010-2012. No records were available from 2009 and earlier. Dr. Koo was of the opinion that one could not truly grasp and use their hands in a labor fashion with meaningful impact to their hands with long acrylic nails. She was also of the opinion that it would be impossible to fit into a glove to

protect her hands. She opined that it would be impossible for petitioner to have developed carpal tunnel syndrome or trigger digits as a result of her work for respondent. Dr. Koo was of the opinion that petitioner is a diabetic, obese and a former smoker, and that her diabetes was significant enough that she had an illness due to her diabetes that required a colectomy of her left sigmoid in 2007. She opined that petitioner's own systemic problems would be the main cause and contributory factors of her bilateral carpal tunnel syndrome and trigger digits. She opined that all of the predisposing factors that she has would be more than enough to cause a bilateral carpal tunnel syndrome and trigger digits.

Dr. Koo reviewed a laborer job description for respondent dated 6/6/12. The job summary was "under general supervision performs various labor functions such as assisting carpenters and operating engineers with road work, culvert work, concrete work, jackhammering, and moving office furniture and equipment." 50% of the job duties involved assisting carpenters with jobs, material pick-up and delivery to job sites. 10% was spent cleaning up job sites throughout duration of job; maintaining utility roads and parking lots, cleaning and replacing culverts and ditches throughout the Lake area; and digging footing and post holes for various jobs such as lane signs, bumper rails, fencing, and footings for buildings or concrete retaining walls. 5% was spent on flagging and installing construction zone signs on road jobs by following the Utility Safety manual on Road Safety; unloading materials from various vendors and stacks material in a neat and orderly manner at the job site or the shop, and removes snow from PMC, PMC Annex, and Security sidewalks; notifies supervisor of locations for underground utilities before digging; and other duties as assigned. The tools used were many: broom, shovels (all types), sledgehammer, pick, wheel barrow, traffic flagging pole, jackhammer, chain saw, acetylene torch, mortar mixer, vibrator, tamper, tar kettle, auger, crow bar, wrecking hammer, wrenches, screwdrivers, grinders, rake, trowel and post hole differ. Physical activity attributes were as follows: climbing 15%, balancing 70%; stooping, kneeling, and crouching 30%; crawling 10%; reaching 50%; standing 90%; walking 80%; pushing 50%; pulling 30%; lifting 60%; fingering 5%; grasping 85%; feeling 5%; talking and hearing 10%; and repetitive motions 30%.

Dr. Koo also reviewed the laborer foreman job description dated 6/11/12. The job summary was "under general direction coordinates work duties for the journeyman laborers, develops material lists, and performs regular Journeyman Laborer duties". The job duties were "performs journeyman laborer duties and responsibilities such as; stock piling lumbar & other materials as needed to do jobs, wheel barrow concrete, traffic flagging, jackhammering, digging post holes, using chain saws, concrete vibrator, tar kettle, wrecking and cleaning work areas, pours concrete, moves furniture and office equipment, and removes snow at PMC, PMC Annex, Security at the Plant 75% of the time. 5% of the time was spent assisting superintendent in reviewing

work orders and assigning daily work for union laborer personnel and coordinates work with other trades including operators, carpenters, painters, and plumbers; advises supervisor of materials and the amount needed (ie., concrete, rock, patch, etc) for jobs; periodically inspects job sites; assists laborers in preparing daily sheets; and performs other duties as assigned. The tools used were many: broom, shovels (all types), sledgehammer, pick, wheel barrow, traffic flagging pole, jackhammer, chain saw, acetylene torch, mortar mixer, vibrator, tamper, tar kettle, auger, crow bar, wrecking hammer, wrenches, screwdrivers, grinders, rake, trowel and post hole differ. Physical activity attributes were as follows: climbing 40%, balancing 20%; stooping, kneeling, and crouching 10%; crawling 5%; reaching and standing 60%; walking 75%; pushing, pulling 20%; lifting 70%; fingering 5%; grasping 55%; feeling 5%; talking and hearing 10%; and repetitive motions 65%.

On 3/25/13 petitioner returned to Dr. Watson with persistent carpal tunnel symptoms on both hands. He noted that since he last examined petitioner she developed some severe deQuervain's tendinitis on the right side. He recommended that petitioner proceed with the right carpal tunnel release.

On 4/4/13 petitioner underwent a right carpal tunnel release performed by Dr. Watson. On 4/18/13 petitioner underwent a left carpal tunnel release performed by Dr. Watson. Petitioner followed up post-operatively by Dr. Watson. On 5/1/13 petitioner returned to Dr. Watson with complete resolution of her carpal tunnel symptoms. He prescribed a course of physical therapy at that time. He continued her off work.

On 7/3/13 petitioner followed-up with Dr. Watson with a three week history of right sided wrist pain dorsally along the extensor tendons and pain that is worse with power gripping. She reported that she was working and doing alot of heavy labor that contributes to her troubles. Dr. Watson noted that petitioner did not have any carpal tunnel symptoms. He examined petitioner and assessed a recurrent extensor tendinitis of the wrist. He prescribed additional therapy which petitioner began that day. He also injected the region with cortisone.

On 7/16/13 the evidence deposition of Dr. Watson was taken on behalf of petitioner. He stated that he first treated petitioner for left sided thumb pain on 5/14/09, and she also had arthritis at the base of her thumb. He performed a release of her trigger thumb and injected her arthritic thumb. She did well until 7/13/09 when she came in with left upper extremity pain he thought was cervical radiculopathy. A nerve conduction study performed at that time revealed left carpal tunnel syndrome. His next visit with petitioner was when he saw her on 10/16/12.

Dr. Watson opined that petitioner's work responsibilities at the minimum aggravated her left carpal tunnel syndrome, and may have caused or aggravated her right carpal tunnel syndrome. Dr. Watson was of the opinion

that from 2009 to 2012 petitioner did not suffer from diabetes. He further opined that her DeQuervain's tenosynovitis was causally related to her work duties. He stated that repetitive hand work, gripping or any other disease may cause swelling of the carpal tunnel tendons. He said the same was true for DeQuervain's tenosynovitis.

On cross examination Dr. Watson opined that carpal tunnel is more prominent in middle aged women and patients with diabetes, thyroid disorders, amyloidosis, cancer, chemotherapy, trauma, those that smoke cigarettes, and obesity. Based his BMI number he assessed that petitioner was obese, and also stated that petitioner was in fact a diabetic and takes a number of medications for that condition. He further opined that petitioner has other neurologic problems in her feet caused by her diabetes. Dr. Watson opined that the more risk factors one possesses the more likely they are to have idiopathic carpal tunnel. Dr. Watson admitted that he did not know when petitioner performed the spreading of asphalt she reported in her intake form. Dr. Watson testified that petitioner painted a picture for him that things got worse when they became short handed at work and she was having to do more of the work herself. He noted that she stated that that is what brought on the increased work and pain. Dr. Watson noted that petitioner also had bilateral trigger digits of both long fingers in the past. Dr. Watson admitted that his opinions are based in part of medical and oral history provided by petitioner and if those histories were incomplete his opinions could change.

On redirect examination Dr. Watson opined that part of his opinion is based on petitioner telling him that the increased workload in her opinion caused her hands to hurt more. On recross examination Dr. Watson agreed that the longer a person has diabetes the more complications they are going to have. He further stated that if diabetes is not well managed you can get complications early.

On 1/29/14 the evidence deposition of Dr. Koo, a plastic surgeon, was taken on behalf of respondent. She testified that she treats people with carpal tunnel and trigger finger disorders. Dr. Koo opined that diabetes can cause peripheral neuropathies such as carpal tunnel. She was also of the opinion that petitioner had it severe enough that her left colon was not working and she needed a colectomy, and had neuropathy of her feet. Dr. Koo was of the opinion that even if one does not develop calluses with heavy laborer due to glove wearing, she has always seen the skin of a laborer having a different tactile feel, and petitioner's did not have that. She opined that petitioner's bilateral carpal tunnel syndrome and trigger digits were primarily related to her obesity and insulin-dependent diabetes.

On cross-examination Dr. Koo stated that her understanding was that petitioner's carpal tunnel symptoms started in 2011 and increased until she sought treatment. Dr. Koo testified that petitioner never told her she used a jackhammer on a regular basis or had to lift 50-100 pounds regularly. She stated that petitioner was very

detailed in description of guiding pipes, using the trowels and smoothing, and that perhaps a lot of work might be flagging. She noted that petitioner did not go into any detail about how often she would use jackhammers, crowbars, shovels, rakes and other things. Dr. Koo opined that petitioner had such significant diabetes that no matter what occupation she performed, no matter what activity, she would go on to have carpal tunnel and require surgical intervention.

On cross-examination Dr. Koo testified that based on petitioner's history she was unsure if petitioner did everything on the job description or only portions of it. She noted that petitioner described doing some duties but not all. She opined that petitioner's soft hands and long acrylic nails were not consistent with someone who did forceful labor with tools 75% of the time. Dr. Koo opined that just because petitioner had symptoms when she worked and did her hair that does not mean those activities caused or aggravated her condition that in her opinion was caused by petitioner's diabetes. Dr. Koo was of the opinion that breaking up activities decreases the risk of developing carpal tunnel syndrome. Dr. Koo opined that petitioner had many different types of activities that she performed.

Robert Painter, worked with petitioner for respondent from 2003-2011. He testified that he was her labor foreman. He also testified that he was petitioner's steward before he became her foreman. While he worked with petitioner she would shovel black top, move filing cabinets, dig ditches, pour concrete, and move furniture. He testified that petitioner was a good employee that did everything she was supposed to. He also testified that she worked better than some guys that worked for him. He estimated that 90% of the job required heavy labor. Painter knew petitioner had problems with her hands and that she told him that they hurt all the time. He testified that he told her to go to the doctor but she did not want to. He testified that the laborers wore hardhat, boots, and safety glasses.

Robert Williams was called as a witness for respondent. He worked on and off with petitioner for 17 years when they worked for other employers and while they worked for respondent. He only worked with petitioner for the past 15 months for respondent. He testified that petitioner was able to pull her own weight. While he was with respondent for the past 15 months, petitioner was his foreman. He testified that she led by example and would patch roads, pour concrete, pack sakrete, move furniture, and do a lot of jackhammering. Williams testified that petitioner was a working foreman and 90% of their work is heavy labor and she does it all. He testified that a laborer can work with the carpenters or other laborers and it changes every day. He testified that the laborers use different tools for different things, and use their hands and backs daily. He also stated that laborers pour concrete. Williams testified that all jobs require constant use of hands with grasping and flexion of the wrist.

Currently, petitioner is able to close her hands. She testified that they are better than they were. She testified that her hands still swell because she retains water. She testified that she has not gotten all her strength back in her hands following surgery.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to her bilateral hands due to repetitive work activities, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

Petitioner alleges 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 10/16/12.

Petitioner has been a laborer for respondent since 2003, and labor foreman since 2012. Petitioner testified that from 2003 to 2008 she shoveled asphalt to cover the lakeside roads by hand. She testified that in 2011 this work slowed down because the staff was reduced. In 2011 petitioner started doing building work, moving heavy desks, relocating offices to different buildings, roofing different buildings, delivering shingles and applying them to the roof, and pouring concrete and using rebar in the meter pit holes. Petitioner also testified that for the entire time she worked for respondent she shoveled snow by hand and using a snowblower at the security property, management center, annex and training center.

Although petitioner listed the various duties she performed she did not provide the frequency, duration, and manner of performing each duty, other than stating that she performed heavy labor 90% of the time. The arbitrator also found it significant that petitioner testified that she performs several different task per day and uses several different tools each day. She specifically testified that her duties changed from day to day.

Petitioner testified that she started having problems with her hands in 2009. At that time she was experiencing discomfort in her hands. She testified that from 2009 to 2012 her symptoms worsened.

Starting in about 2004 petitioner was diagnosed type 2 diabetes mellitus. Petitioner testified that she is insulin dependent and has not always had her diabetes controlled.

On 9/17/09 petitioner was diagnosed with left carpal tunnel syndrome following an EMG that was performed after petitioner reported pain radiating from her neck to her hand with associated numbness. Dr. Watson recommended a left carpal tunnel release, and also noted that petitioner had a history of diabetes mellitus. Petitioner did not undergo the recommended surgery.

Petitioner did not seek any further treatment until she was referred to Dr. Speck on 8/11/11 because of poorly controlled type 2 diabetes mellitus that was complicated by sensory neuropathy. Petitioner admitted that she had a glucose meter at home but did not test regularly. At that time Dr. Speck diagnosed petitioner with Type 2 diabetes with neurological complications uncontrolled; type 2 diabetes mellitus requiring insulin; diabetic sensory neuropathy; and thyroid hormone in the past. Petitioner was prescribed a new insulin program at that time. Petitioner continued with diabetic related problems including a blood transfusion. From February 2012 to May 2012 petitioner's type 2 diabetes was uncontrolled with glucose readings in at least the 300's.

On 10/16/12 petitioner presented to Dr. Watson with bilateral hand pain with numbness and tingling that had become constant. At that time, based on the history petitioner provided, Dr. Watson was of the opinion that petitioner did a large variety of different types of work that all involved significant power gripping. He noted that petitioner stated that her symptoms persisted most recently over the past 6 months and had become much

more intense. The arbitrator finds it significant that during this period petitioner's type 2 diabetes mellitus was extremely uncontrolled.

The arbitrator notes that petitioner has identified her accident date at 10/16/12, the date she presented to her physician and noted that the pain, numbness and tingling in her hands had become constant.

Following this period of uncontrolled type 2 diabetes mellitus petitioner underwent repeat nerve conduction studies that revealed bilateral carpal tunnel syndrome, right greater than left. The arbitrator notes that in 2009, petitioner only tested positive for left carpal tunnel syndrome.

Respondent had petitioner examined by Dr. Koo. Petitioner reported that her hands had been losing strength for a little over a year or even two years. She reported that her symptoms were ongoing before she was promoted for foreman. Petitioner reported that from 2003 to 2008 she pulled asphalt 4-5 days a week, 8 hours a day, but now only does it periodically, and only 1-2 times a week, for a total of 4-6 hours. She stated that she spread concrete on her knees with a trowel or other equipment, with both hands rocking back and forth, primarily on the first five years of her employment. She also reported that she uses crow bars, shovels, and rakes to dig meter pit holes, but then testified at trial that she does not dig out the holes, but rather put in the rebar and concrete, during the first five years of her employment. She testified in the interim she worked with an operator putting in 10" diameter culverts that are 20' long, and carried pipes and lifts and grabs 8 hours a day. Petitioner then went on to report that most recently she had been moving offices, which required primarily lifting boxes onto a cart and loading them on a truck before unloading them. She reported that working with asphalt in the parking lot, and milling, is more intermittent now. Petitioner testified that from 2003-2008 her work duties were more physical than they are now.

Based on the work history petitioner provided, the fact that petitioner is an insulin dependent type 2 diabetic with peripheral neuropathy affecting her feet, and is obese, Dr. Koo was of the opinion that petitioner's bilateral carpal tunnel and bilateral trigger digits were primarily related to petitioner's obesity and insulin dependent diabetes. Dr. Koo was of the opinion that while the type of work petitioner described would be considered hard manual labor, she did not have a good grasp on how much actual hard repetitive grasping petitioner performed. Dr. Koo was of the opinion that working with trowels, jackhammers, and smoothing out tar and cement would certainly be repetitive activities that could cause bilateral carpal tunnel syndrome if they were performed on a daily basis for at least 4 hours per day for 2 1/2 years, but was of the opinion that she did not have an accurate assessment of exactly how much hand intensive labor petitioner did over the past 2 years prior to her symptoms developing. She noted that petitioner gave a history of performing manual labor in the first few years of her employment with respondent, but noted that petitioner's symptoms did not really start until

the last 2 1/2 years. Dr. Koo was of the opinion that it would be impossible for petitioner to have developed carpal tunnel syndrome or trigger digits as a result of her work for respondent. She was further of the opinion that petitioner's own systemic problems would be the main cause and contributory factors of her bilateral carpal tunnel syndrome and trigger digits.

The arbitrator notes that the laborer job description dates 6/6/12 identified a multitude of functions that petitioner performed as part of her job. These functions included assisting carpenters and operating engineers with road work, culvert work, concrete work, jackhammering, and moving office furniture and equipment; assisting carpenters with jobs, material pick-up and delivery to job sites; cleaning up job sites throughout duration of job; maintaining utility roads and parking lots, cleaning and replacing culverts and ditches throughout the Lake area; digging footing and post holes for various jobs such as lane signs, bumper rails, fencing, and footings for buildings or concrete retaining walls; flagging and installing construction zone signs on road jobs by following the Utility Safety manual on Road Safety; unloading materials from various vendors and stacking material in a neat and orderly manner at the job site or the shop, and removing snow from PMC, PMC Annex, and Security sidewalks; notifying supervisor of locations for underground utilities before digging; and other duties as assigned. As a laborer petitioner used many tools including broom, shovels (all types), sledgehammer, pick, wheel barrow, traffic flagging pole, jackhammer, chain saw, acetylene torch, mortar mixer, vibrator, tamper, tar kettle, auger, crow bar, wrecking hammer, wrenches, screwdrivers, grinders, rake, trowel and post hole differ. The percentage of time spent grasping things was 85%, but no specific details regarding what she grasped and how tight she grasped things was identified. The percentage of time spent doing repetitive motion was 30%, but the specific activities she performed repetitively, and when she performed these activities was also not identified.

The job description for a laborer foreman dated 6/11/12 which petitioner testified she began sometime in 2012 also indentified a multitude of activities that were performed including coordinating work duties for the journeyman laborers, developing material lists, and performing regular Journeyman Laborer duties. The job duties included performing journeyman laborer duties and responsibilities such as stock piling lumbar & other materials as needed to do jobs; wheel barrow concrete; traffic flagging; jackhammering; digging post holes; using chain saws, concrete vibrator and tar kettle; wrecking and cleaning work areas; pouring concrete; moving furniture and office equipment; and removing snow at PMC, PMC Annex, and Security at the Plant 75% of the time. The remaining time was spent assisting superintendent in reviewing work orders and assigning daily work for union laborer personnel and coordinates work with other trades including operators, carpenters, painters, and plumbers; advising supervisor of materials and the amount needed (ie., concrete, rock, patch, etc) for jobs;

periodically inspects job sites; assists laborers in preparing daily sheets; and performing other duties as assigned. The tools she used to perform these duties were a broom, shovels (all types), sledgehammer, pick, wheel barrow, traffic flagging pole, jackhammer, chain saw, acetylene torch, mortar mixer, vibrator, tamper, tar kettle, auger, crow bar, wrecking hammer, wrenches, screwdrivers, grinders, rake, trowel and post hole differ. The percentage of time spent grasping things was 55%, but no specific details regarding what she grasped and how tight she grasped things was identified. The percentage of time spent doing repetitive motion was 85%, but the specific activities she performed repetitively, and when she performed these activities was also not identified.

On 3/25/13 petitioner presented to Dr. Watson with new complaints of severe deQuervain's tendinitis on the right, in addition to her persistent bilateral carpal tunnel syndrome.

Dr. Watson was of the opinion that petitioner's work responsibilities, at the minimum, aggravated her left carpal tunnel, and may have caused or aggravated her right carpal tunnel syndrome. He also opined that petitioner's DeQuervain's tenosynovitis was causally related to her work duties. This opinion was based in part on Dr. Watson's belief that from 2009 to 2012 petitioner did not suffer from diabetes. The arbitrator finds this belief is totally inconsistent with the credible medical records that show petitioner had type 2 diabetes mellitus for 10 years that was insulin dependent and was uncontrolled during this period and had resulted in peripheral neuropathy.

During his deposition Dr. Watson opined that carpal tunnel is more prominent in middle aged women and patients with diabetes, thyroid disorders, amyloidosis, cancer, chemotherapy, trauma, those that smoke cigarettes, and obesity. Based on the BMI number he assessed that petitioner was obese, and also stated that petitioner was in fact a diabetic and takes a number of medications for that condition. He further opined that petitioner has other neurologic problems in her feet caused by her diabetes. Dr. Watson opined that the more risk factors one possesses the more likely they are to have idiopathic carpal tunnel. Dr. Watson admitted that he did not know when petitioner performed the spreading of asphalt she reported in her intake form. Dr. Watson testified that petitioner painted a picture for him that things got worse when they became short handed at work and she was having to do more of the work herself. He noted that she stated that that is what brought on the increased work and pain. Dr. Watson noted that petitioner also had bilateral trigger digits of both long fingers in the past. Dr. Watson admitted that his opinions are based in part of medical and oral history provided by petitioner and if those histories were incomplete his opinions could change.

Dr. Watson opined that part of his opinion is based on petitioner telling him that the increased workload in her opinion caused her hands to hurt more. Dr. Watson agreed that the longer a person has diabetes the more

complications they are going to have. He further stated that if diabetes is not well managed you can get complications early.

During her deposition Dr. Koo stated that petitioner was very detailed in her description of guiding pipes, using a trowel and smoothing concrete, and that perhaps a lot of her work involved flagging. She noted that petitioner did not provide any detail regarding the frequency with which she used jackhammers, crow bars, shovels, rakes and other things. Dr. Koo opined that petitioner's diabetes was so significant that no matter what occupation she had, no matter what activities she performed, she would go on to have carpal tunnel and require surgical intervention. Dr. Koo opined that petitioner did not explain what duties she performed, what duties she did not perform, and the percentage of time she spent doing each activity. Dr. Koo opined that petitioner had many different types of activities that she performed and that breaking up these activities decreased the risk of developing carpal tunnel syndrome.

Even Painter, her supervisor listed a multitude of activities petitioner performed that included shoveling black top, moving file cabinets, digging ditches, pouring concrete, and moving furniture. Painter did not testify as the frequency and duration petitioner performed these tasks. Williams, a laborer on her crew, testified that petitioner would patch roads, pour concrete, pack sakrete, move furniture, and do a lot of jackhammering. He also testified a laborer can work with the carpenters or other laborers and it changes every day. He testified that the laborers use different tools for different things, and use their hands and backs daily. He also stated that laborers pour concrete.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands due to repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 10/16/12.

In order for the petitioner to prove a repetitive trauma injury 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. Although petitioner testified regarding the work activities she did while she worked for respondent, the record contains many different histories regarding when petitioner performed specific work activities, and does not include the frequency, duration and manner of performing these activities. Based on the totality of the evidence the arbitrator finds the petitioner performed a multitude of varied work duties with a multitude of various tools. When petitioner actually performed these duties, the frequency with which she performed then, the duration she performed then and the manner in which she performed them was not

provided. The arbitrator also finds it significant that petitioner, Painter and Williams all testified that the duties they performed varied from day to day, and the tools they used for these specific duties also varied.

In addition to lack of details regarding the job duties she performed, as well as the frequency, duration and manner in which she performed these duties, the petitioner was obese, had high blood pressure, and insulin dependent type 2 diabetes mellitus for ten years that was uncontrolled most of the time, and resulted in peripheral neuropathy in her feet. The arbitrator also finds it significant that when petitioner presented to Dr. Watson on 10/16/12 with bilateral hand pain with numbness and tingling that had become worse over the past 6 months, she failed to mention that during this period she was treating with Dr. Speck for uncontrolled type 2 diabetes mellitus that was insulin dependent, and resulted in a blood transfusion during that period and blood glucose levels in excess of 300.

In order to prove an injury due to repetitive work activities, it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. In the case at bar it is clear that both Dr. Koo and Dr. Watson did not have a detailed and accurate understanding of petitioner's work activities. The arbitrator bases this on the fact that work activities petitioner testified to at trial, and provided to Dr. Koo and Dr. Watson varied.

The arbitrator finds the opinions of Dr. Koo more convincing than those of Dr. Watson based not only on the failure of petitioner to provide Dr. Watson with a detailed and accurate understanding of her work activities, but also the fact that Dr. Watson's opinions are based on an inaccurate belief that petitioner did not suffer from diabetes from 2009 to 2012. The arbitrator notes that during this period petitioner's diabetes was uncontrolled and resulted in many health complications for petitioner including peripheral neuropathy in her feet and a blood transfusion, which is totally inconsistent with the evidence Dr. Watson relied in formulating his opinions.

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 BENEFITS ARE IN DISPUTE?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Based on the arbitrator's finding that petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands due to repetitive work activities that arose out of and in the course of her employment by respondent that manifested itself on 10/16/12, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Javier Robles,
Petitioner,

vs. NO: 10 WC 41544

National Tire & Battery,
Respondent.

15IWCC0795

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 the accident, temporary total disability, permanent partial disability, medical expenses, notice and penalties and attorneys' fee and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed, November 13, 2014 is hereby affirmed and adopted.

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: OCT 2 8 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-10/27/15
jdl/wj
68

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Javier Robles
Employee/Petitioner

v.

National Tire & Battery
Employer/Respondent

Case # **10** WC **41544**

Consolidated cases: **N/A**

15IWCC0795

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Falcioni**, Arbitrator of the Commission, in the city of **Waukegan**, on **October, 23, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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. [x] Other **Respondent credit for medical paid ($3,887.44)**

FINDINGS

On **September 20, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**14,854.32**; the average weekly wage was $**285.66**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **2** dependent children.

Petitioner ***has not*** 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 $**3,887.44** for other benefits, for a total credit of $**3,887.44**.

Respondent is entitled to a credit of $**N/A** 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.

Richard E Dahm
Signature of Arbitrator

November 5, 2014
Date

NOV 13 2014

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

BEFORE THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS

JAVIER ROBLES,	)	
	)	
Petitioner,	)	
	)	No. 10 WC 41544
v.	)	
	)	Arbitrator Robert Falcioni
NATIONAL TIRE & BATTERY,	)	
	)	
Respondent.	)	15IWCC0795

MEMORANDUM OF DECISION OF ARBITRATOR

I. STATEMENT OF FACTS

TESTIMONY OF PETITIONER

The petitioner was employed by the respondent as a Tire Technician on September 20, 2010; he had been in this position for at least 12 years. As a Tire Technician, the petitioner's primary job was to remove and install tires. While not working on cars, the petitioner would organize the warehouse. This entailed stocking tires and batteries manually. The petitioner also changed flat tires and performed oil changes.

The petitioner testified as to the process of changing a tire and installing a tire. He indicated that he would begin by lifting the car up on a rack 6-8 inches from the floor. He testified that he then had to bend over to remove the nuts from the tire with an air gun and remove the tire with his hands. The petitioner did not wear gloves while using the air gun.

Once a tire was removed, the petitioner would roll it to a machine that removed the tire from the rim. He would lift the tire approximately 30 inches and lay the tire flat on the machine. He indicated that he would adjust the machine to remove the tire by using a bar tool and pedals to make the machine turn. He testified that he pushed the tire with his body and hands to get the tire off of the rim.

The process of installing a tire began with lifting a tire approximately 30 inches onto a balancing machine. This process entails placing weights on a tire with a special hammer.

Once the tire is balanced, the petitioner lifts it and carries it to a vehicle for installation. He testified that he installed nuts and tightened them with an air gun. The petitioner testified that he used a torque wrench to ensure that the proper amount of torque was applied to the nuts of the tire.

As far as the Arbitrator can determine from the sometimes confusing testimony, Petitioner stated that he worked on no more than 8 cars per day.

The petitioner testified that he began to feel numbness in all of the fingers of his left hand, thigh pain, and back pain in September 2009. He testified that he "definitely" thought it was work related at that time.

On September 20, 2010 the petitioner noticed pain in his back and the left hand. The petitioner testified that he told his supervisor that he had pain his legs on September 20, 2010.

The petitioner testified that he returned to work full duty for the respondent on January 22, 2011. He continued working full duty for the respondent for two years. He testified that he is currently working for Potbelly's. He has not seen a doctor since January 2011.

The petitioner did not testify as to ever experiencing cervical pain, left elbow, or right upper extremity pain.

MEDICAL EVIDENCE

On September 20, 2010, the petitioner was seen by Dr. Mohamed Malas (chiropractor). The petitioner reported that he had been having low back pain for "almost one year." The petitioner also complained of a two week history of left hand numbness. Dr. Malas diagnosed the petitioner with carpal tunnel syndrome and lower back pain. An MRI scan of the back was recommended, and the petitioner was authorized off of work for two weeks. The petitioner was advised to consult a neurologist. Dr. Malas recommended chiropractic treatment three times per week.

Between September 20, 2010 and October 20, 2010, the petitioner attended 14 sessions of physical therapy at Family Medical & Chiropractic Center.

An MRI scan of the lumbar spine performed on September 27, 2010 was read by the radiologist to reveal disc bulging at L4-5 and L5-S1.

On referral from Dr. Malas, Dr. Bassam Osman performed an EMG/NCV on October 2, 2010. This test was read by Dr. Osman to reveal mild bilateral carpal tunnel syndrome, a bilateral C7-C8-T1 radiculopathy, and a right L4-L5-S1 radiculopathy.

Dr. Malas authorized the petitioner off of work for two weeks on October 2, 2010.

On October 9, 2010 Dr. Malas advised the petitioner to consult a neurosurgeon for his back pain.

The petitioner was seen by Dr. Osman on October 9, 2010. He assessed the petitioner with a lumbar and cervical radiculopathy, cervical and lumbar sprain and strain, and carpal tunnel syndrome. The petitioner was advised to continue conservative management with physical and chiropractic therapy.

On October 18, 2010 Dr. Malas authorized the petitioner off of work for two weeks.

Between October 22, 2010 and November 19, 2010, the petitioner attended 13 sessions of physical and chiropractic therapy at Family Medical & Chiropractic Center.

On November 8, 2010 Dr. Malas released the petitioner to return to work with light duty restrictions.

On November 11, 2010 the petitioner was seen for an IME with Dr. Martin Lanoff. Dr. Lanoff testified by way of evidence deposition.

Dr. Osman saw the petitioner on November 15, 2010. Continued treatment by way of conservative management with physical and chiropractic therapy was recommended.

On November 19, 2010 Dr. Malas recommended a month long work conditioning program and a consult with a neurosurgeon.

The petitioner was seen by Dr. Malek on November 22, 2010. He diagnosed the petitioner with repetitive motion injury, left ulnar neuropathy, left carpal tunnel syndrome, bilateral lumbar radiculopathy, clinically and lower lumbar distribution with preponderance of right-sided symptoms. The doctor opined that the petitioner would benefit from a caudal epidural steroid injection and right L4-5, L5-S1 transforaminal for his inflammation. He was not a candidate for surgical intervention as the discs were well hydrated and the height was maintained. The doctor also recommended an elbow splint and wrist splint for his arms with medication as needed. The petitioner was to complete a course

of therapy followed by a conditioning program. The doctor kept the petitioner off work.

The petitioner was seen by Dr. Malas on November 27, 2010. Dr. Malas diagnosed the petitioner with a left ulnar neuropathy, left carpal tunnel syndrome, bilateral lumbar radiculopathy, and EMG consistent with bilateral carpal tunnel syndrome and a bilateral cervical radiculopathy and lumbar radiculopathy. Dr. Malas authorized the petitioner off of work and recommended lumbar steroid injections and work conditioning.

Between November 22, 2010 and January 17, 2011, the petitioner attended 18 sessions of work conditioning at the Family Medical & Chiropractic Center.

Dr. Michael Malek administered an epidural steroid injection at the Fullerton Surgery Center on December 17, 2010.

On January 10, 2011, the petitioner had an appointment with Dr. Michael Malek and reported that his symptoms were much improved and he was almost 90% better. The petitioner was to complete his work-conditioning program which would be followed by a functional capacity evaluation at which point he would probably be placed at maximum medical improvement. The petitioner was continued off work until he was reassessed after his functional capacity evaluation.

The petitioner underwent a Functional Capacity Evaluation on January 21, 2011 with chiropractor Mohamed Malas.

On January 24, 2011 Dr. Malas released the petitioner to return to work without restriction.

TESTIMONY OF DR. MALAS

Dr. Malas, chiropractor, testified that the petitioner's lower back problem was "due to his work..." He testified that the petitioner "change tire---heavy tire. Okay? And that's fast, really fast. I'm not positive how much the amount. But he say there's a lot of competition, it seemed like, in this company. You have to do it fast."

Counsel for petitioner questioned Dr. Malas as follows:

Q: Is there anything about the movements, when he's changing those tires, which would create or cause the problems?

A: Right. Yeah. You know, I mean, you went to some mechanic, you know how they change the tire. There is always---you have to pick up the tire from the

floor. The tire ---the car and the jack, the car and the jack. You have to pick up the tire and put the tire on the car.

When questioned by counsel for petitioner as to what specific factors formed the basis of his opinion, Dr. Malas testified as follows:

"Based on----he worked there for ten years. He came, no problem, no back problem... And then he starts suffering of the back pain and radiculopathy down ---the numbness down the legs. And as I describe to you before, what the patient do, he do kind of lifting with a bending of the back and twisting, which is, we know—we know this puts a lot of stress---bending and twisting with weight put a lot of stress on the disc, and eventually will cause injury.

This Motion has lifting, right? Lifting and twisting, the same motion. So you have heavy stuff. You talk about, maybe, close to 100 pounds, up and put it down. So you are lifting---motion lifting and putting that, twisting. So do this, eventually---and you do it fast, you do it fast. Eventually this will—this gentlemen will hurt his back ---hurt his disc. And that's what MRI show up."

Relative to whether the left carpal tunnel syndrome he diagnosed was caused by the petitioner's work activities, Dr. Malas testified as follows:

"Carpal tunnel is caused by his job. There is a lot of literature say using air gun—using the air gun is cause carpal tunnel. We know that. That's why there is a specific glove, they use it, you know, the workers. They give them specific gloves to wear to loosen---to loosening that vibration of the air gun."

He further added:

Carpal tunnel syndrome is obviously from that air gun and from grabbing. So he has to grab all the time. He has to grab a tire and put in on the car. So we know for the fact that the grabbing is caused carpal tunnel, repetitive grabbing—repetitive grabbing cause carpal tunnel. We know that for a fact."

Dr. Malas provided no opinion testimony as to diagnosis or causality relative to the cervical spine, the left elbow, or the right upper extremity.

On cross examination, Dr. Malas admitted that he didn't know how many hours a day the petitioner had to change tires, how much the tires weighed, or how many tires he had to grab in any given day. Moreover, Dr. Malas believed that the petitioner was required to lift tires at least up to his waist. Dr. Malas indicated that he didn't know how often the petitioner had to bend his back at work.

Dr. Malas also admitted that he didn't know how many hours a day that the petitioner used the air gun, that he didn't know what degree of force was

required to grip or squeeze the gun, or the extent of force utilized by the petitioner's hand when he grabbed at work. He also admitted that he didn't know the extent to which the petitioner flexed and extended his wrists and hands.

TESTIMONY OF DR. MARTIN LANNOFF

Dr. Martin Lanoff, physician board certified in both physical medicine and rehabilitation as well as pain medicine, examined the petitioner on November 11, 2010. The petitioner indicated that he had back pain and left hand pain for quite some time, and that he just reported it on September 20, 2010.

The petitioner complained of numbness in the right thigh and in the left fourth (ring) and fifth (pinkie) fingers. Dr. Lanoff noted that these fingers are spared in carpal tunnel syndrome, and that they have nothing whatsoever to do with this syndrome.

The petitioner complained of lower back pain, which Dr. Lanoff noted was localized; meaning it didn't radiate. He testified that the lack of radiation is indicative of no radiculopathy.

Dr. Lanoff testified that he reviewed the MRI films for the MRI scan of the lumbar spine. He testified that it was utterly normal with no abnormalities.

The EMG data was reviewed, and Dr. Lanoff testified that it made no sense. He testified that the EMG reading, which included nine different levels of radiculopathy or pinched nerve, doesn't exist. He testified that the EMG did not show any evidence of radiculopathy from a low back standpoint..

Additionally, he indicated that the EMG data showed no evidence of carpal tunnel syndrome or cubital tunnel syndrome. He testified that he had no idea how the electromyographer in this case diagnosed carpal tunnel syndrome because the raw data was negative for it.

Dr. Lanoff noted that Dr. Malek's diagnosis of cubital tunnel syndrome was made without performing any appropriate physical examination for it, without any history suggesting it, and negative EMG findings.

Dr. Lanoff indicated that either the EMG machine utilized was broken or that Dr. Osman didn't know how to read the data.

Dr. Lanoff testified that a physical examination revealed no abnormalities. He did not appreciate any pathology in the lower back or the hands/wrists. Thus, Dr. Lanoff concluded that there was nothing physically wrong with the petitioner, and that the petitioner's subjective complaints were out of

proportion to the objective findings. He didn't see any pathology related to a work-related activity.

Dr. Lanoff testified that he did not see any need for any further treatment, that the petitioner was capable of full duty work, and that the petitioner was at MMI.

II. CONCLUSIONS OF LAW

C. DID AN ACCIDENT OCCURR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT ?

D. WHAT WAS THE DATE OF ACCIDENT?

The Arbitrator incorporates by reference thereto the findings and statements of fact as set forth above. Based on the record as a whole, the Arbitrator finds that the petitioner did not sustain an accident arising out of and in the course of his employment with Respondent.

Initially, the Arbitrator notes that the petitioner provided no testimony as to ever experiencing cervical pain, right upper extremity pain, or left elbow pain while at work. The Arbitrator further notes that Petitioner testified that he worked on only 8 cars per day maximum, or a total of 32 tires changed over the course of an eight hour day. The Arbitrator finds that this level of work over such a time period is insufficient to have caused a repetitive trauma injury as alleged by Petitioner. All other issues are moot except as set forth below.

O. IS RESPONDENT ENTITLED TO A CREDIT?

The Arbitrator finds that the respondent is entitled to a credit of $3,887.44, representing the amount paid in medical benefits prior to trial.

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

Bruce Radford Jr ,

Petitioner,

vs.

NO: 13WC 10976

15IWCC0796

Safelite Auto Glass,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §(19b) having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of 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 4, 2015, is hereby affirmed and adopted.

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

15IWCC0796

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 $41,600.00. 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: OCT 30 2015
MJB/bm
o-10/26/15
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

RADFORD JR, BRUCE
Employee/Petitioner

Case# **13WC010976**

15IWCC0796

SAFELITE AUTO GLASS
Employer/Respondent

On 2/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0180 EVANS & DIXON LLC
KARIE E CASEY
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bruce Radford, Jr.
Employee/Petitioner

v.

Safelite Auto Glass
Employer/Respondent

Case # **13** WC **10976**

Consolidated cases: **N/A**

15IWCC0796

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **December 5, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0796

FINDINGS

On the date of accident, **March 9, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,960.00**; the average weekly wage was $**480.00**.

On the date of accident, Petitioner was **20** 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 $**7,149.11** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**7,149.11**.

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

ORDER

Respondent shall pay temporary total disability benefits pursuant to Section 8(b) of the Act beginning on March 10, 2013 through December 5, 2014, in the amount of **$320.00 per week** for a period of **90 5/7** weeks. Respondent has paid temporary total disability benefits from March 10, 2013 through September 25, 2013 in the amount of $7,149.11 and shall have a credit for same.

Respondent shall pay reasonable and necessary medical services of $19,577.88, as provided in Section 8(a) and 8.2 of the Act and pursuant to the Medical Fee Schedule. Respondent shall be given a credit for any medical bills that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving the credit, as provided in Section 8(j) of the Act.

Respondent is ordered to provide to Petitioner prospective medical treatment as recommended by Dr. Patricia Hurford, including, but not limited to, the inpatient detoxification treatment program at RIC, as well as outpatient care following the inpatient stay. Following successful completion of this program, Petitioner will be referred to Dr. David Raskas for surgical consultation, and such surgical intervention shall be approved if Dr. Raskas deems the surgery reasonable and necessary to relieve Petitioner of the effects of his lumbar spine injury.

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

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

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

Nancy Lindsay
Signature of Arbitrator

January 29, 2015
Date

ICArbDec19(b)

FEB 4 - 2015

Findings of Fact and Conclusions of Law

The Arbitrator finds:

Petitioner underwent a prior low back surgery on April 19, 2010 -- a right L5-S1 microdiskectomy with partial facetectomy performed by Dr. Leonard. Petitioner was seventeen years old. According to records, Petitioner had a one year history of progressive back pain and right leg pain he described as sharp and electric, radiatinig from his buttock down into his right heel. As of July 16, 2010 he was undergoing nerve root injections per Dr. Barry Jones due to ongoing lower back pain and right lower extremity pain greater than the left, with scar tissue along his incission. It was believed Petitioner's problems were probably due to scar tissue more noticeable due to Petitioner's thin frame. The doctor felt it would settle down and resolve itself over time. Petitioner was noted to be on pain medication including oxycodone and Neurontin for discomfort. It was easing his movement but he was still in chronic pain. Possible repeat surgery was discussed but it would be more extensive. Petitioner was interested as school and work were forthcoming. Petitioner and his mother were to call with questions or concerns. (RX D, RX E)

Dr. Jones' records are found in Respondent's Exhibit "E." He began working with Petitioner in 2010 regarding Petitioner's ongoing back and leg pain issues. In his June 3, 2010 note Dr. Jones noted Petitioner had been suffering from debilitating low back pain for approximately a year and a half. Therapy hadn't helped. Tylenol, ibuprofen and Naproxen provided no relief. Petitioner reported that the previous fall the pain had become so bad that he began buying pain pills from kids at school. His father had begun giving his pain medication beginning in January or February of 2010. While Petitioner had undergone surgery with Dr. Leonard, he was reporting increasing low back pain involving both sides and intermittent radicular symptoms into the legs. Petitioner was taking hydrocodone 10/325, three on a good day and four on a bad day. Petitioner reported a tendency to want to lie down and be away from people when he was hurting. He reported trouble sleeping. Petitioner denied any weakness in his legs or bowel or bladder problems. Occasionally, he hears a pop in his back but no associated pain. He was also experiencing hopelessness about his pain and was feeling troubled by not being active. Petitioner hadn't been fishing for weeks and reported being active as a boy, working on cars, and holding down a job while going to school. Dr. Jones felt some of Petitioner's persistent pain might be related to the presence of a non-excised disc. There could also be inflammatory changes present and related post-surgical changes. Petitioner's adjustment disorder and depressive symptoms and irritability were related to the change in his activity, the persistence of his pain and the long duration of his pain in general. Petitioner was placed on additional medication and counseled on their use. He was also given an epidural. (RX E)

Petitioner continued to treat with Dr. Jones. In the January 5, 2011 progress note Dr. Jones noted that Petitioner was still experiencing significant low back pain and radicular pains radiating down into his feet bilaterally. Petitioner's back pain was more constant and common than the radicular complaints. They were reportedly somewhat intermittent but fairly frequent. Petitioner's pain reportedly varies significantly, with some days worse than others. Petitioner reported waking up more often in the middle of the night and having trouble sleeping. He reported the same amount of numbness on each foot. Petitioner was in a home construction class at school which involved a fair amount of significant labor. Petitioner reported worsening pain

15IWCC0796

with long periods of sitting, standing, or repeated bending. Resting, lying down, and using a heating pad and pain meds helped. Petitioner was taking 10 oxycodone tablets per day. He was showing some side effects (nails and dental work) the doctor attributed to the previous use of Neurontin (which Petitioner had been off of for two months). Petitioner reported stiffness in his back when he lies down and gets up in the morning and a tendency to have more radicular pain in his feet. Petitioner's diagnosis was lumbago associated with degenerative disc disease and a history of a bulging L5-S1 disc status post right L5-S1 microdiscectomy ten months earlier. Petitioner also had bilateral radiculopathy suggestive of S1 and associated numbness along the distal lateral border of each foot. Other back factors could not be ruled out. The feeling that Petitioner was relieving pressure in his very low back when he flexes his spine sounded like the disc was still bothering him as do the radicular symptoms. His anxiety and depression seemed better with Celexa.

Dr. Jones planned to keep Petitioner on the oxycodone which he noted Petitioner was using to a lesser degree in recent months as he was able to ignore/cope better with the pain. He was also given a prescription for pregabalin. Petitioner and his mother expressed interest in another opinion from a neurosurgeon and they thought they might have him evaluated at Washington University. Dr. Jones noted he would be leaving Washington University and moving to the Cleveland Clinic so he felt Petitioner's pain management needed to be transferred to an adult pain management doctor. (RX E)

Petitioner was hospitalized at Children's Hospital in mid March of 2011 after having experienced jarring back pain going down stairs. In a note dated March 16, 2011 Dr. Jones noted he had spent over an hour interviewing and counseling Petitioner. Noting that a relative had brought up "concerns," Dr. Jones reviewed Petitioner's history. He noted that due to severe back pain, Petitioner had used oral opiods bought on the street. He denied using injectible opiods. Dr. Jones felt some of Petitioner's behaviors were a form of pseudoaddiction based on his fear of pain and his short-acting oxycodone regimen. Petitioner's pain and mobility were noted to be significantly improved. Dr. Jones noted that he had taught Petitioner to replace smoking with relaxation breathing and imagery of fishing. He was encouraged to be less fearful of his pain. Petitioner was given a note for his PE teacher to allow him to decide which activities to do. In a discharge letter dated March 17, 2011 Dr. Ankney noted Dr. Jones was currently working to arrange outpatient follow-up with a pain service preferably at Barnes Adult Pain Clinic. (RX E)

Petitioner testified that following his surgery, he was referred to a pain management specialist, Dr. Jones, at St. Louis Children's Hospital, who began prescribing him medication on a routine basis. Specifically, Petitioner testified that Dr. Jones prescribed him "Oxycodone 10/325 miligram, 300 tablets per month. There were some, I believe, Valium for muscle spasms. We tried gabapentin, and we may have used Flexeril." He indicated that these medications helped him function on a daily basis, and allowed him to continue working and attend school. (RX3, RX4).

Petitioner testified to, and the medical records also corroborate, that Petitioner had a flare-up of low back pain in 2011 while going down a flight of stairs at home. (RX5). He testified that his medications were temporarily increased, he was placed on bed rest, and he was released within several days. He testified that following this flare-up, he made a good recovery and returned to

work and school. This was also confirmed by the medical records submitted into evidence by Respondent. (RX3, RX4, RX5).

On March 9, 2013, Petitioner was a twenty (20) year old employee of Respondent, a company who replaces glass in automobiles. Petitioner testified at the time of trial, and it was stipulated to by the parties, that on March 9, 2013, he sustained accidental injuries in the course of his employment while installing a windshield on a tractor-trailer. (AX1) Petitioner explained that he set the new piece of glass on top of the motor and climbed on top of the tractor tire and then the motor in order to begin installation. He noted that underneath the hood of a tractor-trailer it's not very clean and usually greasy. Petitioner had to lean forward about two feet to work and as he did so, his right foot slipped out from underneath him. He then pushed the glass forward into the area where it's supposed to go (instead of throwing it down) and, as he did so, he felt a very hard pop in his back followed by extreme pain going down both of his legs. Petitioner testified that he was able to finish the job as there wasn't much left to do after that point, but it was very hard to finish. He then called his dispatcher and advised him of the accident.

Petitioner testified that following the accident, he attempted to continue working. He would do minor things like removing windshield wipers and other small tasks. He recalled a customer asking him why he was limping and he gave him a short summary of it. Petitioner testified he felt badly having been late to arrive at the customer's location and the customer offered to let him sit and wait for another installer to come out because it was evidence Petitioner was in pain. Petitioner did the job as well as another one which was a special order windshield on his own van. However, he ended up calling his father because he was in so much pain and asked him to meet him at the shop that he worked out of. According to Petitioner, it was his father who actually unloaded all of the glass off his truck along with that special order windshield because there was just no way he could do it. It hurt just getting out of the van. Petitioner testified that he couldn't imagine unloading a van with six (6) broken windshields and one good one that you have to really take care of because it is a special order part.

Following the completion of his job duties for that day, Petitioner went home. At that point, he was "most definitely" in pain.

On March 10, 2013, the day after the accident, Petitioner presented to Belleville Memorial Hospital. (PX3). The initial history taken by emergency room personnel was as follows:

> Putting window in semi truck and slipped jolting back having low back pain. (PX3, Belleville Memorial Hospital, 3/10/13).

The history also indicated Petitioner felt a popping sensation in his low back as he tried to keep from falling. Petitioner reported right leg numbness and tingling. It was also noted that Petitioner had a history of back surgery for a herniated lumbar disc, and that he had taken Percocet four (4) hours prior to arriving in the emergency room. *Id.* It was reported that Petitioner's current list of medications included 50 mg of Fentanyl which was administered transdermally, as well as Oxycodone/Percocet. *Id.*

The emergency room physician's impression was "acute low back pain, lumbar radiculopathy, degeneration of lumbar intervertebral disc." Petitioner was also given a new prescription for Oxycodone and advised to continue his current medications. *Id.* A CT scan of Petitioner's lumbar spine without contrast was also performed, which showed central canal stenosis associated with a broad-based disc bulge at L5-S1. *Id.* It was indicated that Petitioner could return to work but with restrictions of no lifting until his symptoms improved or he was able to follow up with an orthopedic specialist. *Id.*

Several days later, on March 12, 2013, Petitioner returned to Dr. Naheed Bashir, the pain management physician who had been following Petitioner and prescribing him medication prior to the March 9, 2013 injury. (PX4). On that date, Dr. Bashir noted that Petitioner presented for a follow-up of low back pain, but noticed an increase in pain after "lifting glass window for car and felt pop in back,." (PX4, Dr. Bashir, 3/12/13).

With regard to Petitioner's medications, the following was indicated:

NEW
Dilaudid (Hydromorphone HCl Tab 4 MG), 1 TAV Q6-8 HRS PRN for 7 days (quantity: 28 Tablet), refills: NO, prescribed on 12 May 2013
MethylPREDNISolone (Pak) (Methylprednisolone Tab 4 MG Dose Pack), as directed (quantity: 1 Not Specified), refills: NO, prescribed on 12 Mar 2013
CHANGED
Endocet (Oxycodone w/Acetaminophen Tab 10-325 MG), 1 TAB Q 6 HRS PRN for 30 days (quantity 120 Tablet), refills: NO, prescribed on 12 Mar 2013
REFILLED
Cyclobenzaprine HCl (Cyclobenzaprine HCl Tab 10 MG), 1 TAB bid PRN for 30 days (quantity: 60 Tablet), refills: NO, prescribed on 12 Mar 2013
Duragesic-75 (Fentanyl TD Patch 72HR 75 MCG/HR), 1 PATCH Q 3 DAYS for 30 days (quantity: 10 Not Specified, refills: NO, prescribed on 12 Mar 2013. (PX4, Dr. Bashir, 3/12/13).

It is also indicated in Dr. Bashir's notes that Petitioner denied obtaining any narcotics from other physicians, and that if Petitioner was found to be in possession of illicit drugs or was determined to be abusing his prescribed medications, that his pain management program would be terminated. *Id.*

Dr. Bashir also noted that Petitioner's pain had increased following his injury at work, and he recommended an MRI of his lumbar spine. *Id.*

Petitioner underwent a lumbar spine MRI at Wolf Creek Imaging Center on March 13, 2013. The impression was post right microdiscectomy, underlying congenital canal narrowing and slight facet joint hypertrophy as well as a right paramedian protrusions resulting in mild right S1 root compression and mild L4-5 joint hypertrophy. (PX 5)

In a note dated March 15, 2013 Dr. Bashir noted Petitioner was excused from work March 9 - 19, 2013, at which time he was scheduled to be re-examined on whether or not he could return to work. (PX 4)

Petitioner next returned to Dr. Bashir on March 19, 2013 with continued complaints of low back pain following a lifting injury at work. (PX4, Dr. Bashir, 3/19/13). At that point, Dr. Bashir continued to keep him off work. *Id.*

Petitioner signed his Application for Adjustment of Claim in this matter on March 28, 2013. (AX 2)

On April 1, 2013, Petitioner presented to Dr. David Raskas, an orthopedic spine specialist. (PX6, Dr. Raskas, 4/1/13). Dr. Raskas took the following history:

> Bruce Radford, Jr. is a 20-year old male who presents with back pain. The patient was involved in a 3/9/13 work related injury. Prior to this injury however in March of 2010 he had a microdiscectomy at L5-S1 which under the direction of Dr. Leonard at Children's. His complaint prior to surgery was low back pain with a dull to severe low back ache and after the surgery the patient states that he really did not get any better and had developed leg symptoms which his leg symptoms consisted of right buttock pain and right posterior thigh pain which would ensue sporadically. He followed up with his physician. The physician stated that he would need to undergo another surgery however at this time the patient did not want to go under another surgery and the patient underwent rehab. The patient stated that the rehab overall helped minimally transient at best. He was willing to continue with therapy but his pain was marked to severe. He was referred over to a pain management physician and was put on an extensive regime of analgesics and muscle relaxants and ultimately found his way to Dr. Bashir who is the pain management physician who changed his pain regimen and this is his current protocol. Prior to his work related injury which occurred on 3/9/13 the patient was taking Oxycodone, Fentanyl transdermal, Xanax, Cyclobenzaprine and Miratazapine. After his incident the patient was on Dilaudid 4mg.
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> His mechanism of injury which occurred on 3/9/13, the patient was involved in the daily routine that he had done for around 12-13 months. He was a windshield installer on semi trucks. He was solo lifting a piece of windshield weighing 40-50 pounds where he had to navigate onto the front of the truck to install the windshield. His right foot slipped and he was holding the glass into a forward extension of his lumbar spine and of his arms and he felt an instant pop. He was in a mechanical garage. He felt instant pain. He felt right leg pain greater than left leg pain. However his right leg pain was present prior to the incident. However this is a new character of right leg pain which is marked and more extensive. His left leg pain was new since the onset of the incident with a numbness and tingling sensation bilaterally into his calves and bilaterally into his feet. His right leg pain consists of posterior thigh, posterior calf and the third to fifth digits on the right foot. His left side lower extremity pain involves his

anterior thigh, his left shin and the dorsum of his left foot. He states that his pain is a grinding pressure pain that is constant and the character has changed since 3/9/13. Forward flexion decreases his pain. He is having trouble with ambulation, trouble with coordination and balance secondary to pain. He is not complaining of any weakness of his lower extremities. He is primarily a back pain patient with leg symptoms. He states prior to the incident on 3/9/13 status post surgery he had three episodes of urinary incontinence without any initiation response. The patient stated that he would urinate all over himself. This was three times. He has not had any urinary incontinence episodes this past month. *Id.*

Dr. Raskas also noted that Petitioner had a history of depression prior to the 3/9/13 injury secondary to pain, and indicated that Petitioner would "like to get out and do more things and return back to work." *Id.* On physical exam, Dr. Raskas noted an antalgic gait, heel and toe stand, as well as tenderness to palpation at the SI joint on the left, and indicated increased pain with left internal rotation of the hip. *Id.* Dr. Raskas also recorded a mildly positive straight leg raise test on the right with radicular symptoms into the posterior thigh and distal to the right knee. *Id.* It was also noted that extension of the lumbar sacral spine markedly increased Petitioner's pain. *Id.*

Dr. Raskas also reviewed an MRI which was performed on March 13, 2013 at Wolf Creek Imaging Center. (PX5, Wolf Creek, 3/13/13). Dr. Raskas' impression was "post right microdiscectomy underlying congenital canal narrowing and slight facet joint hypertrophy as well as right paramedian protrusion results in mild right S1 nerve root compression with a mild L4-5 facet joint hypertrophy." (PX6, Dr. Raskas, 4/1/13).

Petitioner's assessment was persistent chronic low back pain that has had a lumbar strain with significant aggravation of this condition. Dr. Raskas recommended aquatic therapy, a Medrol Dose pak, and Pecrocet, and advised him to follow up in several weeks. *Id.* He noted, "Today I explained to Mr. Radford and his father that I believe that he has an aggravation of a preexisting condition. I believe his lumbar strain is the cause of significant aggravation of his preexisting post laminectomy syndrome. The aggravation has produced the need for him being off work and the need for the medical treatment that has been recommended so far." *Id.* Dr. Raskas kept Petitioner off work. *Id.*

During this time, Petitioner also continued to follow up with Dr. Bashir from April 2013 to October 2013. (PX4)

Petitioner began a course of physical therapy on April 10, 2013 . (PX 7)

Petitioner returned to Dr. Raskas on April 15, 2013 following two (2) therapy visits. (PX6, Dr. Raskas, 4/15/13). It was indicated that although Petitioner noticed improvement while engaging in therapy, that he was still suffering from paravertebral spasms, as well as limited range of motion in his low back and a short-strided gait. *Id.* At that point, Dr. Raskas recommended that Petitioner remain off work and complete a full course of physical therapy, and that he would be re-evaluated after twelve (12) visits of PT. *Id.*

On May 20, 2013, Petitioner returned to Dr. Raskas with continued complaints of extreme back and leg pain. (PX6, Dr. Raskas, 5/20/13). It was noted that Petitioner's physical exam remained unchanged. *Id.* At that point, Dr. Raskas recommended graduating Petitioner to land physical therapy and to reevaluate him in two weeks to determine if Petitioner could undergo a course of work hardening. *Id.* He also indicated that Dr. Bashir had provided Petitioner with three (3) injections since his last visit in an attempt to treat the aggravation of his pre-existing condition. *Id.* Dr. Raskas continued to keep Petitioner off work. *Id.*

Petitioner's last therapy session was held on June 3, 2013. (PX 7)

Petitioner next returned to Dr. Raskas on June 4, 2013. (PX6, Dr. Raskas, 6/4/13). At that point, it was noted that:

> Bruce returns to the office today. He has tried some physical therapy. He is still miserable with significant back pain. It is giving him a difficult time with sleeping, bending, lifting, twisting; anything of that nature really bothers him a lot. He has tried weaning himself off of some of the narcotics. He has gotten off the Dilaudid. He is only on Percocet and Fentanyl now, and also continues to take Flexeril and Xanax. He went through a trial of physical therapy with Apex Physical Therapy. He has had injections done with his pain management physician under fluoroscopic guidance. *Id.*
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> ...
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> I think in all likelihood, the patient needs a fusion at L5-S1. This could be done through an anterior approach depending on what he would choose. The need for the surgery is related to 2-3 major things. One being the patient's prior surgery; two being the subsequent time and degeneration that has gone on and three being the injury the patient sustained at work. Prior to the injury the patient sustained at work, the patient was able to work and worked for over a year with his existing pain management regimen but now that is no longer effective. I went over the surgery with the patient in detail; discussed the risks of retrograde ejaculation associated with an anterior fusion and rods and screws posteriorly with a posterior fusion. Given the patient's smoking history, I think he would be best to have an anterior fusion with a posterior immobilization, either facet fusion or pedicle screw fixation. Patient was counseled against the ill-effects of smoking and its effect on its back and we will schedule the surgery electively. The patient is temporarily totally disabled until after the surgery. *Id.*

At the request of Respondent Petitioner was examined by Dr. Donald A. deGrange on June 26, 2013. (RX A - dep. ex. 2) Dr. deGrange concluded that Petitioner's mechanism of injury was consistent with a lumbar strain against a backdrop of chronic low back pain. Petitioner was noted to be taking high-dose supraphysiologic narcotic pain medications for three years before the accident. Dr. deGrange saw no causal relationship between Petitioner's current medical condition

and the work accident. He saw no reason for a fusion procedure. "Given [Petitioners] dependence upon narcotic pain medication, any surgical intervention .... would unlikely produce a good outcome." He added that in all likelihood Petitioner required an inpatient multidisciplinary program to wean him from his narcotic dependence. He further found no need for any work restrictions and felt Petitioner had reached maximum medical improvement.

In a note dated July 30, 2013 Dr. Bashir noted that Petitioner had tried to return to work on July 29, 2013 and was unable to perform his work duties due to increased pain. Dr. Bashir noted Petitioner was to refrain from all work duties pending surgery (which was to be scheduled once authorized by his workers' compensation insurer). (PX 4)

The deposition of Dr. David Raskas was taken on October 29, 2013. (PX 9) Dr. Raskas testified that he is a board certified orthopedic surgeon who specializes exclusively in spine surgery. (PX9, Deposition of Dr. Raskas, p. 5-6). Dr. Raskas testified that in addition to his clinical practice as a treating physician, he also performs independent medical examinations in the course of his practice at the request of both plaintiffs and defendants in civil and workers' compensation claims. (*Id.* at 13)

Dr. Raskas testified consistently with his records that his diagnosis for Petitioner was a lumbar strain which caused an aggravation of his pre-existing laminectomy syndrome, and that this condition was attributable to the March 9, 2013 work injury. *Id.* at 7-8. Dr. Raskas testified that Petitioner showed no improvement or progression with physical therapy, and opined that at this point, Petitioner's condition would be considered end stage and would not respond to any further physical therapy. *Id.* at 8. He opined that his current recommendation was for Petitioner to undergo a narcotic weaning program, and if that program was successfully completed, a spine fusion at L5-S1. Dr. Raskas testified that he was aware of Petitioner's prior low back symptoms and treatment, as well as his history of narcotic pain medication use. *Id.* at 9. When asked why he recommended a weaning program, Dr. Raskas testified:

> Well, I think there's a couple of things. First of all, if he demonstrates the ability to adequately wean himself off narcotic medication, shows me that he's going to have the motivation to recover from a spine fusion, do the therapy that's necessary to maximize his overall function. So I think it shows me some level of dedication and commitment of the patient to take charge of his own care and his own well-being. The other thing that it is effective in doing is it helps us control his pain in the perisurgical period, perioperative period, after surgery more unsuccessfully. Lastly, if we can wean him off the narcotics successfully, this portends a better prognosis for the rest of his life with regard to any injuries or pain problems he may develop in the future. *Id.* at 9-10.

Dr. Raskas testified that he would recommend a referral to Dr. Hurford or Dr. Feinberg for placement in such a program. *Id.* at 10-11. The subsequent records reflect that a referral to Dr. Hurford was in fact made by Dr. Raskas. (PX6).

Dr. Raskas also testified that he reviewed the June 26, 2013 IME report of Dr. deGrange, and indicated that he agreed with Dr. deGrange that Petitioner needed to be weaned off narcotic pain

medications, but further testified: "I don't believe that just weaning this patient down off of narcotics is going to result in a sustained meaningful improvement in his condition." *Id.* at 14. Dr. Raskas testified that he disagreed with Dr. deGrange's comments regarding the efficacy of a fusion, and indicated:

> I think that he points out some conditions which are amenable to fusions, but certainly patients that have laminectomies with disc space collapse and disc height narrowing are certainly amenable to fusions, especially single level fusions, and I certainly seen him…I've certainly seen Dr. DeGrange give opinions in the past that have been consistent with recommending fusions for exactly this condition. *Id.* at 15-16.

Dr. Raskas testified that if Petitioner successfully weaned himself off narcotic pain medications, Petitioner would have a 70-80 percent chance of undergoing a successful surgery. *Id.* at 16. He further opined that the need for the pain management program and potential surgery was causally related to the March 9, 2013 injury. *Id.* at 16-17.

Following the conclusion of the direct examination of Dr. Raskas, it appears that a brief discussion was had between counsel concerning a potential agreement with regard to the treatment that had been recommended by Dr. Raskas and Dr. deGrange. *Id.* at 17. The record does not indicate that an agreement was ever reached, and no cross-examination of Dr. Raskas was ever requested by Respondent. *Id.* at 17-18.

Petitioner next returned to Dr. Raskas on December 2, 2013, after undergoing an independent medical examination with Dr. Donald deGrange at the request of Respondent. (PX6, Dr. Raskas, 12/2/13). On that date, Dr. Raskas noted:

> I have reviewed Dr. deGrange's comments and I would concur that probably getting this patient to wean off of narcotics first would be the most appropriate course of action and then reevaluating him after he has been weaned off of significant dose of narcotics at least to see how he is doing.
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> …
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> He is motivated to do this and my recommendations are for him to remain off work and for him to see Dr. Hurford or Dr. Feinberg for a narcotic weaning program. *Id.*

Dr. Hurford, a pain management specialist, initially evaluated Petitioner the next day, on December 3, 2013. Dr. Hurford took the following history:

> This is a 20-year old gentleman with a chronic opioid requirement after prior back problems. He underwent a back surgery in 2010 and then had a work-related injury on March 13th with escalating doses of analgesics. At this point, it has been recommended that he come off the analgesics prior to surgery. He has attempted weaning himself, has had difficulty with a chronic escalating analgesic dose. He

has attempted weaning opioids himself, but has had difficulty with withdrawal symptoms. He is currently taking 75 mcg of Fentanyl q.3 days, Oxycodone 10/325 four tablets per day, Flexeril at bedtime, Remeron for sleep disruption and Lexapro which was started a week-and-a-half ago. The goal is to get him off of analgesics prior to surgery. The hope was to perhaps put him on a short-acting analgesic or even consider methadone replacement. Current pain ratings are 9 on a 10 pain scale.

Dr. Hurford's impression at that point was high-dose analgesic requirement compounded by back disorder. Her treatment recommendation was as follows:

> Surgical opinion at this point is an L5-S1 fusion. I am in agreement that Mr. Radford be detoxed from analgesics prior to surgery. This will be difficult given his age, the chronic nature of the opioid requirement, the potential risk for long-term opioids and the disability associated with opioids despite what may be a perfect lumbar surgery. I would recommend an inpatient comprehensive pain detox program. The closest option would be RIC in Chicago with a team approach to detox and begin cognitive behavioral treatment prior to back surgery. In the absence of this, Mr. Radford would be placed on a slow wean of analgesics. Week-to-week medications until his current situation has been evaluated in the Courts would be recommended. Mr. Radford is given Fentanyl 75 mg q.3 days, three patches only, a refill on his Oxycodone, a max of four tablets a day for two weeks only. He is scheduled to go to Court. Again, it is my medical opinion and strong recommendation that Mr. Radford be placed in a comprehensive pain management program with cognitive behavioral and medication detox treatment as well as therapy preoperatively. If he is unable to be placed in an inpatient detox program, begin Oxycodone and Fentanyl weaning done on an outpatient basis. (PX6, Dr. Hurford, 12/3/13).

Petitioner followed up with Dr. Hurford on December 17, 2013. On that date, Dr. Hurford noted:

> An opioid detoxification program was discussed in significant detail with Mr. Radford with inpatient program considered most optimal. At this office visit discussion included both Mr. Radford and his father and was followed by a request for additional medical records. Current pain ratings are 9 on a 0 to 10 pain scale. (PX6, Dr. Hurford, 12/17/13).

Dr. Hurford also noted that Petitioner's current medications were Fentanyl, Oxycodone, Xanax, Remeron, Lexapro, and Flexeril. *Id.*

On December 19, 2013, Dr. Hurford also authored a letter to Petitioner's attorney dated December 19, 2013, which indicated:

> As you know, Bruce Radford is a 20-year old gentleman who initially underwent surgery in 2010 and was able to go back to work without restrictions. He was

reinjured on March 9, 2013, but opioid reduction has been recommended prior to any further surgery. Mr. Radford has been evaluated by Dr. David Raskas who indicated the need for surgery to treat his current condition.

In attempting to address his medical needs and weaning process in a short timeframe to allow him the best opportunity for excellent response, Mr. Radford has been referred for an inpatient detoxification program from opioids. An inpatient versus outpatient program could be utilized, however, it needs to be intensive and of sufficient quality to address this young man's needs as it relates to opioid use in the context of pain. My medical opinion is that an inpatient program would best fit this purpose.

It is my medical opinion that the work injury of March 9, 2013 is the reason for Mr. Radford's need for surgery and the prior records given to me suggest escalating and worsening pain condition as a result of that injury. The detoxification prior to surgery is therefore considered medically necessary and appropriate given the high level of opioid use and continued pain that resulted from the March 9, 2013 work injury.

I would appreciate your prompt attention to this matter in order to begin appropriate intensive inpatient opioid reduction. If you have any questions, please do not hesitate to contact me. (PX6, Dr. Hurford, 12/19/13).

Dr. deGrange, Respondent's examining physician, was deposed on December 10, 2013. At that time, Dr. deGrange testified that he performs independent medical examinations in the course of his practice, and that 90% of these exams are at the request of employers or insurance companies. (RX1, Deposition of Dr. deGrange, p. 31). He testified that in his opinion, Petitioner did not sustain any type of injury on March 9, 2013, and his current condition and the need for a detoxification program was not causally related to the March 9, 2013 accident. *Id.* at 21-22. At that time, Dr. deGrange acknowledged that he had not been provided with a copy of any of Dr. Raskas' treatment records with regard to Petitioner, and that he did not know whether Petitioner had been able to perform his normal job duties before March 9, 2013. *Id.* at 32-34. When asked if that information would change his opinion with regard to causation, he testified, "I would be interested in seeing that." *Id.* at 34. Dr. deGrange also testified that he did not find any signs of symptom magnification or malingering in Petitioner when he evaluated him. *Id.* at 38-39. Dr. deGrange agreed with Dr. Raskas and Dr. Hurford that Petitioner needs to be enrolled in an inpatient detoxification program. *Id.* at 39. He further acknowledged that the mechanism of Petitioner's injury could aggravate a pre-existing lumbar spine condition. *Id.* at 39-40.

Dr. deGrange issued a supplemental written report on February 14, 2014, as requested by Respondent. In it, he reviewed records pre-dating Petitioner's work accident. He then opined that Petitioner remained at maximum medical improvement and that he needed no further treatment as a result of the work accident. He also felt Petitioner's medical records pre-dating the accident revealed pre-existing drug seeking behavior. (RX B, dep. ex. 3)

Thereafter, Dr. deGrange issued a third report on April 21, 2014 after being asked by Respondent to review Dr. Hurford's records and her recommendation for a comprehensive inpatient detox program. In his reportr Dr. deGrange described Petitioner's accident as a lifting episode involving a thirty pound windshield. (RXB, dep. ex. 4, p. 2) He also noted a recent severe flair up approximately two weeks before March 23, 2011. He found the work accident in 2013 no more responsible for Petitioner's condition than the last flare-up when he missed a step and jarred his back. He was required to be hospitalized for five days with high dose intraveous opioid drugs prior to discharge. His MRI showed no progression of his L5-S1 disc. His earlier opinions remained unchanged. (RX B, dep. ex. 4, p. 2,3)

Dr. deGrange was deposed a second time in this matter on May 16, 2014. (RX2). Dr. deGrange testified that he is an orthopedic spine specialist, and is not a physical medicine and rehabilitation specialist. (RX2, Deposition of Dr. deGrange, p. 29). He further testified that he has no special certifications in pain management, and holds no board certifications in pain management. *Id.* at 29. Dr. deGrange also acknowledged that he does make referrals to pain management specialists in the course of his practice, and has referred individuals to Dr. Hurford in the past, and that he "absolutely" believed Dr. Hurford was a well-qualified physician. *Id.* at 30. He also acknowledged that pain management specialists are typically given special training in order to detect addiction, and indicated, "I'm not exactly sure what training the psyiatry folks undergo, to be perfectly frank, because they are physical medicine and rehab specialists." *Id.* at 35. Dr. deGrange testified on this occasion that in his opinion, from his review of the medical records, Petitioner exhibited signs and symptoms of narcotic analgesic addiction and abuse." *Id.* at 30-31. This testimony is at odds with his testimony taken on December 10, 2013 in which he stated he found no signs of symptom magnification on his own examination.

However, Dr. deGrange did acknowledge that he could not recall any medical records from any other physician who was of the opinion that Petitioner was addicted to prescription medication. *Id.* at 36-37. He again testified on cross-examination that he did not review any records from any other physicians who found Petitioner to be malingering or magnifying his symptoms. *Id.* at 39. Further, on cross-examination, after being confronted with numerous medical records from 2010 and 2011 documenting that Petitioner continued to function, work, and attend school, the following exchange took place:

Q: And do you know if Bruce has been able to go back to work since this March 9, 2013 incident?
A: No, m'am, I don't.
Q: Okay. Just to clarify, you don't know if he has or he has not?
A: I don't know either way.
Q: Okay. If he has not—has not been able to go back to work since this happened, would you agree that this is different from his progression after the 2010 injury and 2011 injury?
A: It seems a change, yes. *Id.* at 56.

Thereafter, Dr. Hurford was provided with additional medical records and issued a supplemental report dated November 11, 2014, which stated as follows:

I have been given additional records to review, these include records from Dr. Jeffrey Leonard February 2010 through July 2010, interventional pain management records from Dr. Khalid from April 29, 2011 through October 15, 2013, MRI's from Wolf Creek Imaging Center 3/13/13, records from Dr. David Raskas April 1, 2013 through June 4, 2013, records from Dr. Barry Jones from June 3, 2010 through March 23, 2011 and I also have some additional records from hospitalizations at St. Louis Children's Hospital from February of 1995. There are operative reports from April 19, 2010 and MRI's from March 5th and May 10, 2010.

The review of these records does not change my medical opinions as they relate to Mr. Bruce Radford's case. He had a history of pain symptoms following a microdiscectomy however was stable and working when he was reinjured. Subsequent to this injury additional surgery has been recommended. Prior to surgical management an opioid reduction and removal program has been recommended. If not for the surgical recommendations as a result of the injury from 2013 the opioid withdraw program would not been recommended.

I have recommended an inpatient rehabilitation program due to the complex nature of this case. The inpatient program at Rehab Institute of Chicago I felt that fit Mr. Radford because of the comprehensive evaluation, cognitive behavioral nursing counseling approach during withdraw. The first phase of the drug rehabilitation process is actually the withdraw of medications and treating withdraw symptoms. A more rapid withdraw can be done in an inpatient setting than can be performed on an outpatient basis. Given the significant nature of opioid use and duration of opioid use in Mr. Radford, this is going to be a complex and difficult process. The inpatient program can monitor Mr. Radford safely and transition him appropriately to an outpatient program when safe. The inpatient program can also work on stress management, family education and utilize intervening modalities or adjunctive treatments to manage pain symptoms for Mr. Radford as he discontinues the use of narcotic or opioid medications. Given Mr. Radford's age and the expected cognitive behavioral components as well as family issues, a more intensive comprehensive approach to management of his pain in the absence of opioids is recommended if not clearly medically indicated. (PX6, Dr. Hurford, 11/11/14).

Dr. Hurford was also deposed on two separate occasions, on April 24, 2014 and November 13, 2014. Transcripts of her testimony were received into evidence as Petitioner's Exhibits 10 and 11, respectively.

Dr. Hurford testified, and her curriculum vitae confirms, that she is a board certified physical medicine and rehabilitation physician with a subspecialty certified in pain management. (PX10, Deposition of Dr. Hurford, p. 4). She also testified that she focuses most of her practice on the treatment of individuals with spine conditions. *Id.* Dr. Hurford indicated that in her practice, she performs outpatient treatments for muscle joint, soft tissue and spine problems, and evaluates the

need for treatment to restore function or pain control. *Id.* at 5. She testified that she offers patients treatment in the form of medication, physical therapy, occupational therapy, prescriptions, and works closely with therapists to monitor her patients' progress. *Id.* at 5-6. Dr. Hurford also performs job analyses in order to place individuals back into the workforce in a graduated way. *Id.* at 6. She also testified that she makes referrals to other facilities with regard to pain management when appropriate:

> In our practice here, we don't do a lot of just chronic pain medication management, so if I had a patient on a regular basis that would require ongoing medications, that's easy enough. If I have a patient who is having issues, whether they be improper use of their medications or side-effect issues with their medicines, then referrals would be made for more appropriate care than I could provide. *Id.* at 6-7.

Dr. Hurford testified consistently with her records that Petitioner was referred to her by her partner, Dr. David Raskas, for medication discontinuation and withdrawal. *Id.* at 10. She testified that she first obtained a history from Petitioner and his father, as well as a current list of his medications, which included 74 micrograms of Fentanyl in patch form, Oxycodone, 10-miligram strength, average of four tablets per day, Flexeril at bedtime, as well as Remeron and Lexapro, which he had recently started. *Id.* at 14. Dr. Hurford confirmed that all of these medications had been prescribed by a physician, and that he had been taking them since approximately 2010. *Id.* She testified that up until March 9, 2013, Petitioner had been able to work while using these medications for pain control. *Id.* at 15.

With regard to her recommendations for Petitioner, Dr. Hurford testified:

> Clearly with a 20-year old gentleman, in any situation, I would agree with that in a chronic state, if that was a necessary requirement prior to surgery, then I would concur that the surgeon had a good reason to do that, so I agreed with medication or analgesic reduction, cessation, or detoxification. *Id.* at 16-17.

Dr. Hurford testified that in her opinion, the best treatment option for Petitioner would be to enroll in an inpatient detoxification program. *Id.* at 17-18. She also testified consistently with her December 19, 2013 note as follows:

> At this point, I had had an opportunity to see additional records, and clearly Mr. Radford's records to me reflected a change in him. The recommendations form the surgeon were to proceed with medication cessation before any further surgery, and I will let the surgeons determine what surgery he would need, but I was in agreement that, yes, that would be helpful. And then I really stressed to the family at this point I thought he would be best served in an inpatient program. *Id.* at 22-23.

Dr. Hurford also unequivocally testified that "the March 9, 2013, injury aggravated his prior condition and it also resulted in additional symptoms into a—into his left leg, and resulted in functional decline in Mr. Radford despite ongoing analgesic treatment." *Id.* at

23. She explained that the basis for this opinion was as follows: "So Mr. Radford had a chronic history of back pain and right leg pain from the—at least from the time of his surgery that persisted. He was in a chronic opioid program with follow-up with a pain management physician. He had been working at least a year, and then on March 9, 2013, had an event which resulted in a severe increase in pain, both in his back and that right leg, but also now in his left leg. In addition, a significant functional decline. Unable to move or certainly work at the level he had prior to that date." *Id.* at 23-24.

Furthermore, Dr. Hurford testified the need for Petitioner to attend an inpatient detoxification treatment program was causally related to the March 9, 2013 injury, and specifically indicated the following:

> I felt that—and this is extremely complicated—but the two thousand—or the March 9, 2013, event led to circumstances that at this point required Mr. Radford's participation in a detoxification program in order to determine further need or necessary need as a result of symptoms from that event. *Id.*

Dr. Hurford further explained that the bases for her opinion were two-fold: a review of the records and a review of his history up to and after that event. *Id.* at 24-25. She also indicated that she believed Petitioner to be a highly motivated individual, and specifically testified: "This was a scared kid. He was in the—a little bit of withdrawal when I saw him the first time, and he knew he couldn't do it on his own, and he had tried on past occasions by our interaction." *Id.* at 28. Dr. Hurford testified that she did not expect Petitioner to improve without enrolling in the inpatient detoxification program she has recommended. *Id.* at 32.

On cross-examination Dr. Hurford was asked by Respondent's counsel if Petitioner would be considered to be "addicted" to narcotic pain medication. *Id.* at 47-48. In response, Dr. Hurford testified:

> I don't have any information that Mr. Radford is addicted.
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> ...
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> Addiction is a term that implies the use of pain medications to acquire effect that the medications were not intended for. I believe that Mr. Radford, based on the information I have from –and the knowledge I have of Mr. Radford in his brief inter—brief visit durations of two days, that he's using the pain medicines legitimately for pain and not as an addict would. *Id.* at 48.

Dr. Hurford further clarified that individuals who use pain medication for legitimate pain control can require higher doses of medication as time passes, and that this phenomena is described as "tolerance" and not addiction. *Id.* at 49-50. Specifically, she testified:

> That—you're describing—if they're still using it for pain, but requiring more use of the medication, that's called tolerance. They become tolerant of the dose of medicine that they needed to control their pain, and require escalating doses of

> opioids to get pain control. There are people who use the medications, then become addicted, and start using medicines for different reasons, but what you just described there was tolerance, and not addiction. *Id.* at 50.

Dr. Hurford also unequivocally testified that she did not detect any signs of symptom magnification in her interactions with Petitioner. *Id.* at 22, 66. She also testified that she found Petitioner to be an honest and forthcoming person. *Id.* at 86.

Dr. Hurford was deposed a second time on November 13, 2014 and her deposition testimony was received into evidence as Petitioner's Exhibit 11. Dr. Hurford testified consistently with her November 11, 2014 report regarding her treatment recommendations for Petitioner and reaffirmed her opinion that a causal connection existed between her recommendation for him and the March 9, 2013 injury following a review of additional medical records. (PX11, Deposition of Dr. Hurford, p. 7). Dr. Hurford also reaffirmed her opinion that Petitioner would not be considered to be addicted to narcotic pain medication, and indicated specifically:

> There are a couple instances in the records where there were notations that I reviewed in better detail. One of those was a notation that Mr. Radford had obtained some additional pain medications from his father when he was hurting. He was seen by his pain management doctor, and his medications were adjusted and increased in response to his pain. That behavior was not consistent with addiction behavior. The other reference was in a hospital record by a physician who was not his primary pain physician who suggested that there may have been issues with illicit medications. There is no substantial information provided about that event or those events, and none of the urine drug screens done up and to that point or after that point suggest drug use. *Id.* at 7-8.

Dr. Hurford further testified that she did not see any indication in any prior medical records that Petitioner was using his medications inappropriately or that he was taking any medications not prescribed to him by physicians. *Id.* at 8-9.

With regard to the specifics of the program she has recommended for Petitioner, Dr. Hurford testified as follows:

> The program I identified is part of the pain management, chronic pain program at Rehab Institute of Chicago, with the goals met directly to withdraw Mr. Radford from the medication, and then provide alternative treatment options for chronic pain so that Mr. Radford has other options available to him in the future, particularly if surgery is completed.

With regard to the duration of this program, Dr. Hurford indicated:

> I would anticipate a two-to-three week inpatient stay with several weeks, if not months, of continued outpatient monitoring. In that inpatient evaluation, the detoxification from medication would occur, withdrawal symptoms would be treated. He would be monitored so he's in a safe environment for the medication

reduction and removal. Counseling is provided both—in this case, family and individual. And after that, Mr. Radford would continue follow-up, not only cognitive and behavioral techniques for pain control, but physical therapy assessment to deal with the deficiencies in Mr. Radford from the time of his injury and lack of activity prior to surgical management. *Id.* at 11-12.

Dr. Hurford indicated that once the first several weeks of treatment were completed at the Rehab Institute of Chicago, she would recommend that he attend a local facility, and specifically "counseling services that can be provided from the other issues where cognitive behavioral treatment combined with counseling—the pain treatment program at the—at Barnes and the chronic pain program at Barnes to be considered." *Id.* at 12-13. She further testified that a 90 day local program in order to ensure medication withdrawal and compliance would be ideal. *Id.* at 13.

Dr. Hurford again reiterated her opinion that the treatment she has recommended for Petitioner is causally related to the March 9, 2013 injury. *Id.* at 14.

Petitioner testified that following his surgery in 2010, he was referred to a pain management specialist, Dr. Jones, at St. Louis Children's Hospital, who began prescribing him medication on a routine basis. Specifically, Petitioner testified that Dr. Jones prescribed him "Oxycodone 10/325 miligram, 300 tablets per month. There were some, I believe, Valium for muscle spasms. We tried gabapentin, and we may have used Flexeril." He indicated that these medications helped him function on a daily basis, and allowed him to continue working and attend school. (RX3, RX4).

Petitioner testified to, and the medical records also corroborate, that Petitioner had a flare-up of low back pain in 2011 while going down a flight of stairs at home. (RX5). He testified that his medications were temporarily increased, he was placed on bed rest, and he was released within several days. He testified that following this flare-up, he made a good recovery and returned to work and school. This was also confirmed by the medical records submitted into evidence by Respondent. (RX3, RX4, RX5).

At the time of trial, Petitioner candidly acknowledged that he suffered from low back pain prior to March 9, 2013 which originated in approximately 2009. Petitioner testified that it was somewhat of a mystery as to what happened to his back. Being young, it was believed to be growing pains because they weren't that bad; however, over a course of months Petitioner began missing two to three days of school each week due to pain. During that time Petitioner also spoke to a classmate about his low back pain. They discussed prescription medications and his friend, who had had a broken leg, gave him a couple of his vicodin that had been prescribed to him. Petitioner took them home and went online to determine the proper dosage. He then took the recommended dosage. This occurred on two occasions and before he was being seen by any doctors.

Petitioner further testified that he began feeling guilty of what he was doing and so he went to his dad and told him what was going on. Petitioner's father then set him up on a regimen where he would get half a vicodin in the morning and a half at night until he could get to a doctor.

Petitioner testified that this continued for only several weeks until he saw a physician for his low back pain.

Respondent's Exhibit 5 includes a discharge summary from St. Louis Children's Hospital which contains a letter from a Dr. Dana Ankney indicating that there was a suggestion that Petitioner may have been using illicit drugs and that counseling would be recommended (RX5). Petitioner was questioned about this medical record and trial, and when asked if this statement was true, he denied it adding he didn't even know who the doctor was or remember seeing him.

There is no other indication or suggestion in the medical records submitted by either party that Petitioner ever used or required counseling for illicit drugs. Petitioner also testified that because of the medications he is prescribed, he is required to undergo random drug and urine screening tests. He testified that he has never failed a drug or urine test, and the medical records confirm same. He also confirmed on cross-examination that he has never been counseled regarding heroin use and has never tried heroin.

Currently, Petitioner is prescribed and takes Oxycodone 10/325, 120 tablets, and 75-microgram fentanyl. He indicated that these were the same medications he was taking prior to March 9, 2013. Petitioner testified that these medications are currently prescribed to him by Dr. Hurford's office, and when asked to describe the process he goes through to obtain refills of these medications, he explained that his father has control of the medications and handles getting the prescriptions filled, picked up, and administered. Petitioner testified that his father speaks to Dr. Hurford's nurse, Renee, and that the prescriptions he asks for and receives are consistently the same medications and same dosages that he was taking when he first saw Dr. Hurford. This was also confirmed by Bruce Radford, Sr., Petitioner's father, who also testified at trial.

With regard to his current level of pain and function as opposed to prior to March 9, 2013, Petitioner testified that things have changed drastically. He described his level of pain as a "9/10." He explained that it is difficult to interact with people due to his level of pain and he gets down because it's a "constant thing" that it envelops you all the time unless you are asleep. It's constantly going all the time.

Petitioner unequivocally testified that he wishes to attend the inpatient treatment program Dr. Hurford has recommended for him adding that he didn't believe it was normal for someone his age to be on all those medications. According to Petitioner Dr. Raskas referred to fentanyl as a drug for the terminally ill cancer patient. He didn't feel he was living a healthy life and didn't wish to be reliant on pain medication.

Petitioner testified that if the treatment program was approved, he would leave to attend immediately. He also testified that he wishes to undergo surgery if it is recommended by Dr. Raskas.

On cross-examination, Petitioner testified consistently that until after the March 9, 2013 accident, no physician had ever provided or suggested that he needed to be weaned off his prescription medications.

The Arbitrator concludes:

1. Causal connection (Issue "F")

Petitioner's current condition of ill-being, including his lumbar spine condition and the need for an inpatient detoxification treatment program, is causally connected to his March 9, 2013 accident. This conclusion is based upon the causation opinions of Dr. Raskas and Dr. Hurford, Petitioner's treating physicians, whose opinions are found to be more persuasive than those of Dr. deGrange.

The Arbitrator notes that per the medical records and Petitioner's own testimony, Petitioner has a history of lumbar spine complaints and underwent a prior microdiscectomy at L5-S1 in 2010. However, it is apparent that from a review of the medical records and based on Petitioner's credible testimony on his own behalf, that prior to March 9, 2013 he was able to function and had worked full duty for Respondent with no difficulty or incident for over a year. Furthermore, in support of this finding, the Arbitrator notes that the medical records of Dr. Bashir confirm that Petitioner suffered an exacerbation or worsening of pain in his low back following the March 9, 2013 work injury. (PX3).

Furthermore, Dr. Raskas, an orthopedic spine surgeon, took the history of Petitioner's complaints, noting that Petitioner had suffered from prior low back pain, but indicated that Petitioner's pain had worsened and had developed new symptoms of left leg pain and numbness following the March 9, 2013 work accident. (PX6). Dr. Raskas also testified consistently with his records that Petitioner showed no improvement or progression with physical therapy, and opined that at this point, Petitioner's condition would be considered end stage and would not respond to any further physical therapy. He opined that his current recommendation is for Petitioner to undergo a narcotic weaning program, and if this program is successfully completed, a spine fusion at L5-S1. Dr. Raskas testified that he was aware of Petitioner's prior low back symptoms and treatment, as well as his history of narcotic pain medication use.

The Arbitrator also finds the opinions of Dr. Patricia Hurfod to be persuasive in this case, particularly as she is the only board certified pain management specialist who has given any opinions with regard to causation or treatment recommendations for Petitioner. Dr. Hurford credibly testified in both her treatment notes and her depositions that the March 9, 2013, injury aggravated Petitioner's prior condition and also resulted in additional symptoms into Petitioner's left leg, and also resulted in functional decline in Mr. Radford despite ongoing analgesic treatment. She explained that the basis for her causation opinion was as follows: "So Mr. Radford had a chronic history of back pain and right leg pain from the—at least from the time of his surgery that persisted. He was in a chronic opioid program with follow-up with a pain management physician. He had been working at least a year, and then on March 9, 2013, had an event which resulted in a severe increase in pain, both in his back and that right leg, but also now in his left leg. In addition, a significant functional decline. Unable to move or certainly work at the level he had prior to that date." *Id.* at 23-24.

Furthermore, Dr. Hurford testified the need for Petitioner to attend an inpatient detoxification treatment program was causally related to the March 9, 2013 injury, and specifically indicated the following:

> I felt that—and this is extremely complicated—but the two thousand—or the March 9, 2013, event led to circumstances that at this point required Mr. Radford's participation in a detoxification program in order to determine further need or necessary need as a result of symptoms from that event.

Dr. Hurford further explained that the bases for her opinion were two-fold: a review of the records and a review of his history up to and after that event.

The Arbitrator finds the opinions of Dr. Raskas and Dr. Hurford to be more persuasive than those of Dr. deGrange, who, although he was provided with numerous medical records and pieces of information from Respondent, and testified by way of deposition on two occasions, was never informed by Respondent that Petitioner was able to work prior to March 9, 2013 and that he has not been able to do so since the injury occurred on that date. Dr. Raskas and Dr. Hurford, however, were provided with this piece of information, which the Arbitrator finds to be an extremely important distinction.

Dr. deGrange's opinion that Petitioner is addicted to narcotic pain medication is also not supported by the evidence submitted at trial—other than one medical record from a physician who never provided any substantial treatment to Petitioner, and which was never substantiated or corroborated, no records or testimony submitted by either party suggest that Petitioner has ever been addicted to or abusing the medications he has been prescribed by physicians.

The Arbitrator also relies upon the credible testimony of Petitioner in this case. Petitioner candidly acknowledged that he suffered from low back pain and was placed on narcotic pain medication prior to March 9, 2013, and testified that this medication allowed him to function and continue to work and attend school. (T.27). However, following the March 9, 2013 accident, Petitioner testified that the medications do not control his pain adequately, and he notices a "night and day" difference between his levels of pain and function before and after March 9, 2013.

The Arbitrator also places significant weight on the medical records and testimony of Petitioner which confirm that no physician had ever recommended a weaning or detoxification program for Petitioner until after March 9, 2013.

Pursuant to Illinois law, even when a pre-existing condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665 (Ill. 2003). The claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 864 N.E.2d 266, 272-73 (5th Dist. 2007). The employer takes the employee as he or she is found. If a preexisting condition is aggravated,

exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

At the very minimum, the Arbitrator finds that Petitioner sustained an aggravation of a pre-existing condition which did not require treatment prior to March 9, 2013, which is compensable under the Act pursuant to the *Sisbro* doctrine.

2. Medical Expenses (Issue "J")/Prospective Medical care (Issue "K")

An employee is entitled to medical care that is reasonably required to relieve the injured employee from the effects of the injury. 820 ILCS 305/8(a) (2011). This includes treatment that is obtained to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Industrial Com'n of Illinois*, 758 N.E.2d 18 (1st Dist. 2001). The provisions relating to medical care are unlimited in time under the doctrine set forth in *Efengee Electrical Supply Co. v. Industrial Commission*, 223 N.E.2d 135 (1967).

As Petitioner has met his burden of proof on the issue of causation with regard to his lumbar spine condition and the treatment provided to date, the Arbitrator concludes that Petitioner's medical care and treatment has been reasonable and necessary to date and reasonably required to cure or relieve the injured employee from the effects of the injury.

Respondent is liable for payment of the medical bills submitted in Petitioner's Exhibit 1 as provided in Section 8(a) and 8.2 of the Act subject to the fee schedule. As stipulated, Respondent shall receive a credit for any medical benefits that have been paid. However, if Petitioner's group health carrier request reimbursement, Respondent shall indemnify and hold Petitioner harmless.

The Arbitrator also awards Petitioner prospective medical care pursuant to Section 8(a) of the Act. All three experts in this case, Dr. Raskas, Dr. Hurford, and Dr. deGrange have recommended that Petitioner attend an inpatient detoxification treatment program in order to be removed from the medications that he has been prescribed over the years. Respondent is therefore ordered to authorize and pay for the prospective treatment recommended by Dr. Hurford, including the chronic pain program at Rehab Institute of Chicago, including a two-to-three week inpatient stay with continued outpatient monitoring at the pain treatment program at Barnes Jewish Hospital in St. Louis, Missouri. These recommendations are outlined by Dr. Hurford in her November 11, 2014 correspondence (PX6), and in her deposition testimony taken on November 13, 2014. (PX11). The Arbitrator relies on the recommendations made by Dr. Hurford, and finds them to be reasonable and necessary, especially in light of the fact that she is the only board certified pain management specialist to testify in this case. (PX10, PX11).

Further, in support of the Arbitrator's award of the prospective treatment recommended by Dr. Hurford, the Arbitrator finds the case of *R. Randall Ryjewski v. Rosewood Care Center*, 08 IWCC 0224 instructive. In that case, the Commission affirmed the Arbitrator's order that the respondent pay all reasonable and necessary medical expenses pursuant to the Act for a drug rehabilitation program. *Ryjewski v. Rosewood Care Center*, 08 IWCC 0224 (2008). The basis

for the Commission's order was the testimony of the claimant's treating physician, who opined that the petitioner's drug ingestion over the past several years "would have to be dealt with in order for any procedure to be successful in ameliorating" the claimant's pain. *Id.* The claimant's physician was aware of the drugs that the claimant was being prescribed, and acknowledged that these medications were regularly used or given to individuals with conditions such as the claimant. The claimant's physician was of the opinion that the drugs were prescribed for the claimant in order to alleviate pain and allow a more functional life. *Id.*

The Arbitrator finds the case at bar to be substantially similar to the *Ryjewski* case. Dr. Hurford and Petitioner both credibly testified that the medications prescribed were allowing Petitioner to function prior to March 9, 2013. Prior to this date, no physician had ever recommended that Petitioner detox or be removed from these medications. However, since the injury occurred on March 9, 2013, detoxification and weaning has been recommended by numerous physicians, including Respondent's examining physician, Dr. deGrange. Dr. Hurford and Dr. Raskas both credibly testified that this treatment is reasonably required to cure the effects of Petitioner's March 9, 2013 injury. (PX6, PX9, PX10, PX11). The Arbitrator also notes that Petitioner testified credibly and without rebuttal that the medications he currently receives and takes are the same medications prescribed to him by Dr. Hurford, and that he still receives refills of these medications from her office. As this treatment is clearly indicated in order to relieve Petitioner from the effects of his injury, Respondent is therefore ordered to authorize and pay for the treatment outlined above.

3. Temporary Total Disability Benefits ("Issue L")

As Petitioner has met his burden of proof on the issues of causation and reasonableness and necessity of medical care and treatment, the Arbitrator also finds that Petitioner has met his burden of proof in determining that he is entitled to receive temporary total disability benefits for the period of March 10, 2013 through the date of the hearing, December 5, 2014.

Petitioner testified credibly and without rebuttal that he has not been able to return to work since the accident on March 9, 2013. The medical records verify that Dr. Bashir and Dr. Raskas have continuously kept Petitioner off work until he is able to undergo the treatment that has been recommended for him.

Therefore, Respondent is ordered to pay Petitioner temporary total disability benefits in the amount of $320.00/week commencing from March 10, 2013 to December 5, 2014, for a total period of 90 5/7 weeks as provided in Section 8(b) of the Act.

The parties stipulated that Petitioner has been paid temporary total disability benefits from March 9, 2013 through September 25, 2013, for a total of $7,149.11, and that Respondent shall receive a credit for same.

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

****

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

Demetrio Gaspar-Jose,

Petitioner,

vs.

NO. 12WC 40549

15IWCC0797

Total Staffing Solutions,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 5, 2014 is hereby affirmed and adopted.

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

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

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

No bond is required for 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: OCT 30 2015
SJM/sj
o-9/3/2015
44

Stephen J. Mathis

Maria Basurto

David L. Gore

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

GASPAR-JOSE, DEMETRIO
Employee/Petitioner

Case# **12WC040549**

12WC040548

15IWCC0797

TOTAL STAFFING SOLUTIONS
Employer/Respondent

On 11/5/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1559 JAMES P LEAHY
1275 DAVIS RD
SUITE 131
ELGIN, IL 60123

4866 KNELL O'CONNOR & DANIELEWICZ
RACHEL SINNEN
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

15IWCC0797

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)/8(a)

Demetrio Gaspar-Jose,
Employee/Petitioner

v.

Total Staffing Solutions,
Employer/Respondent

Case # **12** WC **40549**

Consolidated cases: **12 WC 40548**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Geneva** on **7/22/14** and **New Lenox** on **8/6/12.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **1/12/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$17,160.00**; the average weekly wage was **$330.00**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of **$2,640.00** for TTD (which parties agree would be considered a credit towards any PPD in event TTD is denied), **$0.00** for TPD, **$0.00** for maintenance, and **$2,258.30** for other benefits, for a total credit of **$4,898.30** (note: parties agree that Respondent would not be entitled to double credit, and that credit would only be applied to one of the two claims in dispute).

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

ORDER

The Arbitrator finds that Petitioner failed to prove that his current condition of ill-being is causally related to the accident on January 12, 2012. Accordingly, Petitioner's claim for compensation is hereby denied.

No benefits are awarded.

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

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

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

Signature of Arbitrator

10/31/14
Date

ICArbDec19(b)

NOV 5 - 2014

15IWCC0797

STATEMENT OF FACTS:

On July 22, 2014, the parties proceeded to trial in Geneva, Illinois. A continuance was granted on Respondent's request on that date and proofs were closed on August 6, 2014.

The first accident claim at issue is 12 WC 40549 with an injury date of January 1, 2012. (Arbitrator Exhibit "AX" 1). Issues in dispute include causal connection, the reasonableness and necessity of past medical treatment, payment of TTD benefits, and prospective medical benefits. (Ax 1).

The second accident claim at issue is 12 WC 40548 with an injury date of September 13, 2012. (Ax 2). Issues in dispute include accident, notice, causal connection, the reasonableness and necessity of past medical treatment, payment of TTD benefits, and prospective medical benefits. (Ax 2).

Arbitrator Exhibits 1 and 2 both claim a credit of $2,640.00 in paragraph 9 which reflect a onetime advancement that was made. (Ax 1 and 2; Respondent's Exhibit "Rx" 3). The parties stipulated on the record that this amount ($2,640.00) would either apply towards TTD benefits or a credit against permanency depending on the Arbitrator's findings. (Trial transcript "Tr" pp. 6-7).

The parties further stipulated that medical bills for Premier Occupational Health and Mid-America Medical Center were not entered into evidence by Petitioner as they have already been paid by Respondent. (Tr p. 7; Ax 1 and 2, paragraph 9).

Petitioner, a 36 year old laborer, testified through a translator that he reported his undisputed first accident involving his lower back (12 WC 40548) to Jack Mullen in January 2012. Petitioner further testified that he was sent to Premier Occupational Health by Respondent. (Tr. pp. 34-35; 59 - 60).

John "Jack" Mullen, the production manager for Multi Tech Machine Components, testified on behalf of Respondent. (Tr p. 12). Mr. Mullen testified that Multi Tech produces different components for the automotive industry using rotary transfer machines and transfer screw machines. (Tr p. 13). Mr. Mullen testified that Petitioner was employed by Respondent and assigned to work at Multi Tech. (Tr p. 14). In January 2012, Petitioner worked in the shipping area where parts were washed and put into boxes. Mr. Mullen testified that Petitioner would be lifting boxes that weighted approximately 30 -40 lbs. (Tr p. 15). Mr. Mullen testified that when an injury occurred involving an employee for Respondent, Mr. Mullen would report the injury to Respondent. (Tr p. 16). Mr. Mullen testified that Petitioner reported a January 12, 2012 work incident and he immediately notified Respondent of the same. (Tr pp. 16-17). Mr. Mullen further testified that Petitioner spoke to him in English, was able to understand Petitioner, and Petitioner did not require assistance with translation. (Tr pp. 22-23).

On cross examination, Petitioner testified that his January 12, 2012 work incident occurred towards the end of his shift but he did finish his shift the day of the accident. Petitioner did not go to the ER on any other doctor until he reported to Premier Occupational Health five days after his accident. (Tr pp. 61-62).

Medical records show that on January 17, 2012 Petitioner presented to Premier Occupational Health in Addison, Illinois. A patient registration form written in Spanish and filled out by Petitioner indicated he felt back pain at work after lifting aluminum container. Petitioner alleged he hurt himself at work on January 12, 2012. Petitioner was placed on work restrictions with lifting no more than 10 pounds and no bending or twisting. (Plaintiff's Exhibit "Px" 1).

Petitioner testified that no one at Premier Occupational Health gave him work restrictions. (Tr. p. 64). This is contradicted by the medical records. (Px 1). Further, Petitioner testified that he continued to work for Respondent at Multi Tech after January 12, 2012 within his work restrictions. (Tr p. 62). Mr. Mullen testified that Petitioner continued to work at Multi Tech in the grinding department after January 12, 2012 within his work restrictions. (Tr p. 17). Mr. Mullen further testified that in the grinding departing Petitioner was required to lift at most 5 lbs by himself. (Tr p. 19). Mr. Mullen further testified that Petitioner was given a back brace. (Tr p. 21). Mr. Mullen testified that Petitioner continued to work in the grinding department until he left in December 2012 (Tr p. 19; Rx 9). Mr. Mullen testified that in the grinding department Petitioner may have assisted another co-worker with boxes weighing up to 80 lbs, at most twice a day. (Tr pp. 19-20).

January 19, 2012, Petitioner underwent x-rays of the lumbar spine. The impression noted "scattered mild degenerative endplate changes." (Px 1). Petitioner testified that he told the doctors at Premier Occupational Health that he had radiating pain. (Tr p. 64). However, the medical records indicate that Petitioner denied radiating pain on several occasions. (Px 1).

January 19, 2012, Petitioner returned to Premier Occupational Health. Petitioner's pain was listed as being moderate and constant. Petitioner denied radiating pain. All tests were negative. Petitioner was diagnosed with a strain of the lower lumbar. Petitioner remained on the same work restrictions. (Px 1).

January 24, 2012, Petitioner returned to Premier Occupational Health. Again, Petitioner denied radiating pain. A physical examination revealed normal range of motion of Petitioner's back Straight leg testing was negative bilaterally. Petitioner remained on the same work restrictions. (Px 1).

January 31, 2012, Petitioner returned to Premier Occupational Health. Petitioner denied radiating pain again. Petitioner's lifting restrictions were increased to 20 pounds. (Px 1).

February 14, 2012, Petitioner returned to Premier Occupational Health. Dr. Garcia noted that it had been about five weeks since the onset of pain. Straight leg testing was negative. Once again, Petitioner denied radiating pain. Petitioner was ordered to undergo physical therapy two times a week for three weeks. Diagnosis was a lumbar strain. Petitioner remained on the same work restrictions. (Px 1).

February 27, 2012, Petitioner returned to Premier Occupational Health. Petitioner denied radiating pain. (Px 1). Petitioner testified that he was never sent to therapy. (Tr. p. 63). However, it was noted that Petitioner was going to therapy in Elgin, Illinois. (Px 1). Petitioner testified that he was sent to Dr. Gavin, a chiropractor, by the doctors at Premier Occupational Health. (Tr pp. 65-66; see also Rx 1 and 2). Petitioner remained on the same work restrictions. (Px 1).

March 7, 2012, Petitioner returned to Premier Occupational Health. Petitioner's lifting restrictions were increased to 25 pounds. Petitioner was to continue with a home exercise program. (Px 1).

April 19, 2012, Petitioner underwent an IME with Dr. Avi Bernstein. Petitioner reported that he was injured on January 12, 2012 when he lifted a bucket weighing about 70 pounds with another coworker. (Rx 1). Petitioner testified that he told Dr. Bernstein that he had pain going down into his legs. (Tr p. 74). However, Dr. Bernstein notes that Petitioner denied radiating pain. Dr. Bernstein found no objective findings. Dr. Bernstein further opined that Petitioner suffered a lumbar strain as a result of the January 12, 2012 work incident. Dr. Bernstein opined that Petitioner could undergo a short course of physical therapy with conditioning and strengthening. Dr. Bernstein opined that more than 18 visits of chiropractic care were not reasonable or necessary. Dr. Bernstein

further opined that Petitioner should reach maximum medical improvement after three to four weeks. Finally, Dr. Bernstein opined that Petitioner could return to unrestricted, full duty work. (Rx 1).

April 30, 2012, Petitioner returned to Premier Occupational Health and was seen by Dr. Garcia. Petitioner complained that the pain is made worse by wearing a back brace and after working a long time in the day. Physical examination revealed that range of motion was normal. Petitioner's x-rays indicated that there were mild scattered degenerative plate changes. Petitioner remained on the same work restrictions. (Px 1).

May 2, 2012, Petitioner returned to Premier Occupational Health and was seen by Dr. Gorovits. Once again, all of the test results were negative. Petitioner noted that he felt a little bit better. Tenderness was reported in the L1 through L5 area. Petitioner returned to regular, full duty work on May 2, 2012. (Px 1).

Petitioner missed his May 9, 2012 appointment and did not return to Premier Occupational Health for treatment. (Px 1).

Petitioner testified that after May 2012 he continued to have pain in his back. (Tr p. 47). However, Petitioner did not seek treatment for over four months. Petitioner admitted to this on cross examination. (Tr pp. 66-67).

Petitioner testified that after he was released from Premier Occupational Health in May 2012, he continued to work light duty for Respondent at Multi Tech. (Tr p. 41). However, the medical records from Premier Occupational Health show that Petitioner returned to regular, full duty work on May 2, 2012. (Px 1).

September 15, 2012, Petitioner presented to Mid America Medical Center complaining of pain in his back. (Px 2). Petitioner filled out a patient information form in Spanish and did not indicate any new injury or accident. Petitioner was evaluated by Dr. Sadek. The notes indicate Petitioner had pain in the lower back since January 2012. Date of incident on the medical records is listed as January 12, 2012. Petitioner was diagnosed with a lumbar strain and placed on work restrictions of no lifting over 10 pounds, ground level work only and no bending or stooping. (Px 2).

September 22, 2012, Petitioner returned to Mid America Medical Center with Dr. Sadek. Dr. Sadek recommended a lumbar spine MRI due to Petitioner's continued low back pain. Petitioner now complained of moderate radiating pain down the left leg and posterior thigh. Petitioner remained on the same work restrictions. (Px 2).

October 3, 2012, Petitioner underwent a lumbar spine MRI at Medical Imaging Center due to low back pain with radiation to the lower extremities. The MRI results indicated a 2.5mm diffuse disc bulging with central herniation flattening the thecal sac and hypertrophy of facet joints at L3-L4 with mild bilateral neural foraminal stenosis, 3.5mm diffuse disc bulging with central herniation impressing the thecal sac and hypertrophy of facet joints and ligamentum flavum at L4-L5 with mild spinal and bilateral neural foraminal stenosis more on the right, and 2 mm diffuse disc bulging with 3mm right paracentral herniation mildly compressing the thecal sac and hypertrophy of facet joints at L5-S1 with mild bilateral neural foraminal stenosis. (Px 2).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the MRI performed on October 3, 2012. Treatment was certified. (Rx 8).

October 6, 2012, Petitioner returned to Mid America Medical Center. The date of incident is still listed as January 12, 2012. Petitioner rated his pain as 7 out of 10 in severity. Dr. Sadek noted that Petitioner's MRI

showed no evidence of canal stenosis or disc pathology. Petitioner was discharged from care by Dr. Sadek and was returned to regular, full duty work on October 6, 2012. (Px 2).

Petitioner did not seek treatment for over one month. Petitioner admitted on cross examination that he never returned to Mid American Medical Center and presented to the Pain Center of Illinois about one month later. (Tr pp. 69-70). Petitioner further admitted that he presented to the Pain Center of Illinois on his own accord, without a medical referral. (Tr p. 70).

November 24, 2012, Petitioner presented to Dr. Neema Bayran, M.D. at the Pain Center of Illinois for interventional pain management. The notes indicate Petitioner complained of lower back pain without radiation into the lower extremities. Petitioner reported that his pain started in January 2012 after he picked up an aluminum tray with a coworker. Petitioner now reported that he was receiving medications until September 2012 when he got hurt again at work. This is the first time that Petitioner reported a second injury to his medical providers. Petitioner stated that he got hurt again doing the same thing (picking up a tray of aluminum at work). Petitioner was told to "continue to work on restrictions" even though he had been released to full duty back in October and was not on restrictions. Physical therapy was recommended. (Px 3).

December 8, 2012, Petitioner returned to Dr. Bayran. Petitioner now reported numbness at the bottom of his feet. Dr. Bayran opined that Petitioner's MRI demonstrated stenosis at L4-L5, diffuse disc bulge with central herniation compressing the thecal sac with hypertrophy of the facet joint, a disc bulge at L5-S1 and a right paracentral disc herniation mildly compressing the thecal sac. Dr. Bayran recommended a lumbar epidural injection at L4-L5 and L5-S1. Petitioner was to remain off work for two weeks after the injection was done. (Px 3).

December 29, 2012, Petitioner presented to Provena Saint Joseph Hospital complaining of low back pain that now radiated from the back of his spine to this head. Petitioner obtained a CT of the head as well as lumbar spine x-rays. The CT was normal. The lumbar spine x-rays were normal. (Px 4). Petitioner testified that he presented to Provena Saint Joseph Hospital without a medical referral. (Tr pp. 71-72).

February 6, 2013, Petitioner returned to Dr. Bayran. Petitioner reported that his pain now radiated from his lower back to his mid back. Petitioner also reported having sudden pain shooting down into his legs bilaterally and noted that the pain sometimes radiated into his left leg and sometimes his right leg. The notes further indicated Petitioner has been off work since December 15, 2012. Dr. Bayran again recommended a lumbar epidural injection at L4-L5 and L5-S1. (Px 3).

March 6, 2013, Petitioner returned to the Pain Center of Illinois. Petitioner complained of pain in his lower back that radiates into his legs bilaterally along with numbness and tingling in the bottom of his feet. ESIs were recommended. Petitioner was placed on light duty work status. (Px 3).

March 13, 2013, Petitioner underwent an IME with Dr. Daniel Troy of Advanced Orthopedics. (Rx 2). Dr. Troy opined that Petitioner suffered a lumbar strain in January 2012. Dr. Troy further opined that Petitioner should have returned to work full duty by May 2012. Dr. Troy opined that a strain required a maximum of twelve weeks of treatment. Dr. Troy also noted that Dr. Bernstein as well as two treating physicians agreed that Petitioner was able to return to full duty work. Dr. Troy also opined that Petitioner's injury was treated excessively. (Rx 2).

March 20, 2013, Petitioner returned to the Pain Center of Illinois and underwent lumbar transforaminal epidural steroid injections at L4-L5 and L5-S1. Petitioner remained on light duty work status. (Px 3).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the injections performed on March 20, 2013. Treatment was not certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed Petitioner's medical records including Petitioner's MRI, IME reports, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty noted that there was no documentation of radicular pain in the distribution of the right of L4-5 and L5-S1. There was no evidence of sensory deficit, myotomal weakness or altered reflex in the lower extremities noted on physical examinations. Further, there was no evidence of positive straight leg raise testing. Dr. Ciochetty also noted that there was no evidence of nerve impingement in the right L4-5 and L5-S1 levels of the lumbar spine on the MRI. As a result, treatment was not certified. (Rx 7).

April 3, 2013, Petitioner returned to the Pain Center of Illinois after undergoing lumbar transforaminal epidural steroid injections at L4-L5 and L5-S1. Petitioner reported improvement in his pain. Petitioner reported that he went back to work with light duty restrictions but the employer would not accommodate them. Petitioner remained on light duty work status. The work status note indicates that Petitioner's date of injury is January 12, 2012. (Px 3).

April 10, 2013, Petitioner returned to the Pain Center of Illinois and reported worsening of his symptoms 3 days after his last appointment. Petitioner reported, for the first time, complaints of neck pain. (Px 3). Petitioner admitted on cross examination that it was the first time he complained of neck pain. (Tr p. 72). Dr. Bayran assessed Petitioner with lumbar disc bulge/tear at L3-L4 and L4-L5, lumbar disc protrusion at L5-S1 and lumbar facet joint involvement. Dr. Bayran recommended a repeat lumbar transforaminal epidural steroid injection at L4-L5 and L5-S1 as well as physical therapy for Petitioner's cervical spine. Petitioner remained on light duty work status. (Px 3).

May 22, 2013, Petitioner returned to the Pain Center of Illinois and underwent repeat lumbar transforaminal epidural steroid injections at L4-L5 and L5-S1, right side. Petitioner remained on light duty work status. (Px 3).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the injections performed on May 22, 2013. Treatment was not certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed Petitioner's updated medical records including Petitioner's MRI, IME reports, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty noted that although Petitioner respondent well to the injection initially, Petitioner reported worsening of symptoms three days after the procedure. Since the first injection did not produce significant and sustained pain relief, the medical necessity for a repeat injection was not established. As a result, treatment was not certified. (Rx 6).

June 5, 2013, Petitioner returned to Dr. Bayran post a second injection. Petitioner reported 75-80% relief of pain but the relief only lasted for one week. It was noted Petitioner continues to complain of pain on the right side of his lower back with radiation into his legs bilaterally. Petitioner was to remain off work. (Px 3).

June 12, 2013, Petitioner returned to Dr. Bayran and underwent a third lumbar transforaminal epidural steroid injection at L4-L5 and L5-S1. (Px 3).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the injections performed on June 12, 2013. Treatment was not certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed medical records including Petitioner's MRI, IME reports, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty noted that Petitioner's two prior injections failed to provide sustained pain relief as well as objective and

functional improvement. Further, as indicated in prior UR reports, there was no clear documentation of radiculopathy on physical examination. As a result, treatment was not certified. (Rx 5).

June 25, 2013, Petitioner returned to Dr. Bayran post his 3rd LTESI. Petitioner reported 60% relief. Petitioner was to remain off work. (Px 3).

July 17, 2013, Petitioner returned to Dr. Bayran complaining of lower back pain bilaterally with radiation into his mid back area. Petitioner denied radiation of his pain into the lower extremities. Dr. Bayran emphasized the importance of Petitioner being able to see a spine surgeon. (Px 3).

February 11, 2013 through August 13, 2013, Petitioner attended Premier Therapy for 56 sessions per the order by Dr. Bayran. (Px 5).

A retrospective utilization review was conducted to assess the reasonableness and necessity of 56 physical therapy sessions from February 11, 2013 through August 13, 2013, per the order by Dr. Bayran. Only 23 out of 56 sessions were certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed medical records including Petitioner's MRI, IME reports from Dr. Bernstein and Dr. Troy, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty noted that there was no mention of any acute flare-up symptoms resulting in significant decline in function to support additional sessions of physical therapy. As a result, treatment was only partially certified. (Rx 4).

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 concludes that Petitioner failed to prove by a preponderance of the evidence that Petitioner's current condition of ill-being after May 2, 2012 is causally related to an accident on January 12, 2012.

The Arbitrator finds that medical records to be more credible than Petitioner's testimony. Petitioner's testimony is unreliable as there are several contradictions contained within the medical records. Petitioner testified that he reported radiating pain to all of his doctors. (Tr p. 64). However, the medical records show that Petitioner denied radiating pain on numerous occasions including January 19, 2012, January 31, 2012, February 14, 2012, and April 19, 2012. (Px 1 and 2; Rx 1). The Arbitrator does not believe that so many physicians would neglect to document Petitioner's radiating pain.

The Arbitrator finds the treatment notes of Premier Occupational Health and Mid America to be credible. The Arbitrator further relies on the credible medical opinions of Respondent's IME physicians, Dr. Bernstein and Dr. Troy. The Arbitrator notes that both providers as well as the IME physicians diagnosed Petitioner with a lumbar sprain. (Px 1 and 2; Rx 1 and 2). The Arbitrator notes that Petitioner was returned to work full duty on May 2, 2012 per Premier Occupational Health and on October 6, 2012 per Mid America. (Px 1 and 2). The Arbitrator also notes that Dr. Bernstein opined on April 19, 2012 that Petitioner had a lumbar sprain, could return to work without restrictions and should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy also agreed with this opinion stating that Petitioner should have returned to work full duty by May 2012. (Rx. 3). Dr. Troy further indicated that Petitioner required a maximum of 12 weeks of treatment. (Rx. 3).

The Arbitrator notes that Petitioner's medical records did not show any abnormal objective findings. Physical examinations demonstrated negative straight leg raises and normal range of motion (Rx 1 and 2; Px 1 and 2).

The Utilization Review report by Dr. Ciochetty confirmed that there was no documentation of radicular pain in the distribution of the right L4-L5 and L5-S1 and no evidence of sensory deficit, myotomal weakness or altered reflex. Negative straight leg raise. (Rx 7). Dr. Bernstein examination did not reveal any positive findings. (Rx 1). Dr. Sadek of Mid America opined that Petitioner's MRI showed no evidence of canal stenosis or disc pathology. (Rx 2). Dr. Troy also reviewed Petitioner's MRI films and opined that the findings were degenerative in nature with no evidence of lateral recess, foraminal or spinal stenosis. (Rx 3). Dr. Ciochetty also reviewed Petitioner's MRI films and found no evidence of nerve impingement in the right L4-5 and L5-S1 levels. (Rx 7).

The records do not contain any credible causation opinions by Dr. Bayran. Furthermore, based on the concurring opinions of and the objective findings documented by Dr. Troy, Dr. Bernstein, Dr. Ciochetty, Dr. Sadek as well as the remaining doctors at Premier Occupational Health and Mid America, the Arbitrator does not find the opinions of Dr. Bayran or the findings documented by Pain Center of Illinois to be credible.

The Arbitrator also notes that Petitioner's alleged neck complaints are unrelated as Petitioner never complained of neck pain until April 10, 2013 which is over a year from Petitioner's January 12, 2012 work incident. Further, there are no medical opinions that relate Petitioner's neck pain to either date of accident. (Px 3). Additionally, Petitioner's mechanism of injury for the January 12, 2012 work incident does not indicate an injury to the cervical spine. Further, the Arbitrator notes that Petitioner presented to Provena Stain Joseph Hospital on his own accord and underwent a head CT. (Px. 4). There is no evidence that establishes an injury to the head.

As such, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that Petitioner's current condition of ill-being after May 2, 2012 is causally related to an accident on January 12, 2012.

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

In light of the Arbitrator's determination that Petitioner's current condition of ill being after May 2, 2012 is not causally related to a work injury on January 12, 2012, Petitioner's claims for Section 8 medical benefits are denied.

The Arbitrator notes that the parties stipulated that medical bills for Premier Occupational Health and Mid-America Medical Center were not entered into evidence by Petitioner as they have already been paid by Respondent. As such, the Arbitrator finds that Respondent is not liable for any additional medical bills.

The Arbitrator further relies of Respondent's utilization reviews. The Arbitrator finds the reports of Dr. Ciochetty to be credible as Dr. Ciochetty reviewed Petitioner's treatment notes including the MRI.

In addition to the Arbitrator's findings above, the Arbitrator also finds Petitioner's injections to be unreasonable and unnecessary. Dr. Ciochetty clearly explains in his reports that the injections recommended by Dr. Bayran were unnecessary and unreasonable as the objective findings did indicate any radicular pain or support the need for injections at L4-5 and L5-S1. (Rx 7). Dr. Ciochetty also indicated that the first and second injections did not result is sustained relief. As such, the second and third injections were not certified as well. (Rx 6 and 5).

In addition to the Arbitrator's findings above, the Arbitrator also finds Petitioner's 33 therapy sessions to be unreasonable and unnecessary per utilization review. (Rx 4).

However, although 23 therapy sessions and the MRI were certified per utilization review (Rx 4 and 8), the Arbitrator finds that Respondent is not liable for any additional medical bills (other than the bills from Premier Occupational Health and Mid-America Medical Center previously paid) based on the Arbitrator's findings on accident, notice and causation discussed above.

The Arbitrator further relies on the medical opinions of Dr. Troy and Dr. Bernstein. Dr. Bernstein opined in April 19, 2012 that Petitioner should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy opined that Petitioner was treated excessively and only required a maximum of 12 weeks of treatment for a lumbar sprain. (Rx. 2).

The Arbitrator also notes that Petitioner presented to Provena Stain Joseph Hospital on his own accord and underwent a head CT.

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

In light of the Arbitrator's determination that Petitioner's current condition of ill being after May 2, 2012 is not causally related to a work injury on January 12, 2012, Petitioner's claims for prospective medical care is denied.

The Arbitrator relies on the medical opinions of Dr. Troy and Dr. Bernstein. Dr. Bernstein opined in April 19, 2012 that Petitioner should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy opined that Petitioner was treated excessively and only required a maximum of 12 weeks of treatment for a lumbar sprain. (Rx. 2). Further, the treating physicians at Mid America and Premier Occupational Health released Petitioner from care and did not recommend any additional treatment. (Px 1 and Px 2).

In addition to the above, the Arbitrator finds Petitioner did not prove by a preponderance of the evidence that a surgical consultation is necessary as a result of a work-related accident of January 13, 2012.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

In light of the Arbitrator's determination that Petitioner's current condition of ill being after May 2, 2012 is not causally related to a work injury on January 12, 2012, Petitioner's claims for additional TTD benefits is denied.

The Arbitrator notes that Petitioner's work restrictions were accommodated and Petitioner received earnings from Respondent through December 17, 2012. (Rx 9).

The Arbitrator relies on the recommendations of the physicians at Premier Occupational Health and Mid America. The Arbitrator notes that Petitioner was returned to work full duty on May 2, 2012 per Premier Occupational Health and on October 6, 2012 per Mid America. (Px 1 and 2). The Arbitrator further relies on the credible medical opinions of Respondent's IME physicians, Dr. Bernstein and Dr. Troy. The Arbitrator notes that Dr. Bernstein opined on April 19, 2012 that Petitioner could return to work without restrictions and should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy also agreed with this opinion stating that Petitioner should have returned to work full duty by May 2012. (Rx. 3).

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

Demetrio Gaspar-Jose,

Petitioner,

vs.

NO. 12WC040548

Total Staffing Solutions,

Respondent.

15IWCC0798

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, prospective medical care, causal connection, notice, permanent disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 5, 2014 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.

15IWCC0798

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: OCT 30 2015
SJM/sj
o-9/3/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

NOTICE OF 19(b) DECISION OF ARBITRATOR

8(a)

GASPAR-JOSE, DEMETRIO
Employee/Petitioner

Case# **12WC040548**
12WC040549

TOTAL STAFFING SOLUTIONS
Employer/Respondent

15IWCC0798

On 11/5/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1559 JAMES P LEAHY
1275 DAVIS RD
SUITE 131
ELGIN, IL 60123

4866 KNELL O'CONNOR & DANIELEWICZ
RACHAEL SINNEN
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

STATE OF ILLINOIS)SS.

COUNTY OF KANE)

15IWCC0798

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

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

Demetrio Gaspar-Jose,
Employee/Petitioner

v.

Total Staffing Solutions,
Employer/Respondent

Case # **12** WC **40548**

Consolidated cases: **12 WC 40549**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Geneva** on **7/22/14** and **New Lenox** on **8/6/12.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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 _____

15IWCC0798

FINDINGS

On the date of accident, **9/13/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**17,160.00**; the average weekly wage was $**330.00**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**2,640.00** for TTD (which parties agree would be considered a credit towards any PPD in event TTD is denied), $**0.00** for TPD, $**0.00** for maintenance, and $**2,258.30** for other benefits, for a total credit of $**4,898.30** (note: parties agree that Respondent would not be entitled to double credit, and that credit would only be applied to one of the two claims in dispute).

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

ORDER

The Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment on September 13, 2012, failed to provide proper and adequate notice, and failed to prove that his current condition of ill-being is causally related to said alleged accident. Accordingly, Petitioner's claim for compensation is hereby denied.

No benefits are awarded.

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

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

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

Signature of Arbitrator

10/31/14
Date

ICArbDec19(b)

NOV 5 - 2014

STATEMENT OF FACTS:

On July 22, 2014, the parties proceeded to trial in Geneva, Illinois. A continuance was granted on Respondent's request on that date and proofs were closed on August 6, 2014.

The first accident claim at issue is 12 WC 40549 with an injury date of January 1, 2012. (Arbitrator Exhibit "Ax" 1). Issues in dispute include causal connection, the reasonableness and necessity of past medical treatment, payment of TTD benefits, and prospective medical benefits. (Ax 1).

The second accident claim at issue is 12 WC 40548 with an injury date of September 13, 2012. (Ax 2). Issues in dispute include accident, notice, causal connection, the reasonableness and necessity of past medical treatment, payment of TTD benefits, and prospective medical benefits. (Ax 2).

Arbitrator Exhibits 1 and 2 both claim a credit of $2,640.00 in paragraph 9 which reflect a onetime advancement that was made. (Ax 1 and 2; Respondent's Exhibit "Rx" 3). The parties stipulated on the record that this amount ($2,640.00) would either apply towards TTD benefits or a credit against permanency depending on the Arbitrator's findings. (Trial transcript "Tr" pp. 6-7).

The parties further stipulated that medical bills for Premier Occupational Health and Mid-America Medical Center were not entered into evidence by Petitioner as they have already been paid by Respondent. (Tr p. 7; Ax 1 and 2, paragraph 9).

See separate decision for findings of fact and conclusions of law relative to claim 12 WC 40549 (D/A = 1/12/12), which are incorporated by reference herein.

Petitioner, a 36 year old laborer, testified through a translator that Petitioner testified that on September 13, 2012 he was working for Respondent at Multi Tech when he re-injured his low back lifting. (Tr. pp. 39-41). Petitioner further testified that he notified Jack Mullen of his second injury on September 13, 2012 in front of various co-workers but Petitioner was unable to provide their full names. According to Petitioner, Mr. Mullen told him to report the injury to Respondent. (Tr. pp.48-49; pp.77-78). Petitioner further testified that he was sent to Mid American Medical Center by Respondent. (Tr. pp. 55-56).

Mr. Mullen denied that Petitioner ever reported a second injury to him and he was never made aware of a second September 2012 injury. (Tr p. 22).

Petitioner presented an additional witness, Alan Lopez, by way of an evidence deposition taken on April 25, 2014. (Rx 10). A translator was present. Petitioner was present. Mr. Lopez testified that he worked for Respondent in September 2012. (Rx 10, p. 6). Mr. Lopez also testified that he worked with Petitioner at the same company (Multi Tech) on September 13, 2012. (Rx. 10, p. 9). Mr. Lopez testified that on September 13, 2012 he asked Petitioner for help lifting a box when Petitioner started to company about his back hurting. (Rx 10, pp. 9-10). Mr. Lopez testified that the box weighed approximately 200 lbs. (Rx 10, p. 12). Mr. Lopez testified that he translated for Petitioner when Petitioner reported the accident to Mr. Mullen. (Rx 10, pp. 12-13). Respondent admitted into evidence a form signed by Mr. Lopez indicating that Mr. Lopez has resigned and no longer worked with Respondent on August 8, 2012, over a month before the September 13, 2012 work incident. (Rx. 11). Petitioner also admitted that Mr. Lopez did not work with him in September 2012. (Tr pp. 77-78).

September 15, 2012, Petitioner presented to Mid America Medical Center complaining of pain in his back. (Px 2). Petitioner testified that he told the doctors at Mid America Medical Center about the September 2012 work incident. (Tr p 68). However, Petitioner filled out a patient information form in Spanish and did not indicate any new injury or accident. Petitioner was evaluated by Dr. Sadek. The notes indicate Petitioner had pain in the lower back since January 2012. Date of incident on the medical records is listed as January 12, 2012. Petitioner was diagnosed with a lumbar strain and placed on work restrictions of no lifting over 10 pounds, ground level work only and no bending or stooping. (Px 2).

September 22, 2012, Petitioner returned to Mid America Medical Center with Dr. Sadek. Dr. Sadek recommended a lumbar spine MRI due to Petitioner's continued low back pain. Petitioner now complained of moderate radiating pain down the left leg and posterior thigh. Petitioner remained on the same work restrictions. (Px 2).

October 3, 2012, Petitioner underwent a lumbar spine MRI at Medical Imaging Center due to low back pain with radiation to the lower extremities. The MRI results indicated a 2.5mm diffuse disc bulging with central herniation flattening the thecal sac and hypertrophy of facet joints at L3-L4 with mild bilateral neural foraminal stenosis, 3.5mm diffuse disc bulging with central herniation impressing the thecal sac and hypertrophy of facet joints and ligamentum flavum at L4-L5 with mild spinal and bilateral neural foraminal stenosis more on the right, and 2 mm diffuse disc bulging with 3mm right paracentral herniation mildly compressing the thecal sac and hypertrophy of facet joints at L5-S1 with mild bilateral neural foraminal stenosis. (Px 2).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the MRI performed on October 3, 2012. Treatment was certified. (Rx 8).

October 6, 2012, Petitioner returned to Mid America Medical Center. The date of incident is still listed as January 12, 2012. Petitioner rated his pain as 7 out of 10 in severity. Dr. Sadek noted that Petitioner's MRI showed no evidence of canal stenosis or disc pathology. Petitioner was discharged from care by Dr. Sadek and was returned to regular, full duty work on October 6, 2012. (Px 2).

Petitioner did not seek treatment for over one month. Petitioner admitted on cross examination that he never returned to Mid American Medical Center and presented to the Pain Center of Illinois about one month later. (Tr pp. 69-70). Petitioner further admitted that he presented to the Pain Center of Illinois on his own accord, without a medical referral. (Tr p. 70).

November 24, 2012, Petitioner presented to Dr. Neema Bayran, M.D. at the Pain Center of Illinois for interventional pain management. The notes indicate Petitioner complained of lower back pain without radiation into the lower extremities. Petitioner reported that his pain started in January 2012 after he picked up an aluminum tray with a coworker. Petitioner now reported that he was receiving medications until September 2012 when he got hurt again at work. This is the first time that Petitioner reported a second injury to his medical providers. Petitioner stated that he got hurt again doing the same thing (picking up a tray of aluminum at work). Petitioner was told to "continue to work on restrictions" even though he had been released to full duty back in October and was not on restrictions. Physical therapy was recommended. (Px 3).

December 8, 2012, Petitioner returned to Dr. Bayran. Petitioner now reported numbness at the bottom of his feet. Dr. Bayran opined that Petitioner's MRI demonstrated stenosis at L4-L5, diffuse disc bulge with central herniation compressing the thecal sac with hypertrophy of the facet joint, a disc bulge at L5-S1 and a right paracentral disc herniation mildly compressing the thecal sac. Dr. Bayran recommended a lumbar epidural

injection at L4-L5 and L5-S1. Petitioner was to remain off work for two weeks after the injection was done. (Px 3).

December 29, 2012, Petitioner presented to Provena Saint Joseph Hospital complaining of low back pain that now radiated from the back of his spine to this head. Petitioner obtained a CT of the head as well as lumbar spine x-rays. The CT was normal. The lumbar spine x-rays were normal. (Px 4). Petitioner testified that he presented to Provena Saint Joseph Hospital without a medical referral. (Tr pp. 71-72).

February 6, 2013, Petitioner returned to Dr. Bayran. Petitioner reported that his pain now radiated from his lower back to his mid back. Petitioner also reported having sudden pain shooting down into his legs bilaterally and noted that the pain sometimes radiated into his left leg and sometimes his right leg. The notes further indicated Petitioner has been off work since December 15, 2012. Dr. Bayran again recommended a lumbar epidural injection at L4-L5 and L5-S1. (Px 3).

March 6, 2013, Petitioner returned to the Pain Center of Illinois. Petitioner complained of pain in his lower back that radiates into his legs bilaterally along with numbness and tingling in the bottom of his feet. ESIs were recommended. Petitioner was placed on light duty work status. (Px 3).

March 13, 2013, Petitioner underwent an IME with Dr. Daniel Troy of Advanced Orthopedics. (Rx 2). Petitioner testified that he told Dr. Troy that he was re-injured in September 2012. (Tr pp. 74-75). Dr. Troy noted that Petitioner only discussed a January 2012 work injury and a second injury in September 2012 was not mentioned. Dr. Troy opined that Petitioner suffered a lumbar strain in January 2012. Dr. Troy further opined that Petitioner should have returned to work full duty by May 2012. Dr. Troy opined that a strain required a maximum of twelve weeks of treatment. Dr. Troy also noted that Dr. Bernstein as well as two treating physicians agreed that Petitioner was able to return to full duty work. Dr. Troy also opined that Petitioner's injury was treated excessively. (Rx 2).

March 20, 2013, Petitioner returned to the Pain Center of Illinois and underwent lumbar transforaminal epidural steroid injections at L4-L5 and L5-S1. Petitioner remained on light duty work status. (Px 3).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the injections performed on March 20, 2013. Treatment was not certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed Petitioner's medical records including Petitioner's MRI, IME reports, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty noted that there was no documentation of radicular pain in the distribution of the right of L4-5 and L5-S1. There was no evidence of sensory deficit, myotomal weakness or altered reflex in the lower extremities noted on physical examinations. Further, there was no evidence of positive straight leg raise testing. Dr. Ciochetty also noted that there was no evidence of nerve impingement in the right L4-5 and L5-S1 levels of the lumbar spine on the MRI. As a result, treatment was not certified. (Rx 7).

April 3, 2013, Petitioner returned to the Pain Center of Illinois after undergoing lumbar transforaminal epidural steroid injections at L4-L5 and L5-S1. Petitioner reported improvement in his pain. Petitioner reported that he went back to work with light duty restrictions but the employer would not accommodate them. Petitioner remained on light duty work status. The work status note indicates that Petitioner's date of injury is January 12, 2012. (Px 3).

April 10, 2013, Petitioner returned to the Pain Center of Illinois and reported worsening of his symptoms 3 days after his last appointment. Petitioner reported, for the first time, complaints of neck pain. (Px 3). Petitioner

admitted on cross examination that it was the first time he complained of neck pain. (Tr p. 72). Dr. Bayran assessed Petitioner with lumbar disc bulge/tear at L3-L4 and L4-L5, lumbar disc protrusion at L5-S1 and lumbar facet joint involvement. Dr. Bayran recommended a repeat lumbar transforaminal epidural steroid injection at L4-L5 and L5-S1 as well as physical therapy for Petitioner's cervical spine. Petitioner remained on light duty work status. (Px 3).

May 22, 2013, Petitioner returned to the Pain Center of Illinois and underwent repeat lumbar transforaminal epidural steroid injections at L4-L5 and L5-S1, right side. Petitioner remained on light duty work status. (Px 3).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the injections performed on May 22, 2013. Treatment was not certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed Petitioner's updated medical records including Petitioner's MRI, IME reports, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty noted that although Petitioner respondent well to the injection initially, Petitioner reported worsening of symptoms three days after the procedure. Since the first injection did not produce significant and sustained pain relief, the medical necessity for a repeat injection was not established. As a result, treatment was not certified. (Rx 6).

June 5, 2013, Petitioner returned to Dr. Bayran post a second injection. Petitioner reported 75-80% relief of pain but the relief only lasted for one week. It was noted Petitioner continues to complain of pain on the right side of his lower back with radiation into his legs bilaterally. Petitioner was to remain off work. (Px 3).

June 12, 2013, Petitioner returned to Dr. Bayran and underwent a third lumbar transforaminal epidural steroid injection at L4-L5 and L5-S1. (Px 3).

A retrospective utilization review was conducted to assess the reasonableness and necessity of the injections performed on June 12, 2013. Treatment was not certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed medical records including Petitioner's MRI, IME reports, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty noted that Petitioner's two prior injections failed to provide sustained pain relief as well as objective and functional improvement. Further, as indicated in prior UR reports, there was no clear documentation of radiculopathy on physical examination. As a result, treatment was not certified. (Rx 5).

June 25, 2013, Petitioner returned to Dr. Bayran post his 3rd LTESI. Petitioner reported 60% relief. Petitioner was to remain off work. (Px 3).

July 17, 2013, Petitioner returned to Dr. Bayran complaining of lower back pain bilaterally with radiation into his mid back area. Petitioner denied radiation of his pain into the lower extremities. Dr. Bayran emphasized the importance of Petitioner being able to see a spine surgeon. (Px 3).

February 11, 2013 through August 13, 2013, Petitioner attended Premier Therapy for 56 sessions per the order by Dr. Bayran. (Px 5).

A retrospective utilization review was conducted to assess the reasonableness and necessity of 56 physical therapy sessions from February 11, 2013 through August 13, 2013, per the order by Dr. Bayran. Only 23 out of 56 sessions were certified. The peer report was authored by Dr. David Ciochetty. Dr. Ciochetty reviewed medical records including Petitioner's MRI, IME reports from Dr. Bernstein and Dr. Troy, treatment notes from Dr. Bayran, physical therapy notes, and treatment notes from Premier Occupational Health. Dr. Ciochetty

noted that there was no mention of any acute flare-up symptoms resulting in significant decline in function to support additional sessions of physical therapy. As a result, treatment was only partially certified. (Rx 4).

WITH RESPECT TO ISSUES (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, AND (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that with regards to Petitioner's first alleged accident (12 WC 40549) with an injury date of January 12, 2012, issue "C" is not in dispute.

However, with regards to Petitioner's second alleged accident (12 WC 40548) with an injury date of September 13, 2012, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that an accident occurred on September 13, 2012 in the course of Petitioner's employment with Respondent, Total Staffing Solutions.

The Arbitrator notes that Petitioner is not a credible witness. The Arbitrator finds that Petitioner did not report his September 13, 2012 work incident to any of his treating physicians other than Dr. Bayran on November 24, 2012, which was over two months after the alleged second accident and over a month after being discharged from Mid America. (Px 1 and 2).

Petitioner testified that he told all his doctors including Dr. Troy about his September 2012 work incident. (Tr pp. 68; 74-75). The Arbitrator does not find his testimony credible as Petitioner filled out a patient information form in Spanish with Mid America following the September 2012 work incident and did not indicate any new injury or accident. (Px 2). Further, the Arbitrator does not believe that all the physicians at Mid America as well as Dr. Troy failed to mention Petitioner's September 2012 work incident if Petitioner informed the doctors of the same.

Further, Petitioner's treatment notes from Mid America indicate that the date of incident is January 12, 2012. (Px 2). Even Petitioner's April 3, 2013 work status note from Dr. Bayran indicates that Petitioner's date of injury is January 12, 2012. (Px 3).

Petitioner testified about numerous individuals that were present during the September 13, 2012 work incident. (Tr. pp.48-49; pp.77-78). The Arbitrator does not find this testimony to be credible. The Arbitrator notes that Petitioner could not provide the full names of these individuals. Respondent was unable to locate any of the alleged witnesses based on the information provided and evidence suggesting that the named individuals did not even work for Respondent at all was not admitted into evidence per Petitioner's hearsay objections. (See Rx 12).

Furthermore, the Arbitrator notes that Mr. Lopez's testimony discredits Petitioner's claims. The Arbitrator finds that Petitioner intended Mr. Lopez to testify on his behalf at trial. The Arbitrator notes that Mr. Lopez's examination was directed by Petitioner's counsel and Petitioner was present during the evidence deposition of Mr. Lopez. (Rx. 10). The Arbitrator notes that the evidence deposition of Mr. Lopez was submitted into evidence by Respondent over Petitioner's objection as it was apparent that Mr. Lopez did not even work for Respondent in September 2012. This was proven by a resignation form signed by Mr. Lopez as well as Petitioner's testimony. (Tr pp. 77-78; Rx 11).

Overall, the Arbitrator does not find Petitioner's testimony regarding the alleged September 13, 2102 accident to be credible and Petitioner's medical records do not support the finding that a September 13, 2102 accident occurred. As such, the Arbitrator concludes that Petitioner failed to prove that an accident occurred on September 13, 2012 in the course of Petitioner's employment with Respondent by a preponderance of the evidence.

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

The Arbitrator notes that with regards to Petitioner's first alleged accident (12 WC 40549) with an injury date of January 12, 2012, issue "E" is not in dispute.

However, with regards to Petitioner's second alleged accident (12 WC 40548) with an injury date of September 13, 2012, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that Petitioner provided timely notice to Respondent, Total Staffing Solutions.

The Arbitrator finds that Petitioner claims a second date of accident on September 13, 2012. The finds that Petitioner had until October 28, 2012 (45 days from September 13, 2012) to provide timely notice to Respondent of his second accident. The Arbitrator finds that Respondent did not have notice that a second accident occurred within the 45 days.

In light of the Arbitrator's findings regarding Petitioner's credibility as discussed above, the Arbitrator does not find Petitioner's testimony regarding his conversations with Mr. Mullen to be credible. The Arbitrator also notes that Petitioner's testimony regarding conversations with an unnamed secretary for Respondent was stricken from the record as inadmissible hearsay and for lack of foundation. (See Tr p. 51). The Arbitrator further finds the testimony of Mr. Mullen to be more credible than Petitioner's testimony. Mr. Mullen credibly denied before the Arbitrator that Petitioner ever reported a second accident that occurred in September 2012. As such, the Arbitrator finds that Petitioner never reported a second accident to anyone at Multi Tech or anyone at Total Staffing Solutions.

The Arbitrator does not find the fact that Respondent sent Petitioner to Mid America in September 2012 to be notice that a second accident occurred. The medical records from Mid America do not indicate that a second accident occurred in September 2011. The records merely show that Petitioner was still having pain in his low back following his January 2012 accident. The medical records from Mid America document a date of accident of January 12, 2012. The first time the medical records indicate that Petitioner reported a second accident was Dr. Bayran's November 24, 2012 treatment note. This falls outside of the 45 day notice requirement. The Arbitrator does not find this to be inaccurate or defective notice, but no notice at all.

As such, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that Petitioner provided timely notice to Respondent.

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 concludes that Petitioner failed to prove by a preponderance of the evidence that Petitioner's current condition of ill-being is causally related to an accident on September 13, 2012.

The Arbitrator finds that medical records to be more credible than Petitioner's testimony. Petitioner's testimony is unreliable as there are several contradictions contained within the medical records. Petitioner testified that he reported radiating pain to all of his doctors. (Tr p. 64). However, the medical records show that Petitioner denied radiating pain on numerous occasions including January 19, 2012, January 31, 2012, February 14, 2012, and April 19, 2012. (Px 1 and 2; Rx 1). The Arbitrator does not believe that so many physicians would neglect to document Petitioner's radiating pain.

The Arbitrator finds the treatment notes of Premier Occupational Health and Mid America to be credible. The Arbitrator further relies on the credible medical opinions of Respondent's IME physicians, Dr. Bernstein and Dr. Troy. The Arbitrator notes that both providers as well as the IME physicians diagnosed Petitioner with a lumbar sprain. (Px 1 and 2; Rx 1 and 2). The Arbitrator notes that Petitioner was returned to work full duty on May 2, 2012 per Premier Occupational Health and on October 6, 2012 per Mid America. (Px 1 and 2). The Arbitrator also notes that Dr. Bernstein opined on April 19, 2012 that Petitioner had a lumbar sprain, could return to work without restrictions and should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy also agreed with this opinion stating that Petitioner should have returned to work full duty by May 2012. (Rx. 3). Dr. Troy further indicated that Petitioner required a maximum of 12 weeks of treatment. (Rx. 3).

The Arbitrator notes that Petitioner's medical records did not show any abnormal objective findings. Physical examinations demonstrated negative straight leg raises and normal range of motion (Rx 1 and 2; Px 1 and 2). The Utilization Review report by Dr. Ciochetty confirmed that there was no documentation of radicular pain in the distribution of the right L4-L5 and L5-S1 and no evidence of sensory deficit, myotomal weakness or altered reflex. Negative straight leg raise. (Rx 7). Dr. Bernstein examination did not reveal any positive findings. (Rx 1). Dr. Sadek of Mid America opined that Petitioner's MRI showed no evidence of canal stenosis or disc pathology. (Rx 2). Dr. Troy also reviewed Petitioner's MRI films and opined that the findings were degenerative in nature with no evidence of lateral recess, foraminal or spinal stenosis. (Rx 3). Dr. Ciochetty also reviewed Petitioner's MRI films and found no evidence of nerve impingement in the right L4-5 and L5-S1 levels. (Rx 7).

The records do not contain any credible causation opinions by Dr. Bayran. Furthermore, based on the concurring opinions of and the objective findings documented by Dr. Troy, Dr. Bernstein, Dr. Ciochetty, Dr. Sadek as well as the remaining doctors at Premier Occupational Health and Mid America, the Arbitrator does not find the opinions of Dr. Bayran or the findings documented by Pain Center of Illinois to be credible.

The Arbitrator also notes that Petitioner's alleged neck complaints are unrelated as Petitioner never complained of neck pain until April 10, 2013 which is over a year from Petitioner's January 12, 2012 work incident. Further, there are no medical opinions that relate Petitioner's neck pain to either date of accident. (Px 3). Additionally, Petitioner's mechanism of injury for the January 12, 2012 work incident does not indicate an injury to the cervical spine. Further, the Arbitrator notes that Petitioner presented to Provena Stain Joseph Hospital on his own accord and underwent a head CT. (Px. 4). There is no evidence that establishes an injury to the head.

As such, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that Petitioner's current condition of ill-being is causally related to an accident on September 13, 2012.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL

APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

In light of the Arbitrator's determination that Petitioner failed to established that he sustained an injury on September 13, 2012 arising out of and in the course of his employment with Respondent, and in light of the Arbitrator's determination that Petitioner failed to establish that he provided timely notice to Respondent of his September 13, 2012 work incident, and in light of the Arbitrator's determination that Petitioner's current condition of ill being is not causally related to a work injury on September 13, 2012, Petitioner's claim for medical benefits pursuant to §8a of the Act are hereby denied.

The Arbitrator notes that the parties stipulated that medical bills for Premier Occupational Health and Mid-America Medical Center were not entered into evidence by Petitioner as they have already been paid by Respondent. As such, the Arbitrator finds that Respondent is not liable for any additional medical bills.

The Arbitrator further relies of Respondent's utilization reviews. The Arbitrator finds the reports of Dr. Ciochetty to be credible as Dr. Ciochetty reviewed Petitioner's treatment notes including the MRI.

In addition to the Arbitrator's findings above, the Arbitrator also finds Petitioner's injections to be unreasonable and unnecessary. Dr. Ciochetty clearly explains in his reports that the injections recommended by Dr. Bayran were unnecessary and unreasonable as the objective findings did indicate any radicular pain or support the need for injections at L4-5 and L5-S1. (Rx 7). Dr. Ciochetty also indicated that the first and second injections did not result is sustained relief. As such, the second and third injections were not certified as well. (Rx 6 and 5). In addition to the Arbitrator's findings above, the Arbitrator also finds Petitioner's 33 therapy sessions to be unreasonable and unnecessary per utilization review. (Rx 4).

However, although 23 therapy sessions and the MRI were certified per utilization review (Rx 4 and 8), the Arbitrator finds that Respondent is not liable for any additional medical bills (other than the bills from Premier Occupational Health and Mid-America Medical Center previously paid) based on the Arbitrator's findings on accident, notice and causation discussed above.

The Arbitrator further relies on the medical opinions of Dr. Troy and Dr. Bernstein. Dr. Bernstein opined in April 19, 2012 that Petitioner should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy opined that Petitioner was treated excessively and only required a maximum of 12 weeks of treatment for a lumbar sprain. (Rx. 2).

The Arbitrator also notes that Petitioner presented to Provena Stain Joseph Hospital on his own accord and underwent a head CT. There is no evidence to suggest that a head CT was reasonable or necessary for a lumbar strain.

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

In light of the Arbitrator's determination that Petitioner failed to established that he sustained an injury on September 13, 2012 arising out of and in the course of his employment with Respondent, and in light of the Arbitrator's determination that Petitioner failed to establish that he provided timely notice to Respondent of his September 13, 2012 work incident, and in light of the Arbitrator's determination that Petitioner's current condition of ill being is not causally related to a work injury on September 13, 2012, Petitioner's claims for prospective medical care is denied.

The Arbitrator relies on the medical opinions of Dr. Troy and Dr. Bernstein. Dr. Bernstein opined in April 19, 2012 that Petitioner should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy opined that Petitioner was treated excessively and only required a maximum of 12 weeks of treatment for a lumbar sprain. (Rx. 2). Further, the treating physicians at Mid America and Premier Occupational Health released Petitioner from care and did not recommend any additional treatment. (Px 1 and Px 2).

In addition to the above, the Arbitrator finds Petitioner did not prove by a preponderance of the evidence that a surgical consultation is necessary as a result of a work-related accident of September 13, 2012.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

In light of the Arbitrator's determination that Petitioner failed to established that he sustained an injury on September 13, 2012 arising out of and in the course of his employment with Respondent, and in light of the Arbitrator's determination that Petitioner failed to establish that he provided timely notice to Respondent of his September 13, 2012 work incident, and in light of the Arbitrator's determination that Petitioner's current condition of ill being is not causally related to a work injury on September 13, 2012, Petitioner's claims for additional TTD benefits is denied.

The Arbitrator notes that Petitioner's work restrictions were accommodated and Petitioner received earnings from Respondent through December 17, 2012. (Rx 9).

The Arbitrator relies on the recommendations of the physicians at Premier Occupational Health and Mid America. The Arbitrator notes that Petitioner was returned to work full duty on May 2, 2012 per Premier Occupational Health and on October 6, 2012 per Mid America. (Px 1 and 2). The Arbitrator further relies on the credible medical opinions of Respondent's IME physicians, Dr. Bernstein and Dr. Troy. The Arbitrator notes that Dr. Bernstein opined on April 19, 2012 that Petitioner could return to work without restrictions and should reach maximum medical improvement within three to four weeks. (Rx. 1). Dr. Troy also agreed with this opinion stating that Petitioner should have returned to work full duty by May 2012. (Rx. 3).

Based on the parties' stipulation, the Arbitrator finds that Respondent's credit of $2,640.00 shall apply as a credit against permanency (Trial transcript "Tr" pp. 6-7; Rx 3).

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marcia A. Washburn,

Petitioner,

vs. NO. 12WC 12599

Maple Lawn Homes, Inc.

Respondent.

15IWCC0799

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, prospective medical care, permanent disability, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 20, 2015 is hereby affirmed and adopted.

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

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: OCT 30 2015
SJM/sj
o-10/15/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WASHBURN, MARCIA A
Employee/Petitioner

Case# **12WC012599**

15IWCC0799

MAPLE LAWN HOMES INC
Employer/Respondent

On 3/20/2015, 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 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
SEAN OSWALDS
3100 N KNOXVILLE AVE
PEORIA, IL 61603

02102593 GANAN & SHAPIRO PC
BRET TAYLOR
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

15IWCC0799

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Marcia A. Washburn
Employee/Petitioner

Case # **12** WC **12599**

v.

Maple Lawn Homes, 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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **February 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **March 15, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**15,468.96**; the average weekly wage was $**297.48**.

On the date of accident, Petitioner was **70** years of age, ***married*** with **0** dependent children.

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

ORDER

Petitioner failed to meet her burden of proof with regard to the issues of accident and causal relationship. The Petitioner's claim is, therefore, denied and no benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

March 11, 2015
Date

MAR 20 2015

FACTS:

On March 15, 2012 the Petitioner was working as an activities assistant at the Respondent's assisted living facility. The Petitioner testified that on March 15, 2012, she was moving some furniture when her left knee began to hurt. She testified that, because of the discomfort, she decided to help out in the kitchen of the facility where she helped with obtaining beverages for the residents. The Petitioner testified that she was standing at a counter obtaining a beverage for a resident when she pivoted, or turned, after filling the beverage and felt a pop in her left knee. The Petitioner initially testified she heard a pop when she "rotated" while going from one direction to another. However, upon further questioning the Petitioner confirmed that she was simply standing still with both feet on the ground when she turned and "rotated" and then felt a pop in her knee. The Petitioner testified that later that day, her knee popped again while she was doing the same activity and that her knee then became extremely swollen. The Petitioner testified that she told a co-worker what had happened and that she then saw the nurse and was directed to Eureka Hospital.

The medical evidence demonstrates that the Petitioner sought medical treatment for left knee prior to March 15, 2012. On October 12, 2010, the Petitioner sought treatment for complaints of left knee pain with her primary care physician at Methodist Medical Group. At that time, she reported a five week history of left knee pain which began when she felt a sudden sharp pain in her left knee and continued without improvement. On November 1, 2010, the Petitioner returned to her primary care physician and again reported left knee pain after jumping rope. Her diagnosis at that time was acute osteoarthritis of the left knee. The Petitioner was seen again at Methodist Medical Group on January 24, 2011, with continued complaints of left knee pain and she had a continued diagnosis of osteoarthritis of the left knee.

The Petitioner sought medical treatment for her left knee with orthopedic surgeon Richard Driessnack on January 5, 2012, two months prior to the date of injury alleged herein. In the medical history form completed by the Petitioner, she reported that she injured her knee while jumping rope and that the knee seemed to improve but then worsened. In the history provided to Dr. Driessnack on January 5, 2012, the Petitioner noted she injured her left knee while jumping rope with her grandchildren approximately six months before. She also reported right knee pain that began approximately one month before without injury. She reported that her left knee was more painful and stiff than the right knee and that she had sharp pain in the medial and anteromedial aspects and occasionally in the lateral aspect of the left knee. The Petitioner reported that all activity made the pain worse and that she also had episodes of her left knee catching. Dr. Driessnack performed x-rays which showed left greater than right osteoarthritis primarily localized to the patellofemoral joint and he injected both of the Petitioner's knees with Cortisone. In addition to the Cortisone injections, Dr. Driessnack ordered physical therapy for education in a home exercise program. The Petitioner was seen at Great Plains Physical Therapy on February 10, 2012, for evaluation and instruction in a home exercise program and released. The Petitioner was scheduled for a follow-up visit with Dr. Driessnack on March 13, 2012, two days prior to the date of the injury alleged herein. Though she could not recall the date, the Petitioner acknowledged that she

did not attend that follow-up appointment as she went to the wrong building and missed the appointment.

Lori Brown testified on behalf of the Respondent. Ms. Brown is the Activities Director at Respondent, and she is Petitioner's immediate supervisor. Ms. Brown testified that she was aware that the Petitioner was having knee problems prior to the date of injury as Ms. Brown also had knee problems and a knee surgery, and they frequently compared notes. Ms. Brown also testified that the Petitioner talked to her about seeing a doctor for her knee, and she confirmed that the Petitioner told her she was going to be late for work on March 13, 2012, due to an appointment with her knee doctor. Ms. Brown further testified that the Petitioner was not late for work on March 13, 2012, and advised that the appointment did not occur. The discussions between Ms. Brown and the Petitioner were documented in the Petitioner's employment file.

The Petitioner reported the March 15, 2012 incident to the Respondent that same day and an injury report was completed. The report indicates that the Petitioner was "Taking orders & serving drinks, walking" and that the injury occurred when she "Turned – pivoting - heard pop in knee. Continued working & same thing happened again." When Petitioner completed her injury report, her supervisor noted the history as reported, as well as the fact that the Petitioner advised this had happened before. (RX7).

The Petitioner also sought treatment at Advocate Eureka Hospital that same day. At that time, she complained that she hurt her knee and she reported "a twisting motion at work" when "pivoted on my knee and felt a popping sensation." Clinical examination showed a little bit of swelling with signs of chronic osteoarthritis, and x-rays were reported to demonstrate osteophytes with small joint effusion. The radiologist's impression was "Degenerative joint disease". The Petitioner was assessed as having left knee pain and a possible meniscal tear.

On March 16, 2012, the Petitioner returned to Dr. Driessnack. Dr. Driessnack noted that the Petitioner was 10 weeks status post bilateral knee injections which she reported had not helped. Dr. Driessnack noted that the Petitioner reported working at Respondent's facility the day before and "simply turned on her left knee and felt a pop." She reported that she had some discomfort and that "a short while later" she turned again and her knee popped again. Dr. Driessnack aspirated and injected the Petitioner's left knee and he noted that he was suspicious of a medial meniscal tear but that, due to a pacemaker, the Petitioner could not undergo an MRI. Dr. Driessnack noted that the Petitioner's condition was "highly suspicious for a medial meniscus tear, in conjunction with her degenerative changes."

The Petitioner ultimately underwent a left knee arthroscopy with Dr. Driessnack on April 30, 2012. Dr. Driessnack's post-operative diagnosis was advanced lateral compartment osteoarthritis, complex tear lateral meniscus, loose body lateral gutter, degenerative tear posterior horn medial meniscus and chondral delamination medial femur. Dr. Driessnack performed chondral debridement along with a medial meniscectomy, partial lateral meniscectomy and removal of loose bodies. Post-operatively, the Petitioner was seen on May 11, 2012. At that time, she specifically questioned Dr. Driessnack as to whether or not

any of her surgical findings could have been caused by her accident. Dr. Driessnack noted that the age of all of the abnormalities within the Petitioner's knee joint were indeterminate and he noted that during the surgery; "I did not see any evidence of acute injury or acute abnormalities within her knee joint." Dr. Driessnack noted that all of the operative findings "appeared chronic" and he indicated that the Petitioner had a very degenerative lateral compartment which had been longstanding.

The Petitioner continued treating post-operatively with Dr. Driessnack and on June 28, 2012 Dr. Driessnack reported that he was "unable to link any of her symptomatology to a specific event in her past". In July of 2012, Dr. Driessnack released the Petitioner to return to work full duty without restriction. The Petitioner testified that she had in fact returned to work for the Respondent and that she continued to work in a full duty capacity at the time of arbitration.

At the request of the Respondent, the Petitioner was examined by Dr. Richard Lehman on November 21, 2012. Dr. Lehman opined that the Petitioner's left knee complaints, medical treatment and subsequent knee surgery were not causally related to the alleged injury of March 15, 2012. The basis for Dr. Lehman's opinion was the history of ongoing complaints and medical treatment in the months leading up to the alleged date of injury, along with the fact she was scheduled to see Dr. Driessnack two days prior to the date of the alleged injury. Furthermore, he noted that the Petitioner had end-stage bone on bone degenerative arthritis in her knee. Dr. Lehman felt that the March 15, 2012, incident as described to him by the Petitioner did not cause, aggravate or exacerbate her condition and need for arthroscopic surgery.

The Petitioner was ultimately referred to Dr. Joseph Newcomer by her attorney for a second opinion regarding causal relationship. Dr. Newcomer causally related the Petitioner's left knee complaints and arthroscopic surgery to an event at work on March 15, 2012. However, Dr. Newcomer noted that the Petitioner reported that her injury occurred while she was moving heavy furniture. Specifically Dr. Newcomer testified that the history reported by the Petitioner was that she "had pivoting episodes moving heavy furniture, and during one of the episode felt a pop, had immediate pain, and was unable to bear weight comfortably." The Petitioner did not provide Dr. Newcomer with the history of simply turning and hearing a pop in her knee, and Dr. Newcomer was not aware this was the history she had previously given her employer and treating physicians. Furthermore, Dr. Newcomer noted that the Petitioner provided a history of having no pain in the knee prior to the March 15, 2012, injury. Dr. Newcomer acknowledged he had not reviewed the medical records of Methodist Medical Group or Dr. Driessnack either before or after the March 15, 2012, injury. He was not aware that the Petitioner was treating for her knee in the months or days leading up to the injury, nor was he aware that the Petitioner was undergoing physical therapy and receiving injections shortly before the date of injury. Dr. Newcomer further testified any additional treatment the Petitioner might need for her left knee, including any potential total knee replacement in the future, would not be causally related to the March 15, 2012, injury.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Petitioner testified that, at the time of the alleged injury, she was standing in front of a beverage dispenser, facing the dispenser, when she turned, or rotated, and heard a pop in her knee. She testified the beverage she held in her hand in no way affected the way she turned at the time of injury. Petitioner testified she was not walking at the time she turned or rotated. The injury report she completed on the date of injury indicates that she simply turned, or pivoted, and heard a pop in her knee. The injury history she provided to Dr. Driessnack the following day was that she "simply turned on her left knee and felt a pop." Based upon the Petitioner's testimony and the injury history she provided to her medical care providers, the Arbitrator finds that the Petitioner failed to prove she was exposed to a risk of injury to a greater degree than the general public. The Arbitrator notes that simply turning around while in a standing position is an activity of daily life to which the general public is exposed on a regular, daily basis. Though Petitioner provided Dr. Newcomer a history of moving heavy furniture, she did not provide this injury history to her employer or any of her medical treatment providers. The Petitioner provided this injury history to Dr. Newcomer only after her treating orthopedic surgeon, Dr. Driessnack, declined to causally relate her complaints and surgical findings to the turning incident of March 15, 2012. Based upon the foregoing, the Arbitrator finds that the Petitioner failed to prove she suffered an accident arising out of and in the course of her employment on March 15, 2012.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner sought treatment for her left knee complaints as far back as October 11, 2010. She began seeking orthopedic treatment for her left knee complaints with Dr. Driessnack on January 5, 2012, two months prior to the date of injury. At that time, she reported all activity made her pain worse and that she had occasional episodes of her left knee catching. She underwent bilateral Cortisone injections in her knees and was prescribed physical therapy for her left knee condition. She was scheduled to see Dr. Driessnack again on March 13, 2012, two days prior to the date of injury, but failed to make the appointment as she went to the wrong building. When she specifically asked Dr. Driessnack if her abnormalities could have been caused by her accident, Dr. Driessnack could not causally relate her left knee condition or treatment to the injury of March 15, 2012. Dr. Driessnack noted he did not see any evidence of acute injury or abnormality and that all of her abnormalities appeared chronic. He felt she had a very degenerative lateral compartment which had been longstanding. Dr. Lehman affirmed Dr. Driessnack's position on this issue, finding he could not causally relate Petitioner's left knee condition or surgery to the event of March 15, 2012. Dr. Newcomer's

opinion regarding causal relationship is based upon a history which was not provided to any other medical care provider, and he provided the opinion without the opportunity to review any other provider's medical records or the medical records showing Petitioner treated for left knee complaints prior to the date of injury. Based upon the foregoing, as well as the fact that the Petitioner has failed to prove she suffered a compensable accident, the Arbitrator further finds that the Petitioner failed to prove a causal relationship between the March 15, 2012, incident and her subsequent left knee complaints, treatment and surgery.

Having found that the Petitioner failed to prove that an accident arising out of and in the course of her employment occurred, and having found that the Petitioner failed to prove a causal relationship between the alleged accident and her subsequent left knee complaints, treatment and surgery, determination of the remaining disputed issues is moot.

The Petitioner's claim for compensation is denied and no benefits are awarded herein.

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

Carlos Alvarez,

Petitioner,

vs.

NO. 13WC07596

15IWCC0800

Cermak Produce No.6, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 1, 2014 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.

15IWCC0800

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: OCT 30 2015
SJM/sj
o-9/24/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALVAREZ, CARLOS
Employee/Petitioner

Case# **13WC007596**

CERMAK PRODUCE NO 6 INC
Employer/Respondent

15IWCC0800

On 12/1/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0293 KATZ FRIEDMAN ET AL
TIMOTHY F WINSLOW
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1886 LEAHY EISENBERG & FRAENKEL LTD
JAMES P TOOMEY
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK

15IWCC0800

- [ ] 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

CARLOS ALVAREZ
Employee/Petitioner

v.

CERMAK PRODUCE NO. 6, INC.
Employer/Respondent

Case # **13** WC **7596**

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **September 22, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0800

FINDINGS

On the date of accident, **February 25, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$19,451.12**; the average weekly wage was **$422.33**.

On the date of accident, Petitioner was **40** 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 **$4,743.49** for TTD, **$0** for TPD, **$0** for maintenance, and $14,812.58 for other benefits, for a total credit of $19,526.07.

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

ORDER

Respondent shall be given credit of $14,812.58 for medical benefits paid under Section 8(a) of the Act.

The Respondent shall pay Petitioner $592.28, the allowable rate pursuant to Section 8.2 of the Act, or the negotiated rate, whichever is less, for the March 6, 2013 and March 20, 2013 visits to Dr. Chunduri.

Respondent shall pay Petitioner temporary total disability benefits of $330.00/week for 14-1/7 weeks, commencing February 26, 2013 through June 4, 2013, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $4,743.49 for temporary total disability benefits that have been paid pursuant to Section 8(b) of the Act.

Respondent shall pay Petitioner $330.00 for 25 weeks as Petitioner has sustained permanent partial disability to the extent of 5% loss of use of the man as a whole, pursuant to §8(d)2 of the Act.

Respondent is entitled to a credit for the payments made beyond the $906.51 paid for the initial six visits for chiropractic manipulation and therapy by Chiropractor Ma.

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

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

15IWCC0800

Findings of Fact

Petitioner's Testimony

Carlos Alvarez (hereafter "Petitioner") testified before the Arbitrator by means of Spanish translator, Alex Gaitan. Petitioner testified that as of 2013, he worked at Cermak Produce (hereafter "Respondent"); and that he had been employed by Respondent for nine years. Petitioner described his job duties as taking care of customers, keeping the workplace clean, and filling the cheese displays. Tr. 11.

Petitioner testified that he worked a nine-hour shift, six days per week, and that his supervisors determined his schedule. He further testified that his supervisor Angel was the one to decide if he could work less than the fifty-five (55) hours that he worked per week.

Petitioner testified that on the date of accident, February 25, 2013, he was filling a display case with a cheese tray, and that he slipped. When he moved, Petitioner testified that he felt pain in the lower part of his back. He testified that he continued to work his shift for another three hours, and reported the accident to Mr. Espero, the manager. Petitioner testified that when he got home, he took Advil for his back pain and worked the following day, while in pain. Tr. pgs. 12-15.

Medical Treatment

Upon referral by Respondent, Petitioner sought medical treatment for his low back condition at Petrovas Medical Center. Petitioner presented to a chiropractor, Peter Petrovas on February 27, 2013, complaining of low back pain "since he lifted twenty pounds of cheese at work". Petrovas noted, "Patient states he had similar pain 6-7 yrs ago while cutting meat." He indicated that his family history was negative for back problems. Petrovas' medical records indicate that Petitioner was limited to 80 degrees on a straight leg raise testing with bilateral hamstring tightness and a negative straight leg raise and Patrick-Fabere test. The Arbitrator notes that in a pain diagram in Chiropractor Petrovas' February 27, 2013 record, Petitioner circled his low back for pain, but did not make any pain markings into the lower extremities. X-rays of the lumbar spine were read as normal. Petrovas diagnosed an acute lumbosacral strain / sprain, and placed Petitioner off work until Monday, March 4, 2013. Tr. Pg. 15 & PX2.

Petitioner returned to Petrovas on February 28, 2013, noting that he felt better, with less low back pain. He underwent additional massage, ultrasound, manipulation, and interferential treatment. On a March 1, 2013 progress note, Petitioner was a "no show". Petitioner testified that he was "released" and told to return to work in three days. The Arbitrator notes that the medical records from Petrovas Medical Clinic did not reference a release from medical care. Tr. pgs. 15-16 & PX2.

Petitioner testified that he sought medical treatment on his own at New Life Medical Center. Chiropractor Irene Ma indicated that Petitioner felt pain in his low back after carrying a heavy container of cheese. Petitioner reported intermittent (0-25% of his awake time) upper and lower lumbar pain bilaterally. In the "Consultation" form dated February 28, 2013, the Arbitrator notes that Petitioner marked a circle around the low back of the pain diagram, without indicating any reference of pain radiating to his legs. Despite the negative straight leg raise at Petrovas Medical Center, Chiropractor Ma indicated that Petitioner demonstrated a positive SLR bilaterally, at 40 degrees on the right and at 45 degrees on the left. Ma noted severe spasm and tenderness in the lumbar spine. Chiropractor Ma's narrative report noted "[q]uadratus lumborum active with radiation into low back," which does not reference radiation down the lower extremities. Ma recommended therapy three times per week for one month. Tr. pg. 16 & PX6.

Petitioner presented to Dr. Krishna Chunduri, a pain management provider, on March 6, 2013. Petitioner filled out the "Initial Visit History and Physical," indicating that his pain did not radiate to another part of the body. He also indicated that his pain was always present. Dr. Chunduri noted, on examination, that Petitioner had a negative straight leg raise bilaterally, but had positive paravertebral tenderness from L4 to S1. Dr. Chunduri diagnosed lumbago and a lumbar strain. He recommended physical therapy, NSAIDs and muscle relaxants. PX6.

On March 20, 2013, Petitioner returned to Dr. Chunduri, noting improvement with therapy, but reporting tingling and numbness radiating down his right lower extremity, into his calf had started since his last visit. Dr. Chunduri noted a positive straight leg raise on the right, but a negative test on the left. He ordered an MRI of the lumbar spine, which was performed at Lakeshore Open MRI and a CT was performed on March 21, 2013. Dr. George Kuritza, the radiologist, interpreted the report as a mild posterior annular bulge at L5-S1, measuring 2 mm, slightly indenting the thecal sac, without spinal stenosis or significant neuroforaminal narrowing. PX6.

On March 22, 2013, Chiropractor Ma prepared a "Work Comp Interim Report," noting that Petitioner only demonstrated forward lumbar flexion at 45 degrees. Despite the very slow improvement in Petitioner's subjective complaints (pain from eight out of ten to seven out of ten), Chiropractor Ma recommended another month of chiropractic manipulation. PX6.

On March 27, 2013, Petitioner presented to Dr. Chunduri, noting pain in his low back that now radiated down his right leg, with numbness and tingling to his toes. Dr. Chunduri noted lumbar flexion at 70 degrees with pain, which was 25 degrees greater than Petitioner demonstrated to Chiropractor Ma five days earlier. He recommended an EMG of the right lower extremity, which was performed at New Life Medical Center, by Chiropractor Gregory Thurston, on April 1, 2013. Chiropractor Thurston noted an essentially normal EMG/NCV of the bilateral lower extremities. PX6.

On an April 3, 2013 follow-up, Dr. Chunduri reviewed the EMG findings, and disagreed with Chiropractor Thurston's conclusion. Dr. Chunduri interpreted the report as showing a mild S1 neuropathy, and recommended a right L5 and S1 transforaminal epidural steroid injection. On April 15, 2013, Dr. Chunduri performed the right L5 and S1 transforaminal epidural steroid injection at Lakeshore Surgery Center. The Arbitrator notes that the procedure took six minutes and Petitioner was placed under MAC anesthesia from 10:05 a.m. through 10:16 a.m., a period of eleven minutes. The Arbitrator also notes that Western Touhy Anesthesia billed for an anesthesia start time of 10:05 and an end time of 11:30 AM, a period of eighty-five minutes. PX1.

On April 24, 2013, Petitioner returned to Dr. Chunduri, noting significant improvement in his right lower extremity paresthesias. The Arbitrator notes that Chiropractor Ma's SOAP notes reference no improvement in Petitioner's pain complaints from the date of the injection until April 24, 2013. Dr. Chunduri recommended a repeat right L5 and S1 transforaminal epidural steroid injection, which was performed at Lakeshore Surgery Center on April 29, 2013. Again, the records from Lakeshore Surgery Center indicate that the injection took seven minutes, and that anesthesia was only administered for fourteen minutes. However, Western Touhy Anesthesia charged for anesthesia from 09:18 a.m. through 10:55 a.m., a period of ninety-seven minutes. PX6 & PX1.

Petitioner presented to Dr. Chunduri for follow-up on June 5, 2013, complaining of no improvement over the past two weeks, but denying radiating pain. Dr. Chunduri noted a negative straight leg raise bilaterally and lumbar flexion at 70 degrees. Because of continued complaints of back pain and a suspicion of L5-S1 discogenic pain, Dr. Chunduri recommended a lumbar discogram. PX6.

The Arbitrator notes that in Chiropractor Ma's June 14, 2013 Interim Report, Petitioner only demonstrated forward lumbar flexion of 50 degrees, 20 degrees less than he demonstrated to Dr. Chunduri on June 5, 2013. Ma also noted a positive straight leg raise bilaterally, whereas Dr. Chunduri noted a negative SLR on June 5, 2013.

Dr. Chunduri performed a discogram at Lakeshore Surgery Center on June 17, 2013. Dr. Chunduri inflated the L4-5 disc from 18 psi to 86 psi and Petitioner indicated he felt no pain. Dr. Chunduri then inflated the L5-S1 disc from 30 psi to 95 psi and Petitioner indicated that he felt no pain. Dr. Chunduri noted that L5-S1 was negative for discogenic pain.

On July 1, 2013, Petitioner underwent a bilateral, L5-S1, diagnostic medial branch block at Lakeshore Surgery Center. On July 10, 2013, Petitioner returned to Dr. Chunduri, reporting no pain relief with the medial branch block. He demonstrated lumbar flexion at 80 degrees and extension / lateral bends at 30 degrees. Dr. Chunduri changed his diagnosis to lumbar strain, believing that Petitioner's pain was most likely myofascial. Dr. Chunduri also provided a Medrol Dosepak. PX6.

On August 13, 2013, Chiropractor Ma again authored a "Work Comp Interim Report." The Arbitrator notes practically no improvement from the previous report in July 2013. In fact, Petitioner's subjective pain complaint remained at a five out of ten. Despite the lack of improvement, Chiropractor Ma continued chiropractic therapy three times per week for another month.

Petitioner returned to Dr. Chunduri on August 14, 2013, complaining of no improvement with the Medrol Dosepak. Dr. Chunduri again changes his diagnosis and opined that Petitioner was not suffering from myofascial pain. He instead diagnosed SI joint dysfunction and recommended a right SI joint steroid injection, which he administered on August 19, 2013.

On August 15, 2013, Petitioner reported an increase in pain to Chiropractor Ma after "he bent down to change a car battery in his car for 30 minutes." On September 3, 2013, Chiropractor Ma authored a "Qualified Medical/Legal Evaluation Report." Once again, Petitioner complained of pain rated at a five on a ten-point scale. Chiropractor Ma diagnosed a lumbar disc herniation and considered him to be "permanent and stationary." After approximately eighty-seven (87) sessions of chiropractic manipulation, Ma referred Petitioner for a neurosurgical consultation. PX6.

Petitioner presented to Dr. Robert Erickson, a neurosurgeon, on September 18, 2013, complaining of immediate low back pain with radiation toward the right lateral calf, after repetitively lifting meat trays up to fifty (50) pounds. On examination, Dr. Erickson indicated that he did not suspect a true lumbar radicular pattern. Petitioner demonstrated a positive straight leg raise bilaterally at 45 degrees. Dr. Erickson interpreted the March 21, 2013 MRI as showing a tiny central herniation at L5-S1 and moderate facet change at L4-5. Despite a normal EMG from April 1, 2013, Dr. Erickson recommended SSEP testing of the lower extremities and requested the discogram results. Petitioner returned to Dr. Erickson on October 16, 2013. The SSEP testing showed only mild delays bilaterally at L5 and S1. Dr. Erickson recommended a medial branch block or facet blockade. PX4.

Petitioner presented to Dr. Chunduri for a final consultation on October 23, 2013, complaining of right-sided, low back pain, which was rated at a four to six out of ten. He indicated that the SI joint injection provided him no improvement. Dr. Chunduri indicated that no pain management offerings were available to "localize his pain." Dr. Chunduri recommended a follow-up with neurosurgery and discharged him from his care.

On October 24, 2013, Petitioner underwent a "California Functional Capacity Evaluation", at New Life Medical Center. The testing was performed by Khalid Rashad, PT, DPT. The Arbitrator notes that the FCE report referenced no objective criteria. Despite the fact that Petitioner demonstrated the ability to carry in the heavy level, physical demand category, he only demonstrated the ability to lift in the medium level, physical demand. Therapist Rashad concluded that Petitioner could lift thirty (30) pounds occasionally and carry twenty-five (25) pounds, occasionally.

On November 6, 2013, Petitioner returned to Dr. Erickson, who had an opportunity to review Petitioner's response to the numerous pain management procedures. Dr. Erickson indicated that surgery was not an option at this time and placed Petitioner on permanent, 30-pound lifting restrictions, per the FCE and discharged him from care. PX4.

Petitioner testified that the treatment he received at New Life Medical Center temporarily relieved his back pain, but it would continue afterward. He testified that the three or four injections performed by Dr. Krishna Chunduri, helped somewhat. Tr. pgs. 17-18.

Currently, Petitioner is employed in a new job, making $9.00 per hour and works 40-45 hours per week. He testified that his job with Respondent paid him $9.50 per hour and that prior to the accident of February 25, 2013; he was able to perform all of his job duties. Petitioner testified that currently, he has pain in his lower back all the time. He testified that he could not carry his children, help at home, or play sports any longer. He also testified that he is not as sexually active as he used to be and that his highest level of education was sixth grade and his previous job was at McDonald's. Tr. pgs. 19-21.

Petitioner testified that he last worked for Respondent on February 27, 2013. He also testified that he did not apply for unemployment benefits until after he was released from Respondent. Petitioner testified that he called Respondent after he provided them with his restrictions and was told that Respondent did not have any work available for him. He testified that he called back two or three times. Petitioner was hired by his new employer on March 25, 2014 and his new job consists of the production of bread, working with his hands, in a light duty capacity. Tr. pgs. 22-24.

Upon cross-examination, Petitioner testified that Dr. Petrovas's medical records are incorrect if they indicated that Petitioner had a previous low back incident six or seven years earlier. He testified that he cut his fingers and did not hurt his back. Petitioner admitted that he made no complaints relative to his right or left leg to Dr. Petrovas. Petitioner again disputed Dr. Petrovas' records that Petitioner reported some improvement in his low back pain after one visit. He testified that he would disagree if Dr. Petrovas' records indicated that he had a negative straight leg raise test bilaterally at 80 degrees, because he had pain. He testified that he could not recall if Chiropractor Ma performed a straight leg raise test on February 28, 2013, but he agreed that he made no leg complaints to Ma. Petitioner testified that he would disagree if Ma's records indicated that he complained of pain on an occasional basis, on February 28, 2013. Tr. 26-32.

Petitioner testified that he could not remember if he referred to any leg complaints when he first treated with Dr. Chunduri, on March 6, 2013. Petitioner testified that he did not remember if he demonstrated lumbar forward flexion of 70 degrees with Dr. Chunduri on March 20, 2013, but could only forward flex 45 degrees with Chiropractor Ma on March 22, 2013. Petitioner testified that he did

not remember very well if he told Ma that he did not have any improvement in his low back complaints on the day following his first epidural steroid injection. Tr. pgs. 33-34.

Petitioner testified that he had no reason to disagree with Dr. Chunduri's report regarding his June 17, 2013 discogram, which indicated no pain of either the L4-5 or the L5-S1 disc, upon inflation. When asked about the subsequent injections by Dr. Chunduri, Petitioner testified that he did not say that the injections did not help, but rather that they did not improve his pain one hundred percent. Petitioner testified that he did not recall if he told Dr. Erickson that he experienced immediate low back pain and right leg radiating pain, but testified that he remembered feeling pain down his legs after the accident.

Petitioner testified that he did not remember if he was hooked to a heart monitor while participating in the functional capacity evaluation ("FCE"). When asked if a car battery weighed more than 30 pounds, Petitioner testified that he has not carried anything more than 30 pounds since the accident, so he did not know. When asked about Ma's entry on August 15, 2013, which indicated that Petitioner was changing a car battery, Petitioner testified that he did not remember, but must have had someone help him carry the battery.

Petitioner testified on cross-examination that despite having a car, he took transportation provided by Dr. Erickson's office, on October 16, 2013 and November 6, 2013. He testified that he requested transportation because he tried not to drive due to back pain. The Arbitrator notes that Petitioner requested travel with Windy City Medical Specialists on October 16, 2013 and again on November 6, 2013. The Arbitrator also notes that these travel services were charged at $500.00 per date of service, with no reference to the mileage driven.

Petitioner admitted that he did not attempt to return to work when Respondent's Section 12 examiner, Dr. Jay Levin, indicated he could return to work full duty, as of May 29, 2013. He testified that because his doctors had not released him, he did not attempt to return to work. When asked about unemployment, Petitioner disputed that he applied for benefits prior to being released from Respondent. Petitioner was presented with a document from the Illinois Department of Employment Security dated September 17, 2013, indicating that he was given unemployment benefits effective August 4, 2013. Petitioner agreed that he was still treating with his medical providers as of September 17, 2013. Tr. pgs. 32-44.

Petitioner testified, at the time of the hearing, his low back pain rated between a six and an eight on a ten-point scale. He testified that on a normal day, his low back pain was between a three and a five. Petitioner testified that he was supposed to return to see Dr. Petrovas after his February 28, 2013 visit.

On redirect examination, Petitioner testified that he did not lift a car battery on August 15, 2013. He testified that he just bent over. Petitioner testified that he had injured his thumbs at work previously and settled that claim with an attorney.

On recross-examination, when asked again about the car battery incident, Petitioner testified, "I remember now that I mentioned that I bent down to check the car battery, and that was hurting a lot, not that I changed it or charged it." When asked about Chiropractor Ma's record indicating that he was changing the battery for thirty minutes, Petitioner testified that he was just checking the battery for thirty minutes, and maybe was trying to unscrew some of the screws. Tr. pgs. 45-50.

Dr. Jay L. Levin's Testimony

On May 29, 2013, Petitioner presented to Dr. Jay Lawrence Levin, an orthopaedic spine surgeon, for an IME and impairment rating, by request of Respondent. The evidence deposition of Dr. Levin was taken on November 26, 2013. He testified that he is board certified in orthopaedic surgery, recertified twice, and that fifty percent (50%) of his practice involves general orthopedics; while the other fifty percent (50%) involves conditions of the spine. He testified that he received his medical degree at Rush Medical College at Presbyterian-St. Luke's Medical Center in 1980 and completed a residency at Rush-Presbyterian-St. Luke's, from 1980 to 1985. Dr. Levin additionally conducted a fellowship in adult and pediatric spinal surgery from 1985 to 1986 and testified that he has been in private practice with Adult & Pediatric Orthopedics, S.C., since 1986. Dr. Levin estimated that forty (40%) of his medical practice consists of medico-legal issues, including expert work and independent medical examinations, with sixty (60%) devoted to the clinical practice of orthopaedic surgery. RX2.

Dr. Levin relied upon his IME report dated May 29, 2013 during his testimony, as he did not have an independent recollection of Petitioner. He testified that Petitioner communicated with him through a translator, Francisca Grijalva. Dr. Levin indicted that Petitioner told him that Respondent had employed him since March 2004; and for the past eight months, he had been working in the deli department, where he moved meats and cheeses, set up and sliced products. Petitioner told Dr. Levin that before the injury of February 25, 2013, he noticed low back pain when he worked in the meat department. Petitioner further reported that he would take Tylenol or Advil for his back pain, but he never sought medical treatment or filled out an injury report; rather, he "dealt with" the pain. RX2.

Petitioner reported to Dr. Levin an incident on February 25, 2013, where he bent forward while holding a 20-pound tray of cheese to place it into a glass case. When he bent forward, he felt immediate pain in his low back and weakness in both legs radiating to his ankles. Dr. Levin testified that Petitioner presented with low back pain, which he rated at seven on a ten-point scale, with no radiation subsequent to his second injection by Dr. Chunduri. Petitioner described transverse lower lumbar pain, which hurt when bending forward to brush his teeth, when sitting or standing for more than 30 minutes, when bending, or when taking the stairs. Petitioner described weight gain and a little loss of bowl/bladder control, and stated that he had not told his doctor of this development. RX2.

After obtaining a history, Dr. Levin testified that he conducted an orthopedic examination of Petitioner's lumbar spine. Dr. Levin noted transverse, low back pain while walking in the heel/heel fashion and midline lower lumbar tenderness with mild sacral tenderness bilaterally. He noted no

spasm present however; he noted mild tenderness of the lumbosacral junction and slight gluteal tenderness. Dr. Levin noted negative straight leg raising bilaterally, negative FABER sign bilaterally, bilaterally symmetric patellar and Achilles reflexes, 5 out of 5 strength testing and symmetric sensation. Of note, was a positive Hoover sign bilaterally, with low back pain on either side. He testified that a positive Hoover is a sign consistent with nonorganic etiology for Petitioner's complaints. He indicated that he had Petitioner lay down in the supine position and told him to lift and hold one leg into the air. At that time, Dr. Levin tested the strength of the contra-lateral leg, which should be pushing down on the table. He testified that he did not test Petitioner for any other signs of symptom magnification. RX2.

Dr. Levin testified that after the examination, he reviewed the diagnostic studies and medical records. He noted degenerative disc changes at L1-2 and mild changes at L5-S1, with no evidence of a herniated nucleus pulposus, in his personal review of the lumbar MRI of March 21, 2013. Dr. Levin opined that the MRI results were age-appropriate findings that did not present any clinical significance. He also reviewed the EMG/NCV that Chiropractor Gregory Thurston conducted on April 1, 2013, which was read as normal.

After taking the history, conducting the examination, reviewing the diagnostic studies and reviewing medical records from New Life Medical Center, Dr. Krishna Chunduri and Lakeshore Surgery Center, Dr. Levin testified that he arrived at a diagnosis of lumbar myofascial strain. He testified that in his opinion, Petitioner's subjective complaints should have improved by May 29, 2013, the date of examination. He testified that as of the date of his examination, he believed the petitioner to be at maximum medical improvement ("MMI") and that he did not need further treatment. He also testified that he believed Petitioner could return to work, in a full duty capacity, as of his examination date.

Dr. Levin further testified that he subsequently reviewed medical documentation sent by attorney for Respondent, on or about October 31, 2013. He also reviewed a report from Dr. Chunduri on June 5, 2013, that recommended a provocative discogram at L5-S1 because he believed Petitioner to be suffering from discogenic pain. Dr. Levin testified that he reviewed the June 17, 2013 discogram report and although he disagreed with the decision to conduct the discogram, the study was inconsistent with Dr. Chunduri's diagnosis of discogenic pain at L5-S1. Dr. Levin noted that the discogram result was therefore consistent with his own diagnosis of a lumbar myofascial strain.

Dr. Levin further testified that he reviewed a June 25, 2013 report from Dr. Chunduri, in which Dr. Chunduri recommended medial branch blocks at L4-5. Dr. Levin noted that there was no diagnosis in Dr. Chunduri's previous records indicating facet-mediated pain, and opined that the July 1, 2013 medial branch blocks, which had not improved Petitioner's complaints, further confirmed his own diagnosis of a myofascial strain. Dr. Levin then reviewed further treatment records from Dr. Chunduri, including evidence of a later right sacroiliac joint injection, which again did not relieve Petitioner's pain. Dr. Levin then reviewed a report from Dr. Robert Erickson and opined that he

disagreed with a diagnosis of mechanical low back pain, because Dr. Erickson had not reviewed the discogram conducted by Dr. Chunduri.

After review of the additional records, Dr. Levin testified that his opinions had not changed from May 29, 2013, and in fact, his opinions had been confirmed by the subsequent, unnecessary medical treatment. He testified that he believed Petitioner had clinical symptoms consistent with a lumbar myofascial strain, but indicated, "when you have such an extensive workup afterwards with all negative findings, one could argue as to whether this patient may not have any injury at all." He testified that the additional treatment from New Life Medical Center and Dr. Chunduri was not reasonable or necessary. RX2.

Dr. Levin then testified that he prepared an AMA impairment rating, dated June 7, 2013. He testified that he is certified to prepare an impairment rating based on the AMA's Guides to the Evaluation of Permanent Impairment, Sixth Edition. He explained that the Sixth Edition is based on diagnosis and that after determining a class based upon diagnosis, the examiner moves within the class, based upon three different grade modifiers; i.e., functional history, physical examination and clinical studies. Since he determined that the diagnosis was myofascial strain, the permanent partial impairment of the whole person was 0%; and there would be no movement based upon the grade modifiers. Dr. Levin indicated that in this case Petitioner has "had a series of additional diagnostic testing which precludes any of these additional diagnoses below anyway." The Arbitrator notes that Class 0 is entitled, "Documented history of sprain/strain-type injury, now resolved, or occasional complaints of back pain with no objective findings on examination."

Upon cross-examination, Dr. Levin admitted that Petitioner's treating physicians had not deemed him to be at MMI, as of the date Dr. Levin prepared his AMA impairment assessment. Petitioner's attorney asked several questions relating to the functional history grade modifier, which is based upon the subjective pain and disability questionnaire, and Dr. Levin testified that despite the grade modifier of 3, the diagnosis class of zero did not allow for movement based upon modifiers. Dr. Levin testified that even if Petitioner was placed in Class 1, which is entitled "Documented history of sprain/strain-type injury with continued complaints of axial and/or non-verifiable radicular complaints and similar findings on multiple occasions," his permanent partial impairment would be 1% of the whole person.

Dr. Levin testified that Petitioner had an invalid examination due to the positive Hoover test and agreed with Petitioner's attorney that the AMA Guidelines do not take into account work restrictions, functional capacity evaluations, or "future problems."

Chiropractor Edwin B. Rabin's Testimony

On March 18, 2014, the parties participated in the telephonic, evidence deposition with Edwin B. Rabin, D.C. Chiropractor Rabin testified that he received his Bachelor's of Science from the University of Florida, majoring in Microbiology and Cell Science. He testified that he received his

Doctor of Chiropractic Medicine from Life University College, in 1996. His curriculum vitae indicates that he was valedictorian of his class at Life University. Rabin testified that he was in private practice until 2011, but currently is employed as a physician advisor for claims evaluation. Rabin testified that he has current licenses in Illinois, Texas, Florida, and New York. RX3.

Rabin testified that he receives a file through a portal, which includes medical records and a draft summary of the medical treatment. He testified that he typically reviews the medical records first, then reviews the draft report to verify that it is correct. He further testified that the vendor typically cites the UR guidelines he believes to be applicable. He then checks to see whether there are any extenuating circumstances or co-morbidities for the subject patient, to justify additional treatment beyond the particular guideline. He testified that medical necessity is determined via use of the guidelines, in addition to his clinical experience as a chiropractor. Rabin testified that the Official Disability Guidelines are a compilation of research on treatment, modalities and surgeries that are reviewed by a panel of physicians; and deemed reasonable and necessary. He further testified the guidelines are updated regularly, sometimes as frequently as a few weeks.

Rabin further testified that he performed a utilization review on medical treatment rendered to Petitioner by New Life Medical Center and authored two reports on June 17, 2013 regarding his review. He had an independent recollection of the Petitioner's treatment records and that all of his opinions would be to a reasonable degree of chiropractic certainty and based upon the ODG-TWC Low Back Guidelines. He performed prospective and retrospective utilization reviews, indicating that in the subject matter, he reviewed New Life Medical Center records from February 28, 2013 through April 29, 2013, some lab reports, an EMG and documentation of epidural steroid injections.

Rabin then testified that the medical records he reviewed did not reference any clinical progress or alleviation of the patient's subjective pain complaints. For instance, he compared the initial report of February 28, 2013 and a later report from March 22, 2013, which had identical objective findings. He noted that the only change in the March 22, 2013 report, which was approximately eight or nine sessions from the first visit, referenced a drop in subjective pain complaints from 8/10 to 7/10. He testified that the ODG-TWC Low Back Guidelines consider a trial of six sessions of physical therapy to be reasonable and necessary, with up to 18 sessions to be certifiable if substantial improvement is noted. Chiropractor Rabin concluded that while the initial six (6) chiropractic sessions would be certified as reasonable and necessary, the remaining treatment would be deemed to be unreasonable and excessive, due to the lack of documentation of objective improvement. When asked whether he was aware of any changes in the ODG Guidelines at present as to the total number of chiropractic treatments, Rabin indicated he was unaware of any changes. RX3.

Rabin testified that during his prospective utilization review, he was unable to certify any additional treatment as reasonable and necessary based upon the lack of objective improvement by the chiropractic care rendered by New Life Medical Center. He testified to his recollection, he had not

spoken with Irene Ma or anyone at New Life Medical Center, but admitted that he is almost never made aware of any appeals on his utilization review determinations.

Upon cross-examination, Rabin testified that Illinois does not have any requirement for a particular set of utilization review guidelines to be used, so long as the guidelines are URAC supported. He testified that while the guidelines do not use subjective reports of improvement to influence the determination of medical necessity, an advisor could utilize the subjective reports as an extenuating circumstance to certify additional treatment. On redirect, he testified that he did not note any extenuating circumstances or co-morbidities in Petitioner's records, to justify additional certification.

Conclusions of Law

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

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 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 casual 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 vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).
It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).
The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances [emphasis added] support the decision. See generally, *Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980), *Caterpillar v Industrial Commission*, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009).

After review of the testimonies of Petitioner, Dr. Levin and Chiropractor Rabin, and a review of the exhibits, the Arbitrator concludes that Petitioner has not proven, by a preponderance of the evidence, that his current condition of ill-being is causally related to the accident of February 25, 2013.

The Arbitrator finds that Petitioner's testimony at hearing lacked credibility. Petitioner denied previously sustaining a low back injury or experiencing low back pain; however, the medical records from Petrovas Medical Center contain an admission that Petitioner had similar low back symptoms six to seven (6-7) years earlier, while working for Respondent. Moreover, Petitioner admitted to Dr. Levin that he previously had low back symptoms while working for Respondent that he "dealt with it" and did not seek medical attention.

Petitioner's history of symptoms after the accident is inconsistent among the various medical providers, as well as his testimony at hearing. Petitioner testified that he had immediate lower extremity weakness after lifting the tray of cheese; however, he admitted that he did not document these symptoms with his initial medical providers. Upon review of the medical records from Petrovas Medical Center and New Life Medical Center, there is no reference to lower extremity or leg complaints. Similarly, Petitioner specifically denied radicular complaints in his initial workup with Dr. Krishna Chunduri. The medical records refer to radicular complaints for the first time, on March 20, 2013, approximately one month after Petitioner ceased working for Respondent. When Petitioner was examined by Dr. Levin and when initially treating with Dr. Erickson, his history changed to reflect an immediate onset of bilateral lower extremity weakness and radiating pain.

Similarly, the medical records show that Petitioner was inconsistent during his presentation to the various medical providers that examined him. The Arbitrator notes that Petitioner had a negative straight leg raise bilaterally at 80 degrees during his initial examination at Petrovas Medical Center on February 27, 2013, with documentation of only hamstring tightness. The examination on February 28, 2013 revealed a similar finding. However, on the same date, Chiropractor Ma noted a positive straight leg raise bilaterally, at 40 degrees on the right and 45 degrees on the left. There is no objective basis to explain how Petitioner's testing, on presentation, could vary so dramatically. Petitioner's presentation to Chiropractor Ma is inconsistent with the presentation to Dr. Chunduri on a frequent basis as well. For instance, Petitioner demonstrated 70 degrees of lumbar forward flexion with Dr. Chunduri on March 20, 2013, but could only forward flex 45 degrees with Chiropractor Ma on March 22, 2013.

At hearing, Petitioner disputed the histories taken by the medical providers, on numerous occasions during cross-examination. He indicated that Chiropractor Petrovas' documentation of a prior onset of low back pain 6-7 years earlier was "a lie" and denied telling Chiropractor Ma that his pain complaints were only intermittent, at 0-25% of his awake time. Perhaps the most telling incident revealing Petitioner's lack of credibility came when asked on cross-examination about changing a car battery, which is documented in Chiropractor Ma's SOAP notes. Petitioner's recollection of the occurrence

changed three times, with the first time denying lifting anything more than 30 pounds; then stating that someone must have done the lifting for him, then indicating, "I remember now that I mentioned that I bent down to check the car battery, and that was hurting a lot, not that I changed it or charged it." When asked about Chiropractor Ma's record indicating that he was changing the battery for thirty minutes, Petitioner testified that he was just "checking" the battery for thirty minutes, and maybe was trying to unscrew some of the screws. The Arbitrator finds Petitioner's testimony to be disingenuous.

The Arbitrator additionally finds that the opinions of Respondent's Section 12 examiner, Dr. Jay Levin, are more persuasive than those of Chiropractor Ma and Drs. Chunduri and Erickson. The Arbitrator notes that in most circumstances, the determination of credibility of the medical providers is a difficult one. However, Petitioner's lack of credibility and the copious medical treatment with no improvement makes this a relatively straightforward determination. During the May 29, 2013 IME, Dr. Levin conducted an examination, reviewed the medical records, and interpreted the MRI of the lumbar spine. He indicated that Petitioner was at MMI and diagnosed a lumbar myofascial sprain. Despite a lumbar discogram, a diagnostic medial branch block, a sacroiliac joint injection, months of additional chiropractic manipulation and a Medrol Dosepak, Petitioner had no improvement in his complaints. The Arbitrator finds Dr. Levin's interpretation of the MRI of the lumbar spine being normal, age-related degenerative changes, to be more persuasive than Dr. Erickson's diagnosis of a "tiny herniation," as Dr. Levin's opinion is more similar to the findings of a 2 mm bulge at L5-S1, that the radiologist interpreted. The Arbitrator concludes that Dr. Levin's opinions were confirmed by the copious treatment provided to the petitioner, resulting in a determination of no pain generator.

Based upon Petitioner's lack of credibility and the lack of objective evidence supporting a cause of Petitioner's subjective complaints, the Arbitrator finds that Petitioner failed to meet his burden of proving, by a preponderance of the evidence, that his current condition of ill-being is causally related to the accident of February 25, 2013.

G. What were Petitioner's earnings?

The Arbitrator reviewed the comprehensive wage statement provided by Respondent in RX4. As the evidence at hearing indicated that Respondent did not dispute that overtime was a condition of Petitioner's employment, the Arbitrator included the overtime hours at the appropriate straight-time rate of $9.50 per hour. Petitioner testified that he worked 6 days per week for Respondent. In the 52 weeks prior to the date of accident, the Arbitrator notes that Petitioner worked approximately 39-5/6 weeks according to a *Sylvester* analysis of weeks actually worked. During those 39-5/6 weeks actually worked, Petitioner worked a total of 1,806.60 hours. Consequently, the Arbitrator calculated Petitioner's AWW to be: (1,806.60 hours x $9.50/hour)/39-5/6 weeks=17,162.70/39.83333=$430.86 per week. As Petitioner's AWW is $430.86 per week, his TTD and PPD rates are the state minimum rate of $330.00 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?

After review of the testimonies of Petitioner, Dr. Levin and Chiropractor Rabin and a review of the exhibits, the Arbitrator concludes that the medical treatment rendered to Petitioner was excessive and unreasonable, and that Respondent has paid all reasonable and necessary medical expenses.

As referenced in subsection F above, the Arbitrator finds the opinions and testimony of Dr. Levin to be more persuasive than those of Chiropractor Ma, Drs. Chunduri, and Erickson. The Arbitrator finds numerous reasons to show that the medical treatment of Petitioner's choice of medical providers, was excessive and unnecessary and will discuss each provider individually.

New Life Medical Center

The Arbitrator preliminarily notes that Petitioner underwent approximately eighty-seven (87) sessions of chiropractic manipulation with Chiropractor Ma from February 28, 2013 through September 3, 2013. During this period, the medical records indicate minimal improvement in Petitioner's subjective complaints of pain. During this treatment, Petitioner's pain complaints reduced from an eight on a ten-point scale to a five. The Arbitrator notes that the SOAP notes of Chiropractor Ma are practically identical for months at a time. Despite the lack of progress noted, Ma continued to recommend identical treatment modalities rather than discharge Petitioner due to lack of progress.

The Arbitrator also reviewed the testimony of Chiropractor Edwin B. Rabin, who performed prospective and retrospective utilization reviews on the treatment rendered by Chiropractor Ma. Chiropractor Rabin testified that only six sessions of Chiropractor Ma's therapy, i.e., from February 28, 2013 through March 12, 2013, were reasonable and necessary, based upon utilization review. The Arbitrator finds Chiropractor Rabin's testimony to be persuasive on this issue, as Petitioner set forth no evidence to refute Chiropractor Rabin's utilization review determination. The Arbitrator also finds Petitioner's testimony that the chiropractic therapy only helped him "at the moment" to be less than persuasive as to the reasonableness and necessity of the treatment.

As a consequence, the Arbitrator finds that only the six certified treatments were reasonable and necessary, and that Respondent is entitled to a credit for the additional payments beyond the $906.51 paid for the initial six visits through March 12, 2013 for chiropractic manipulation and therapy.

Dr. Krishna Chunduri/New Life Medical Center and Advanced Spine and Pain

The Arbitrator similarly finds that the treatment rendered by Dr. Krishna Chunduri was unnecessary and excessive. The Arbitrator finds that during the initial visit with Dr. Chunduri on March 6, 2013, Petitioner made no complaints of radicular pain into his lower extremities. Only during the March 20, 2013 visit, did Petitioner complain of a development of radicular complaints. Petitioner's

treatment then focused on treating an unrelated radiculopathy complaint that was not present until nearly four weeks after the accident. After those injections, Dr. Chunduri undertook a substantial amount of invasive treatment, in an apparent attempt to find a reason for Petitioner's continued complaints of pain. The Arbitrator finds that there was no objective basis for Petitioner's complaints of pain, which was corroborated by Dr. Chunduri's lack of success in treating him. The Arbitrator therefore concludes that the treatment rendered by Dr. Chunduri after the March 20, 2013 visit, was excessive and unnecessary. Consequently, the Arbitrator awards $592.28, the 8.2 allowable rate, or the negotiated rate, whichever is less, to Petitioner for the March 6, 2013 and March 20, 2013 visits by Dr. Chunduri; and denies the additional treatment from Dr. Chunduri.

Lakeshore Surgery Center

The Arbitrator likewise finds that none of the treatment at Lakeshore Surgery Center was reasonable and necessary. In addition to finding that the injections were unnecessary, the Arbitrator notes a pattern and practice of charging for anesthesia in excess of the documented time anesthesia was administered.

Dr. Robert Erickson/American Center for Spine & Neurosurgery

As the Arbitrator finds that Petitioner had reached MMI by the date of Dr. Levin's examination, none of Dr. Erickson's treatment would be deemed reasonable or necessary treatment, and the Arbitrator therefore does not award Dr. Erickson's bill.

Remainder of Medical Treatment

The Arbitrator denies the Leading Toxicology bill and the Redwood Toxicology bill, as Petitioner did not set forth any testimony or medical evidence that indicates why such testing would be reasonable and necessary. The simple existence of a medical bill is not justification that the service rendered is causally related, reasonable or necessary. Additionally, the Arbitrator denies the transportation charges from Windy City Medical Transportation, as (1) the service was provided after the Arbitrator deemed Petitioner to have reached MMI, and (2) the charge of $500.00 per trip, without corroborating documentation of the mileage traveled, is patently excessive. Additionally, the Arbitrator notes that that bills alleged to be outstanding in PX 11 for Prime Medical Resources were paid by Respondent.

K. What temporary benefits are in dispute?

After review of the exhibits and the testimonies of Petitioner, Dr. Levin and Chiropractor Rabin; the Arbitrator concludes that Petitioner was temporarily, totally disabled from February 26, 2013 through June 4, 2013, a period of 14-1/7 weeks, at the minimum rate of $330.00 per week. The Arbitrator finds that Petitioner could have returned to work as of the date of examination by Dr. Levin on May 29, 2013; however, it appears the parties did not have Dr. Levin's report until June 4, 2013.

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

Petitioner testified to his disability at the hearing. With regards to the determination of permanent partial disability, the Arbitrator finds the following in accordance with the Section 8.1b(b) factors:

With regards to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 0% of the whole body as determined by Dr. Jay L. Levin, 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 Act, but instead is a factor to be considered in making a disability evaluation. Dr. Levin noted a diagnosis of lumbar myofascial sprain, which is a Class 0 diagnosis, partly due to Petitioner's invalid examination, and partly due to the lack of objective evidence of a more significant lumbar pathology. Because of Petitioner's failure to respond to the numerous diagnostic treatments and tests provided by Dr. Krishna Chunduri and failure to substantially improve in subjective complaints with any medical treatment, the Arbitrator gives greater weight to this factor.

With regards 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 deli worker in the cheese department at the time of the accident; and that he is able to return to work, in his prior capacity, after said injury. The Arbitrator did not find Petitioner to be credible regarding his continued subjective complaints at hearing; and notes that the "California Functional Capacity Evaluation" contains no objective validity criteria. Petitioner's classification as a butcher in the Functional Capacity Evaluation is also misleading. The Arbitrator gives greater weight to Dr. Levin's opinions than those of Chiropractor Ma and Dr. Erickson. Because of Petitioner's lack of credibility, the Arbitrator therefore gives minimal weight to this factor.

With regards to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 40 years old at the time of the accident. This age is relatively middle-aged in the working world and Petitioner is capable of continuing to work. Because of Petitioner's lack of credibility and his reaching maximum medical improvement as of May 29, 2013, the Arbitrator therefore gives little weight to this factor.

With regards to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner is earning $0.50 per hour less with his new employer. Because of Petitioner's lack of credibility as to his ability to return to work with Respondent and the negligible change in earning capacity, the Arbitrator gives minimal weight to this factor.

With regards to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner made continued subjective complaints of pain in his final medical record with Dr. Erickson. Despite his lack of seeking medical treatment since his release by Dr. Erickson on November 6, 2013, Petitioner testified that he continues to have pain complaints that are as high as an eight on a ten-point scale; which would be identical to his subjective complaints as of

the date of accident. Because of Petitioner's lack of credibility, the Arbitrator gives no weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the man as a whole pursuant to §8(d)2 of the Act.

N. Is Respondent due any credit?

After review of the testimony and the evidence presented at hearing, the Arbitrator concludes that Respondent is due a credit for payment of TTD benefits in addition to medical benefits. With regards to TTD, the parties agree that Respondent paid $4,743.49 in TTD benefits. Based upon the AWW calculation, Petitioner would be entitled to TTD totaling $4,667.14. As such, Respondent is entitled to a $76.35 TTD credit.

With regard to 8(a) medical benefits, Respondent paid $5,959.26 to M & R Rudra New Life Medical. Based upon the analysis above, the Arbitrator finds that only $1,498.79 of the medical treatment rendered by New Life Medical / Dr. Chunduri was reasonable and necessary. As such, Respondent is entitled to a credit of $4,460.47 for medical benefits.

15IWCC0800

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
13 WC 7596
SIGNATURE PAGE

Signature of Arbitrator

November 26, 2014
Date of Decision

DEC 1 - 2014

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

Betsy Jo Pierce,

Petitioner,

vs. NO. 12 WC 19457

Medinah Christian School,

15IWCC0801

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, 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 4, 2014 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.

15IWCC0801

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,200.00. 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: OCT 30 2015
SJM/sj
o-9/24/15
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PIERCE, BETSY JO
Employee/Petitioner

Case# **12WC019457**

MEDINAH CHRISTIAN SCHOOL
Employer/Respondent

15IWCC0801

On 12/4/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0641 HARRIETT LAKERNICK ESQ
203 N LASALLE ST
SUITE 2100
CHICAGO, IL 60601

2097 GRANT & FANNING
DANIEL SWANSON
300 S RIVERSIDE PLZ SUITE 2050
CHICAGO, IL 60606

STATE OF ILLINOIS)

15IWCC0801

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

BETSY JO PIERCE
Employee/Petitioner

v.

MEDINAH CHRISTIAN SCHOOL
Employer/Respondent

Case # **12** WC **19457**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Wheaton**, on **11/05/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **03/16/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**28,854.00**; the average weekly wage was $**554.88**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**regular salary paid during lost time** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**see above**.

Respondent is entitled to a credit of $**77,705.72** under Section 8(j) of the Act.

ORDER

The respondent shall pay reasonable and necessary medical services as set forth herein pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit as set forth herein for expenses paid by group health insurance, but shall hold petitioner harmless from any reimbursement requests from the group carrier for any service for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

The respondent shall pay the petitioner the sum of $332.93 per week for 63.25 weeks, as the accident caused permanent partial disability to the extent of 25% loss of use of the right arm, pursuant to §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

December 4, 2014
Date

DEC 4 - 2014

15IWCC0801

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BETSY JO PIERCE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 12 WC 19457
	)	
MEDINAH CHRISTIAN SCHOOL,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner testified she began working for Medinah Christian School as a preschool teacher in late 2006. On March 16, 2012, she began her day at 7:00 A.M. and did her normal classroom activities. Following her usual school day, she remained at the school to assist with an after-school stage performance with the students. That program ended at about 8:00 P.M. As she was walking out of the school into the parking lot, she testified that her left foot caught on the lip of the curb and she fell, landing on her left side with her right arm underneath her.

The petitioner testified that at the time she fell, she was carrying several bags on her left arm, including a change of clothes, her purse, her lunch bag, and a bag with school course materials in it. She estimated the total weight of these bags at approximately fifteen pounds. She acknowledged, and the medical records reflect, prior diagnoses of scoliosis which had required a childhood surgery as well as degenerative disk disease in her spine. These had resulted in her having difficulty walking and a pronounced limp in her left leg; the Arbitrator noted she was using a cane at the time of the trial. She testified that fatigue sometimes makes her limp worse, but testified that while she was tired that evening she had no problems walking that night. She testified that the weather was clear and dry, and that while the sun had set the parking lot had lights, and she acknowledged there were no rocks, branches, debris or obstacles in the area. Photographs of the area were taken later and were admitted as part of PX6.

The chairman of the Medinah Christian School Board, Craig Haigh, testified he was at the program that night and heard a commotion down the sidewalk when he left, and a bystander reported to him that the petitioner had fallen. Mr. Haigh is the chief of the Hanover Fire Department and a certified paramedic; he went to assist the claimant and assessed her with a fractured right arm. He splinted the arm and called 911. He confirmed the weather and the lack of debris or cement or pavement cracks.

The petitioner was taken by ambulance to St. Alexius Medical Center where X-rays revealed fractures to the right radius and ulna. Dr. Luke, an orthopedist, was called for consultation and following examination, recommended surgery. Dr. Luke performed open reduction internal fixation on March 17, 2012 with a closed reduction of the radial head. She was casted postoperatively and discharged from the hospital on March 18, 2012 with instructions to follow up with her orthopedist. See PX1, PX2.

On March 22, Dr. Luke saw the petitioner and noted mild swelling and good healing. She was maintained in a cast and instructed to follow up for X-rays in a week. On March 29, she was released to work with no use of the right arm as of April 2, 2012. On April 5, 2012, Dr. Luke saw the claimant and reviewed new X-rays. He noted a low risk of posttraumatic wrist arthritis and recommended against further surgery at the wrist. He recommended occupational therapy at that time. On April 19, 2012, Dr. Luke noted ongoing healing on X-rays and recommended occupational therapy and home exercise. On May 10, she noted no pain during the day but occasional forearm pain at night. On June 21, 2012, Dr. Luke noted he was "impressed" with the range of motion and discontinued use of the brace. He instructed her to continue exercise and return in one month. On July 26, 2012, he noted fibrous union in the right radius but recommended against surgery. He instructed her to continue home exercise and follow up in two months; it was noted the petitioner might be moving to St. Louis at that point, and it was noted they may need to copy her records if she were to do so and seek local medical treatment there. See generally PX2.

The petitioner testified that her symptoms improved following the removal of the cast and she had returned to work in April of 2012. She testified that in December 2012, she began experiencing right arm pain.

On January 10, 2013, she returned to Dr. Luke and noted pain in the right arm over the last month. X-rays revealed a broken screw with loosening of the hardware and Dr. Luke referred her to a colleague, Dr. Bernstein, for evaluation of revision surgery. Dr. Bernstein then saw her on January 16, 2013. He concurred with the revision ORIF procedure and scheduled her for preoperative testing. See PX3.

Dr. Bernstein performed a revision ORIF surgery on February 22, 2013. She was casted postoperatively. On March 5, 2013, she reported feeling much better and she was told to follow up for X-rays in two weeks. On March 19, 2013, she was noted to have bony healing and was recommended vitamin supplements and kept in the cast. On April 5, 2013, those prescriptions were maintained. PX3.

On May 14, 2013, she was referred for physical and occupational therapy and was instructed on scar massage. She began physical therapy on May 16, 2013 and continued to undergo it thereafter. On June 11, Dr. Bernstein saw her in follow up. It was noted she would be moving to southern Illinois and would see a doctor there. He provided her a prescription for additional physical therapy at that time and she did attend at least one of those sessions on June 14, 2013. See PX3.

The petitioner testified she returned to work on March 16, 2013, and worked for the rest of that school year. She then amicably resigned her position at Medinah Christian School at the end of the school year for personal reasons. She testified that her arm was weak when the cast was removed but gained strength thereafter. She testified as to some occasional residual pain, especially with pronation and supination of the forearm.

In addition to Mr. Haigh, Mr. L. Scott Chisholm, the Director of Facilities and Operations at the respondent, testified. He knows the petitioner and saw her daily and confirmed that she had problems walking before this incident. He testified that the area was in good repair and that there had no recent repaving. He testified there was no demolition or debris in the area and confirmed the photographs of the area.

OPINION AND ORDER

Accident and Causal Relationship

A claimant must prove by the preponderance of credible evidence that an injury both arose out of and was in the course of employment in order to receive compensation under the Act. See, e.g., *Orsini v. Industrial Commission*, 117 Ill.2d 38, 44-45 (1987). "In the course of" refers to the time, place and circumstance under which the accident occurred, while "arising out of" refers to the origin or cause of the accident that gave rise to the injury. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill.2d 478, 483 (1989). In this case, there is no dispute the petitioner was at her usual place of work, during the time that she could have reasonably been expected to be present. Therefore, the Arbitrator finds she has satisfied the "in the course of" element.

The fact that the claimant's duties took her to the place of injury and that, but for her employment, she would not have been there, is not sufficient to support a finding that her injuries arose out of employment. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill.2d at 485-86; *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill.2d 52, 58 (1989). For an accidental injury to arise out of employment, its origin must be in some risk connected with or incidental to the employment, rather than simply location or a positional risk, in order to establish a causal connection. *Caterpillar Tractor Co.*, 129 Ill.2d at 63. There are three categories of risks to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks, which have no particular employment or personal characteristics. *Illinois Institute of Technology v. Industrial Commission*, 314 Ill.App.3d 149, 162 (1st Dist. 2000); see also *First Cash Financial Services v. Industrial Commission*, 367 Ill.App.3d, 102, 106, 853 N.E.2d 799 (1st Dist. 2006). In cases involving a neutral risk, there must be some other work-related cause for a fall to deem it a work-related accident. See, e.g., *First Cash Financial Services v. Industrial Commission*, 367 Ill.App.3d 102, 106, 853 N.E.2d 799 (1st Dist. 2006).

Here, the petitioner tripped on a curb. In and of itself, risk of a misstep is not uniquely associated with the petitioner's employment. While the claimant's retained

investigator characterized this as a "trip hazard," the Arbitrator does not share this assessment. The photographs of the lot demonstrate that is shows generally good repair and maintenance of the area. An attempt to characterize a tiny lip on a wheelchair ramp that is otherwise in good repair as a "premises defect" strains that term past its breaking point. Nothing from the photographs or testimony suggests this would rise to any level of obstacle, debris, or potential danger. The weather and lighting conditions further do not support an increased risk. It was, by all accounts, clear and dry, and while night had fallen, the parking lot had adequate lighting and the petitioner was also familiar with the area. As such, the Arbitrator finds a lack of credible evidence supporting those as contributory causes.

The only potential work-related cause that appears to be credible is that the claimant was carrying bags on her left side, which caused a degree of imbalance. The claimant did fall towards the left side. The petitioner also appeared credible on the stand and testified that she was carrying work materials in her bags. She further testified that she told the respondent's adjuster about this in an interview, and the respondent did not provide either a transcription of the interview or contrary testimony from the adjuster.

The respondent submits that the claimant's idiopathic condition caused the fall, and the Arbitrator does note that the claimant by both witness accounts and observation at the hearing does have gait problems. An idiopathic fall is easily possible.

The respondent's position is certainly understandable, but considering all the evidence presented, the Arbitrator finds enough evidence to sustain a finding of an increased risk based on the carrying of the work materials by the claimant.

Notice

The respondent's representatives were on site and the insurance provider noted in writing in early April 2012 that the matter had been reviewed. Notice within 45 days of the accident has clearly been established.

Medical Services Provided

The medical services were disputed based on liability rather than the necessity of the care. Given the above findings, the respondent is directed to pay the petitioner the $10,380.00 in co-pays and deductibles identified, subject to the limits of Sections 8(a) and 8.2 of the Act. The respondent is further directed to hold the petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for the $77,705.72 in payments heretofore made for the treatment incurred.

Temporary Total Disability

TTD was disputed based on liability. However, the parties concurred that the claimant was paid her regular salary while off work. As such, while the claimant has demonstrated entitlement to disability for the period of lost time in question, appropriate benefits have already been tendered. The respondent shall hold the petitioner harmless for any recoupment efforts for any such benefits, however, pursuant to Section 8(j).

Nature and Extent of the Injury

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

Applying this standard to this claim, the Arbitrator first notes that neither party elected to submit an AMA impairment rating, and the Arbitrator therefore relies on the other four factors in making a determination.

The petitioner was a preschool teacher, 60 years old at the time of the injury. She returned to her pre-injury employment for over a year before retiring at her own preference, and no enmity or ill-feeling was apparent based on the witness testimony. No evidence of future earnings impairment is evident. The petitioner did testify as to some residual discomfort, consistent with the injury sustained.

The Arbitrator finds the work-related accident resulted in the fractures necessitating the remedial surgeries. The petitioner now having attained maximum medical improvement, the respondent shall pay the petitioner the sum of $332.93/week for a further period of 63.25 weeks, as provided in Section 8(e) of the Act, as the injuries sustained caused permanent loss to the petitioner's right arm to the extent of 25% thereof.

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

Jason Tomaska,

Petitioner,

vs. NO. 12WC 23095

Commscope, Inc,

15IWCC0802

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 temporary disability, causal connection, medical expenses, prospective medical care, penalties and attorney fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 31, 2015 is hereby affirmed and adopted.

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

15IWCC0802

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: OCT 30 2015
SJM/sj
o-10/22/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

TOMASKA, JASON
Employee/Petitioner

Case# **12WC023095**

15IWCC0802

COMMSCOPE
Employer/Respondent

On 3/31/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4947 LAW OFFICE OF PATRICK BROOKS
299 WALNUT ST
WINNETKA, IL 60093

1120 BRADY CONNOLLY & MASUDA PC
BEVERLY N MASUDA ESQ
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

15IWCC0802

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)/8(a)

Jason Tomaska,
Employee/Petitioner

v.

Commscope, Inc.,
Employer/Respondent

Case # **12** WC **23095**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **New Lenox**, on **2/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/10/11**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**42,385.20**; the average weekly wage was $**815.10**.

On the date of accident, Petitioner was **32** 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 $**71,728.80** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**71,728.80**.

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

ORDER

The Arbitrator finds that Petitioner failed to prove that his current condition of ill-being is causally related to the accident on 12/10/11. Accordingly, Petitioner's claim for TTD, prospective medical treatment and penalties is hereby denied.

No benefits are awarded.

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

3/24/15
Date

ICArbDec19(b)

MAR 3 1 2015

STATEMENT OF FACTS:

Petitioner, a 37 year old cable fitter, testified that on December 10, 2011 he was fitting cable and moving a reel weighing 300 to 400 pounds when he turned to his left and felt a pop and soreness in his left shoulder. He first sought treatment at MedWorks on December 12, 2011. He indicated that he was referred to another physician in the clinic, Dr. Niemeyer, who administered an injection into the left shoulder. Petitioner noted that he did not obtain any relief from the injection. He underwent an MRI study of the left shoulder and underwent three months of physical therapy in 2012, which he noted did not help. He indicated that at that time he was unable to lie down due to the pain, his fingers would go numb on the right side of his hand and that his ring finger would tingle. The records of MedWorks and/or Dr. Niemeyer were not submitted into evidence.

Petitioner testified that Dr. Niemeyer subsequently referred him to Dr. Giridhar Burra at Hinsdale Orthopaedics. He was first seen at this facility on June 5, 2012. The records of Dr. Burra were submitted into evidence. However, Dr. Burra did testify by way of evidence deposition on December 8, 2014 and February 9, 2015. (PX1). Dr. Burra confirmed that Petitioner was referred by his primary care physician, Dr. James Niemeyer, and that the first examination took place on June 5, 2012. (PX1, p.6). On that date, Petitioner gave a history of injuring his left shoulder while rolling a 300 pound heavy cable reel. (PX1, p.7). He noted that Petitioner described his arm as being in a supinated position and that he felt a pop in his left shoulder. (PX1, p.7). Dr. Burra testified that the history of treatment prior to his first visit included an MRI arthrogram, conservative treatment and an injection. (PX1, p.7). He noted that Petitioner's initial complaints included a sharp, stabbing pain and paresthesias in his hand. (PX1, p.8). Dr. Burra ordered a high-resolution MRI. Based on the clinical and radiological work-up, Dr. Burra diagnosed a SLAP lesion, biceps tendonitis and impingement, and ulnar nerve neuropathy. (PX1, p.8). Dr. Burra recommended surgical repair of the left shoulder and biceps tendon consisting of a SLAP repair, a subacromial decompression and acromioplasty, a biceps tendon tenodesis, and removal of loose bodies. (PX1, p.9). He noted that the plan at that time was to treat the ulnar neuropathy conservatively. (PX1, pp.8-9).

Petitioner testified that he subsequently underwent surgery at Silver Cross Hospital on July 18, 2012 and that his left arm was placed in a sling thereafter.

At his deposition, Dr. Burra agreed with counsel for Petitioner when he was asked whether he performed surgery on June 18, 2012. (PX1, p.11). The Arbitrator notes that this date would appear to be in error, and that the actual date of surgery was July 18, 2012, per Petitioner's testimony as well as the reference in Dr. Atluri's initial report to left shoulder surgery in July of 2012. (RX2). In any event, Dr. Burra testified that on the date in question he performed four (4) surgical procedures: 1) a SLAP lesion repair, 2) a biceps tenodesis, 3) an acromioplasty and 4) removal of loose bodies. (PX1, p.11). Dr. Burra noted that the surgery did not present any findings that differed from his clinical diagnosis. (PX1, p.11).

Petitioner testified that on July 29, 2012 he hit a board with his foot and tripped on his deck at home. He indicated that he fell to the left side and his left arm and forearm hit the deck surface. He noted that at the time of the fall, his arm was in a sling at a 90 degree angle and that he was not able to break his fall with his right hand. Petitioner testified that he called Dr. Burra's office that day and saw him the following day. He indicated that Dr. Burra told him to continue with therapy.

Dr. Burra testified that Petitioner returned on July 30, 2012 with a history of having slipped outside his house the day before and falling with his left shoulder, resulting in some slipping of the biceps tendon tenodesis along with the appearance of a deformity or bulge consistent with a slipped biceps tendon. (PX1, p.12). Dr. Burra noted that Petitioner's elbow was in a sling and flexed 90 degrees at the time of the fall, which he noted "...

kind of puts him at risk for an axial load as opposed to somebody, for example, falling onto their side and hitting the side of their shoulder. Now, this puts all of the stress directly on the shoulder.' (PX1, pp.12-13). Dr. Burra examined Petitioner and noted an obvious popeye deformity and stated that "[a]ll or a portion of the tenodesis had slipped. But that deformity tends to be primarily cosmetic. And at that point, I wanted to continue on his rehab protocol. I did not expect a significant change in his postoperative protocols." (PX1, p.13). As a result, Dr. Burra agreed that other than the deformity, he proceeded as if the fall had never happened. (PX1, p.13).

Petitioner testified that after the fall at home his biceps tendon was "completely gone" and that there was a "big bubble" that is still present today. The Arbitrator viewed the area above Petitioner's left biceps and noted an indentation approximately 1" x 2" in size.

Petitioner testified that due to his continued complaints of numbness, Dr. Burra ordered an EMG study which was performed by Dr. Glantz on November 9, 2012. Petitioner indicated that he then saw Dr. Burra on November 13, 2012 at which time nerve transposition surgery was recommended. He noted that Dr. Burra continued to recommend physical therapy during this period for his shoulder.

Dr. Burra testified that post-operatively Petitioner had issues with stiffness and some capsular contracture, and that soon after that he also experienced ulnar nerve neuropathy symptoms, which he noted were present pre-operatively as well. (PX1, p.13). Dr. Burra noted that this eventually led to an EMG and neurological consultation and the recommendation in November of 2012 for an ulnar nerve transposition for his left elbow. (PX1, p.14). He testified that throughout this period Petitioner received physical therapy for his left shoulder, which he characterized as intermittent due to breaks when therapy was not authorized. (PX1, p.15). Dr. Burra noted that one of the effects of the interruptions in therapy is the issue of secondary impingement. (PX1, pp.15-16). Dr. Burra also indicated that weakness of the rotator cuff and capsular contracture can contribute to a recurrence of such an impingement problem, and that that is one of the issues he was currently concerned about in Petitioner's case. (PX1, p.16). Dr. Burra noted that at the time of his recommendation for surgery relative to the ulnar nerve in November 2012, Petitioner was complaining of shoulder pain with overhead activities, anterior shoulder pain, recurrent impingement and biceps entrapment pain. (PX1, pp.16–17).

At the request of Respondent, Petitioner visited Dr. Prasant Atluri on January 23, 2013 for purposes of a §12 examination. (RX2). On that date Dr. Atluri recorded a history of injury on December 10, 2011 wherein Petitioner was pushing and pulling a reel of cable weighing approximately 350 pounds when he heard a pop in his left shoulder. Dr. Atluri noted Petitioner noticed immediate pain at the anterior aspect of the left shoulder followed by some discomfort in the left elbow. Two days later, he noted numbness and tingling in the ring and small fingers of his left hand. He was treated with cortisone injections as well as physical therapy, without improvement of his symptoms. He eventually underwent a left shoulder arthroscopy in July of 2012. Dr. Atluri recorded that three (3) weeks after the surgery Petitioner tripped and fell while wearing his sling, injuring his left upper extremity and developing a deformity of his left arm. Following his examination and review of the record, Dr. Atluri's impression was 1) left shoulder derangement, status post arthroscopy labral repair with subacromial decompression and removal of loose bodies, 2) failed arthroscopic biceps long head tenodesis, 3) left cubital tunnel syndrome. (RX2). Dr. Atluri opined that the stated mechanism of injury in December 2011 "... is plausible for aggravating or contributing to the development of a labral tear. Mr. Tomaska's left shoulder condition would be considered directly related to the work injury he describes. Cubital tunnel syndrome is unlikely to have been caused by the accident as described. However, the swelling associated with a labral tear along with the postoperative changes following left shoulder surgery including swelling and immobilization may contribute to the development of symptoms associated with cubital tunnel syndrome. Therefore, Mr. Tomaska's cubital tunnel syndrome may be related to the work injury he described." (RX2).

Dr. Atluri noted that Petitioner's left shoulder treatment was reasonable and necessary thus far, that the function of the left shoulder looked good, given that he had excellent strength and good range of motion, and that Mr. Tomaska's subjective complaints were out of proportion with his objective findings. As a result, Dr. Atluri believed that no further treatment was indicated for the left shoulder at that time and that Mr. Tomaska had reached MMI for same. (RX2). With respect to the left elbow, Dr. Atluri agreed that surgical intervention was appropriate, including an ulnar nerve decompression with a possible anterior transposition, either in the form of an in situ cubital tunnel release or a more extensive anterior transposition. Dr. Atluri indicated that MMI would be expected 4-6 months postoperatively with regards to the left elbow. (RX2).

Petitioner testified that he returned to Dr. Burra in March of 2013 at which time the latter was still recommending surgery. Petitioner indicated that surgery had not been approved and that he was not receiving any TTD at that time. He testified that he did not receive anything in writing as to why he was not getting TTD or why surgery had not been approved. He also indicated that Dr. Burra had not released him to return to work as a cable installer by March of 2013. Petitioner noted that he finally received a TTD check at the end of April 2013.

Dr. Burra testified that at the time of his office visit of May 14, 2013, or prior to the ulnar nerve surgery, Petitioner complained of continued pain and weakness of the rotator cuff, tenderness of the biceps tendon groove, and had a positive impingement test. (PX1, p.17).

Petitioner testified that he underwent surgery consisting of an ulnar transposition at Silver Cross Hospital on May 22, 2013. He noted that following surgery he underwent physical therapy at Accelerated Rehab through the summer of 2013, followed by work conditioning. Petitioner testified that surgery alleviated the numbness, but that he continued to have pain and a pinching sensation in his left shoulder/arm.

Dr. Burra testified that following ulnar nerve surgery, Petitioner's symptoms of paresthesias and numbness of the 4th and 5th fingers improved and eventually resolved, but that he continued to complain of shoulder pain. (PX1, p.18). He also noted that there were once again periodic interruptions in physical therapy during this period. (PX1, p.18). When conservative therapy failed, including injections into the biceps groove and subacromial space, physical therapy and work conditioning, Dr. Burra recommended a second surgery for the left shoulder. (PX1, p.18).

Petitioner indicated that he saw Dr. Burra in August 2013 at which time injections were recommended. Petitioner believed that he had two injections after surgery, one in his shoulder and the other closer to the biceps. He noted that the injections provided some relief, for about a half an hour, but it was not long lasting.

Dr. Burra verified that an injection into the subacromial space was performed on August 12, 2013 (PX1, p.20) and the injection into the area of the biceps tendon was performed on October 28, 2013. (PX1, p.19). He testified that the injections served a two-fold purpose – to control inflammation (treatment) and to identify the source of the symptoms (diagnostic). (PX1, pp.20–21). Dr. Burra indicated that the injections confirmed the source of pain as at the biceps tendon groove and the subacromial space. (PX1, pp.21-22). As a result, Dr. Burra recommended arthroscopy of the left shoulder with a subacromial decompression and acromioplasty and release of the entrapped biceps tendon. (PX1, p.22). Dr. Burra testified that the original biceps tenodesis had slipped, after sustaining the fall, causing a deformity. (PX1, p.23). He noted that the purpose of surgery was to "...remove and relieve any portion of entrapped tendon to basically address that pain." (PX1, p.23).

With respect to the subacromial decompression, Dr. Burra noted that his plan was to "... basically reproduc[e] what we did earlier, but because of his contracture of the capsule and the weakness of the cuff, whatever, there

is still some bone that is pressing on there. So my intention is to take care of some more bone to address the overhead pain that he has so he can raise his arm without pain." (PX1, pp.23–24). Along these lines, Dr. Burra agreed that the therapy notes document Petitioner was still complaining of pain with overhead activities at that time. (PX1, p.24).

Petitioner testified that on November 11, 2013 he returned to Dr. Burra at which time he recommended further surgery to the top front of his left arm where the arm meets the shoulder and biceps. Petitioner indicated that this surgery has not been approved, and that Dr. Burra has never released him to return to work as a cable installer.

In a report dated December 6, 2013, Respondent's §12 examining physician, Dr. Atluri noted that he had reviewed the correspondence and additional records forwarded to him by the insurance company. He noted that based on these records Petitioner had undergone a left elbow ulnar nerve decompression with an anterior transposition in May of 2013, that his post-operative course was relatively uneventful and his ulnar nerve symptoms had essentially resolved. Dr. Atluri also indicated that Petitioner had had an "inconsistent response to therapy" and that "[i]t is unclear why this patient's shoulder condition would actually deteriorate despite a nearly continuous period of over a year of rehabilitation, including significant utilization of supervised therapy in the absence of performing any type of heavy labor or additional trauma." (RX3). Dr. Atluri went on to state that Petitioner's poor response to cortisone injection to the subacromial space "... suggests that this patient's ongoing symptoms are not related to any persistent intraarticular or subacromial pathology involving his left shoulder." (RX3). As a result, Dr. Atluri noted that he did not agree with the treating physician's recommendation for a left shoulder arthroscopy. He indicated that Petitioner's primary complaints involving the anterior aspect of the left shoulder were consistent with some of his complaints at the time of his previous evaluation in January of 2013, and given that Mr. Tomaska had had a failed biceps tenodesis at that time "[i]t is possible that this patient has some pain associated with a failed biceps tenodesis. That is, he may have a remnant of the biceps tendon which is painful or possibly even scar tissue in the area of the biceps tenodesis which is causing some of his symptoms." (RX3). At that time, Dr. Atluri felt it reasonable to try a cortisone injection into the area of the biceps tenodesis. (RX3). Dr. Atluri indicated that if the injection provided temporary resolution of Petitioner's symptoms, then it would be reasonable to perform a surgical exploration of the biceps tenodesis site with a possible tenotomy and tenolysis or revision of tenodesis of the biceps long head tendon. (RX3). However, if Petitioner did not achieve significant improvement in his symptoms from the injection in that area, Dr. Atluri felt that Mr. Tomaska's pain "... would not be predictably improved with any type of surgical intervention. In that case, surgical treatment is not recommended at this time." (RX3).

Petitioner was re-examined by Dr. Atluri on January 24, 2014. (RX4). Dr. Atluri noted that Petitioner had undergone left elbow surgery since he was last seen and reported that the numbness and tingling in his left hand had resolved and that his elbow was "great." (RX4). Following his examination and review of the record, Dr. Atluri's impression was 1) left shoulder pain after failed biceps long head tenodesis; 2) status post left shoulder arthroscopy with a subacromial decompression superior labral repair, biceps long head tenodesis; 3) left ulnar neuropathy, status post left elbow ulnar nerve anterior subcutaneous transposition. (RX4). Dr. Atluri noted that "Mr. Tomaska's initial left shoulder labral tear would be considered directly attributable to the lifting injury he reported. The ulnar nerve condition would be considered related to the work injury. Specifically, the initial injury as well as the subsequent surgery may have contributed to his development of ulnar nerve symptoms. The on-going left shoulder pain appears to represent a complication of his left shoulder surgery. Therefore, the on-going left shoulder condition would be considered work-related." (RX4). Dr. Atluri also indicated that "[i]t would be reasonable at this time to pursue the revision surgical intervention. In particular, an open exploration of the bicipital groove with a biceps long head tenolysis and possible excision of the biceps long head tendon would be reasonable." (RX4). However, Dr. Atluri still felt while Petitioner reported some discomfort with

overhead activities and heavy lifting, "... there is no medical contraindication to performing those types of activities. This patient should be able to safely perform his usual work activities without restrictions." (RX4). Finally, Dr. Atluri noted that Petitioner had reached MMI if he does not proceed with surgery, and that MMI would be achieved 4-6 months post-operatively if he did proceed with surgery. (RX4).

In a report addressed to counsel for Respondent dated March 28, 2014, and after receiving correspondence from same, Dr. Atluri stated that "[t]he recurrent left shoulder biceps tendon rupture does appear to be secondary to the fall injury sustained by the patient less than two weeks following his left shoulder surgery. The patient has undergone a biceps tenodesis with no deformity in his left arm prior to that incident. He had immediate formation of a 'popeye deformity' which is indicative of a rupture of the biceps tenodesis. Unfortunately, this patient's ruptured biceps does appear to be symptomatic. Therefore, as indicated in my prior correspondence, surgical treatment could be considered. However, the need for surgical treatment for this patient's left shoulder biceps tendon rupture is not due to the original shoulder injury. Rather, the need for revision surgery is due to the recurrent rupture associated with the fall injury that occurred after the left shoulder surgery." (RX5).

Petitioner testified that he returned to Dr. Burra on June 9, 2014 at which time his symptoms remained basically the same. He indicated that Dr. Burra once again recommended the same surgical procedures.

Dr. Burra verified that he saw the patient again on June 9, 2014 at which time there was no significant change in examination findings, the diagnosis was unchanged, and he continued to recommend surgery. (PX1, p.24). He noted that as of that date, Petitioner was given restrictions of no repetitive motion or overhead reaching with the left shoulder and a lifting limit of 30 pounds. (PX1, p.25). As a result, Dr. Burra believed that Petitioner could go back to modified work, but that he could not return to work as a cable installer. (PX1, p.25).

Dr. Burra testified that he last saw the patient on July 21, 2014 at which time Petitioner complained that the impingement pain was worse than the anterior biceps tendon pain. (PX1, p. 25). Dr. Burra noted that he continued to maintain the same physical restrictions and continued to recommend surgery at that time. (PX1, p.26).

Petitioner likewise testified that he last saw Dr. Burra on July 21, 2014 at which time his symptoms were the same and Dr. Burra continued to recommend surgery. He noted that he does not have any future appointments scheduled with Dr. Burra, other than the recommendation for surgery. On direct examination, Petitioner testified that he was not sure of Dr. Burra's current restrictions, but believed they were under 15 pounds. On cross examination, however, he agreed with the records of Dr. Burra if they showed he could return to modified duty with restrictions of no lifting over 30 pounds, no push/pulling, no overhead lifting, and no repetitive motion of the shoulder. He indicated that he has not looked for work within these restrictions since that date.

In a report addressed to counsel for Respondent dated August 8, 2014, and after receiving correspondence and additional records from same, Dr. Atluri stated that "[b]ased upon a reasonable degree of medical and surgical certainty, Mr. Tomaska's ongoing left shoulder complaints represent a consequence of the fall injury which occurred following his left shoulder surgery from July 18, 2012. According to the materials available for my review, Mr. Tomaska had an uncomplicated left shoulder biceps tenodesis on July 18, 2012. However, after tripping and falling at home he developed an immediate deformity of the left biceps. This suggests traumatic failure of the biceps tenodesis related to the fall injury. I am in agreement with the treating physician that the failed biceps tenodesis and the associated scarring is the likely cause of his anterior shoulder pain. This is attributable to the fall injury and not due to the original work-related shoulder condition." (RX6).

At his deposition, Dr. Burra testified that he was of the opinion the recommended biceps tendon surgery was related to the original work-related injury. (PX1, p.26). Dr. Burra testified that the recurrent impingement is a known complication and is "... somewhat related to the interruptions in physical therapy." (PX1, pp.26–27). Dr. Burra also indicated that he believed Petitioner "... has not done anything to cause this impingement pain." (PX1, p.27). Dr. Burra when on to state that "... it is a pretty known complication where sometimes the tendon slips. And when you have – he still had residual pain in the groove and that for me is a continuum of the original procedure and by that, it's a continuum of the original work-related injury as a cause of his present symptoms." (PX1, p.27). As far as the significance of the fall post surgery, Dr. Burra testified that Petitioner was in a sling and his elbow was bent, and "[t]hat position does put him a little bit at risk because of the axial load on the arm when he fell forward and his elbow in the flexed position hit the ground. But the very fact that he had a tenodesis puts him at a risk for slipping and that's a known complication." (PX1, p.28).

On cross-examination, when questioned about the mechanism of injury to the labrum, Dr. Burra testified that Petitioner was pushing a heavy reel of cable with a supinated forearm where his hand is in a palm-up position when he felt a pop in his shoulder. (PX1, p.37). Dr. Burra noted that as the superior labrum and the biceps tendon are internally connected, "... what hurts the labrum can hurt the long head of the biceps tendon." (PX1, p.37). However, Dr. Burra could not specifically relate the operative findings of significant fraying of the biceps tendon and evidence suggesting entrapment in the groove because the superior labrum is connected to the biceps, "... and once injured how they progress is anybody's guess." (PX1, p.39). Dr. Burra indicated that he surgically reattached the labrum back to the bone, disconnected the biceps tendon from the labrum, excised a portion of the tendon and attached the remnant to the humerus, which is not its anatomical origin. (PX1, p.40). He also removed some loose bodies within the shoulder joint, which he said may or may not have been related to the work injury, and performed an acromioplasty. (PX1, pp.40-41). Dr. Burra testified that the surgery was a success in the sense that he was able to repair the injuries to the labrum and biceps tendon. (PX1, p.41). Dr. Burra noted that when discharged from the hospital, Petitioner's left arm was immobilized in 90 degree flexion, in a sling, with his arm by his side. (PX1, p.41). Petitioner was to remain in this position for 3 to 4 weeks, sometimes up to 6 weeks, with removal of the sling for purposes of physical therapy. (PX1, pp.41–42).

Furthermore, Dr. Burra testified that as a result of the fall at home, the previously repaired biceps tendon slid from the top portion of the humerus where it was attached with a screw, towards the elbow, creating "... a little bulge about the elbow." (PX1, pp.43–44). Dr. Burra agreed that the fall at home "undid" the surgical repair of the biceps tendon. (PX1, p.45). He also agreed that Petitioner's post-op course was complicated by his ulnar symptoms; however, he did not believe there were any post-operative complications related to the labrum repair. (PX1, pp.45-46).

Dr. Burra noted that it was "hard to say" whether the ensuing biceps entrapment pain was due to the sliding of the biceps tenodesis when Petitioner fell at home on July 29, 2012. (PX1, p.47). However, he did note that biceps entrapment pain is a known complication even without injury and is a risk of biceps tenodesis. (PX1, p.48). He estimated that possibly 5 to 10 percent of patients who do not have sliding of the tenodesis have biceps entrapment pain, but that it all depends on the technique and how low on the humerus you put it. (PX1, pp.48–49). Dr. Burra also testified that the biceps tenodesis could have failed on its own even if Petitioner had not fallen at home. (PX1, p.49). When asked whether in this particular case, the failed biceps tenodesis and biceps entrapment pain was related to the fall, Dr. Burra stated that "[i]n this case I would go so far as to say, yes. The failure of the tenodesis from the time of the fall. The entrapment pain I'm not sure whether I can say it happened only because of the fall ... I don't think I can subscribe to that." (PX1, p.50). The surgical procedures recommended by Dr. Burra include a release of the entrapped biceps tendon and a subacromial decompression.

Currently, Petitioner testified that movement affects his symptoms, and that he experiences pain when he raises his arm or performs any activity where the arm is outreached. He also indicated that he still wishes to proceed with the surgeries recommended by Dr. Burra.

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

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. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 290 Ill. Dec. 495 (2005); *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 742, 640 N.E.2d 1, 203 Ill. Dec. 574 (1994). 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. *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970).

In the present case, the Arbitrator notes that no medical records were submitted into evidence, other than the deposition testimony of treating orthopedic surgeon Dr. Burra (PX1) and the reports of Dr. Atluri, Respondent's §12 examining physician (RX2-RX6). Thus, we are left to piece together the facts of this case based on Petitioner's testimony and the secondhand information provided by Drs. Burra and Atluri.

In any event, there would appear to be no dispute that Petitioner sustained accidental injuries involving his left upper extremity which arose out of and in the course of his employment on December 10, 2011 while he was moving a heavy roll of cable. (See Arb.Ex.#1). Dr. Burra testified that following said undisputed accident he diagnosed Petitioner with a SLAP lesion, biceps tendonitis and impingement, and ulnar nerve neuropathy. (PX1, p.8). Dr. Burra recommended surgical repair of the left shoulder and biceps tendon consisting of a SLAP repair, a subacromial decompression and acromioplasty, a biceps tendon tenodesis, and removal of loose bodies. (PX1, p.9). He noted that the plan at that time was to treat the ulnar neuropathy conservatively. (PX1, pp.8-9).

On July 18, 2012 (not June 18, 2012), Dr. Burra performed surgery consisting of a SLAP lesion repair, a biceps tenodesis, an acromioplasty and removal of loose bodies. (PX1, p.11). Dr. Burra noted that the surgery did not present any findings that differed from his clinical diagnosis. (PX1, p.11). He also later testified that the surgery was a success in the sense that he was able to repair the injuries to the labrum and biceps tendon. (PX1, p.41).

Then on July 29, 2012, or eleven (11) days post-surgery, Petitioner tripped over a board on his deck at home and fell on the left side of his body. Petitioner testified that after the fall his biceps tendon was "completely gone" and that there was a "big bubble" that remains to this day.

Dr. Burra agreed that the fall at home "undid" the biceps tenodesis. (PX1, p.45). However, he testified that it was "hard to say" whether the ensuing biceps entrapment pain was due to the sliding of the biceps tenodesis when Petitioner fell at home. (PX1, p.47). He also noted that biceps entrapment pain is a known complication even without injury and is a risk of biceps tenodesis. (PX1, p.48). He estimated that possibly 5 to 10 percent of patients who do not have sliding of the tenodesis have biceps entrapment pain, but that it all depends on the technique and how low the attachment is made to the humerus. (PX1, pp.48–49). Dr. Burra also testified that the biceps tenodesis could have failed on its own even if Petitioner had not fallen at home. (PX1, p.49). When asked whether in this particular case, the failed biceps tenodesis and biceps entrapment pain was related to the

fall, Dr. Burra stated that *"[i]n this case I would go so far as to say, yes. The failure of the tenodesis from the time of the fall. The entrapment pain I'm not sure whether I can say it happened only because of the fall ... I don't think I can subscribe to that."* (PX1, p.50). (Emphasis added).

Thus, it would appear that even though he believed the biceps tenodesis could have failed on its own, at any time for a variety of reasons, as a complication of the surgery, Dr. Burra agreed that it failed in Petitioner's case as a result of the fall at home. However, Dr. Burra was equivocal when it came to whether or not the ensuing biceps entrapment pain was due to the sliding of the tenodesis. Furthermore, Dr. Burra testified that Petitioner's elbow being in a sling and flexed 90 degrees at the time of the fall "... kind of puts him at risk for an axial load as opposed to somebody, for example, falling onto their side and hitting the side of their shoulder. Now, this puts all of the stress directly on the shoulder." (PX1, pp.12-13). Dr. Burra reiterated this opinion later on in his testimony when he noted that having his arm in such a position "... does put [Petitioner] a little bit at risk because of the axial load on the arm when he fell forward and his elbow in the flexed position hit the ground. But the very fact that he had a tenodesis puts him at a risk for slipping and that's a known complication." (PX1, p.28).

In addition, Dr. Burra agreed that Petitioner's post-operative course was complicated by his ulnar symptoms, but that he did not believe there were any post-operative complications related to the labrum repair. (PX1, pp.45-46). Along these lines, Dr. Burra noted that Petitioner exhibited ulnar neuropathy symptoms prior to the original surgery in July of 2012, but that they had decided to treat the condition conservatively. (PX1, pp.8-9). Dr. Burra indicated that post-operatively, and by extension after the fall at home, Petitioner had issues with stiffness and some capsular contracture, and that soon after that he also experienced ulnar nerve symptoms, which had also been present pre-operatively. (PX1, p.13). Dr. Burra noted that this eventually led to an EMG and neurological consultation and the recommendation in November of 2012 for an ulnar nerve transposition for his left elbow. (PX1, p.14). This surgery was ultimately performed on May 22, 2013 at Silver Cross Hospital. (PX1, pp.14-15). Dr. Burra was not specifically asked what effect, if any, the fall at home may have had on Petitioner's ulnar nerve condition.

Respondent's §12 examining physician, Dr. Atluri, initially indicated that Petitioner's current conditions of ill-being were related to either the original injury or the subsequent surgery (RX2, RX4), only to change his mind after receiving correspondence and additional records from counsel for Respondent. (RX5, RX6). More to the point, Dr. Atluri, in his most recent report dated August 8, 2014, opined that "[b]ased upon a reasonable degree of medical and surgical certainty, Mr. Tomaska's ongoing left shoulder complaints represent a consequence of the fall injury which occurred following his left shoulder surgery from July 18, 2012. According to the materials available for my review, Mr. Tomaska had an uncomplicated left shoulder biceps tenodesis on July 18, 2012. However, after tripping and falling at home he developed an immediate deformity of the left biceps. This suggests traumatic failure of the biceps tenodesis related to the fall injury. I am in agreement with the treating physician that the failed biceps tenodesis and the associated scarring is the likely cause of his anterior shoulder pain. This is attributable to the fall injury and not due to the original work-related shoulder condition." (RX6).

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being as it relates to the failed biceps tenodesis and biceps entrapment pain is not related to the original work injury on December 10, 2011. As Dr. Burra readily admitted, the fall at home on July 29, 2012 essentially "undid" the surgical repair he performed eleven (11) days earlier on July 18, 2012, and which he had subsequently declared a success. Such an incident clearly represents an independent, intervening accident which effectively broke the chain of causation between the original work injury and Petitioner's state of ill being at the time of arbitration. In addition, there is no evidence to suggest that Petitioner fell as a result of the prior injury, or the treatment

related thereto. This is not a case where an individual walking on crutches, for example, following a work related knee injury, falls as a result of either having to ambulate in a compromised fashion or due to the weakened state of his leg. Instead, Petitioner simply tripped on a board while walking across his deck at home. The fact that he was wearing a sling at the time had absolutely nothing to do with causing him to fall. Indeed, Petitioner could have just as well been struck by a car while walking down the street, or even hit by a meteorite, for that matter, and the fact that his arm was in a sling would have played no role in the ensuing injury.

Furthermore, while Dr. Burra did testify that the positioning of the arm placed Petitioner at risk for an axial load as compared to someone who falls on their side, such an opinion would seem to go more to the medical implications occasioned by the fall and not the legal question of causation. Indeed, Dr. Burra acknowledged that the failed tenodesis as well as the entrapment pain could have occurred as a not-all-that-unusual complication of surgery. However, the tenodesis did not fail as the result of any complication from surgery; it failed as a direct consequence of the fall at home on July 29, 2012. As a result, it cannot be said that Petitioner's present condition of ill-being relative to his left shoulder would not have occurred "but for" the original injury.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that his current condition of ill-being with respect to his left arm/shoulder is causally related to the accident on December 10, 2011, and as such Petitioner failed to prove that a causal relationship exists between said accident and the need for the surgical procedures recommended by Dr. Burra.

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

Dr. Burra has recommended arthroscopy of the left shoulder with a subacromial decompression and acromioplasty and release of the entrapped biceps tendon. (PX1, p.22). Petitioner wishes to proceed with Dr. Burra's recommendation for surgery in this regard.

However, based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to prospective medical treatment. Accordingly, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to temporary total disability benefits. Accordingly, Petitioner's claim for same is hereby denied.

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

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Respondent's defense of this claim was neither unreasonable nor vexatious under the circumstances. Therefore, Petitioner's claim for additional compensation pursuant to §19(k) and §19(l) and/or attorneys' fees pursuant to §16 of the Act is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Teresa Stumps,

Petitioner,

vs. NO. 12WC 15475

Kroger Schnucks,

15IWCC0803

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, permanent disability, causal connection, 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 January 5, 2015 is hereby affirmed and adopted.

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

15IWCC0803

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: OCT 3 0 2015
SJM/sj
o-9/24/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STUMPS, TERESA
Employee/Petitioner

Case# **12WC015475**

KROGER SCHNUCKS
Employer/Respondent

15IWCC0803

On 1/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2489 LAW OFFICE OF JIM BLACK
JASON EDMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

15IWCC0803

☐ 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

Teresa Stumpf
Employee/Petitioner

v.

Kroger Schnucks
Employer/Respondent

Case # **12** WC **15475**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Rockford**, on **11-14-14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11-06-11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident given to Respondent.

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

In the year preceding the injury, Petitioner earned $**2,700.00**; the average weekly wage was $**450.00**.

On the date of accident, Petitioner was **53** 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 $**3,249.97** for other benefits, for a total credit of $**3,249.97**.

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

ORDER

THE PETITIONER FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT SHE SUSTAINED AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT. THEREFORE, ALL BENEFITS ARE DENIED. ALL OTHER ISSUES ARE MOOT.

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

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

Robert E Dahm
Signature of Arbitrator

December 18, 2014
Date

JAN 5 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

15IWCC0803

Teresa Stumpf,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 12 WC 15475
	)	
Kroger Schnucks	)	
	)	
Respondent.	)	

MEMORANDUM OF DECISION OF THE ARBITRATOR

FINDINGS OF FACT

The petitioner testified that she worked at Kroger for 8 years. She worked as a meat wrapper and as a "boss" when her boss was not in. She stated her job duties included wrapping meat, filling counters, and weighing chickens, hams, turkeys. She stated she would place ground meat on 10-15 pound trays and lift the trays for weighing and put through the wrapper. She also testified that she would weigh 40-50 pound boxes of hams. She stated that she spent her day between wrapping, filling the counter, and weighing meat. Sometimes she would help unload trucks about 2-3 days per week which would require unloading 40-60 pound boxes for about three hours.

On November 6, 2011, the petitioner stated that her back was hurting when she got out of bed. After she showered, she lifted her leg to put her sock on and her back hurt more than it ever had before. She went to work that day until she couldn't stand the pain any more and then she went to see Dr. Sieradzki on November 7, 2011. (PX 1) She reported to the doctor that she was "feeling tired or poorly. Pt is here with recurrence of her back pain in the lower lumbar area – she states the flexeril and the meds used last year worked well and she just needs those again. . . and thinks it is related to her moving things about in her house as she puts things away for the season." (PX 1) She was prescribed medications at that time.

The petitioner was seen by Dr. Boswell on November 29, 2011. (PX 2, RX 3) At that time she complained of left leg pain. No accident history was provided at that time. She had two MRI's – one with and one without gadolineum on December 8 and December 9, 2011. (RX 3) The MRI of 12/8/2011 showed significant disc involvement from L3-L5. She was then referred to Dr. Soriano.

When the petitioner was seen by Dr. Soriano, she reported that she felt pain in her back after putting socks on at home, but that she also does lift at work. According to Dr. Soriano's handwritten notes, it stated that on November 20, 2011, she "felt pull LB when put sock on . . .

lifts a lot at work." (PX3, RX 2) The dictated note from Dr. Soriano to Dr. Boswell states that the petitioner is, "a delightful woman who in November of 2011 was putting on her sock, and felt a pull in her low back. She continued working in the meat department at Hilander, but two to three weeks later, she began experiencing pain in her left thigh and calf, on the outer surface. She does lift a lot at work, and stands eight hours a day." (PX 3, RX 2) The petitioner testified that she told Dr. Soriano about the sock incident because her pain got much worse after that. Dr. Soriano recommended epidural steroid injections which only helped for a couple days. He then recommended surgery.

The petitioner underwent surgery in the form of a left L4-5 microscopic hemilaminotomy and discectomy at the hands of Dr. Soriano on January 12, 2012. The postoperative diagnosis was herniated disk, left L4-5, with left L5 radiculopathy. (PX 3, RX 2) After the surgery, the petitioner testified that the pain in her leg completely went away. She was off work until March 26, 2012, during which time she received short term disability benefits. She did not file a workers' compensation claim at that time, nor did she request workers' compensation benefits.

The petitioner was released to return to work full duty by Dr. Soriano on March 26, 2012 without restrictions. (PX 3, RX 2) The petitioner did return to work, but has since retired. The petitioner hired Jim Black's office to represent her in April of 2012.

The petitioner was seen by Dr. Coe, an occupational medicine specialist, for a Section 12 examination at the request of her attorney on March 27, 2013. (PX 5) Dr. Coe reviewed the medical records from Dr. Sieradzki and Dr. Soriano. Dr. Coe did not mention that the petitioner told Dr. Sieradzki that her low back pain was related to moving things in her house. Dr. Coe also did not mention in his "History" section that the petitioner complained of increased pain in her low back after she put socks on at home. Nevertheless, Dr. Coe concluded that the petitioner suffered "repetitive strain injuries to her lower back while moving meat at work." (PX 5) Further, Dr. Coe stated that the history of the petitioner putting on socks at home "is different than that provided to me by Ms. Stumpf." (PX 5)

The petitioner was seen by Dr. Ghanayem, a board certified orthopedic surgeon specializing in the spine, for a Section 12 examination at the request of the respondent on June 27, 2013. (RX 1) The petitioner testified that she told the truth about her injury to Dr. Ghanayem. His detailed report states that on November 6, 2011, she "hurt her back. This occurred at home when putting her socks on. She was bent over putting her left sock on when this occurred. Throughout the course of the day, the pain became worse and eventually progressed into left-sided leg pain. She did not describe any particular work injuries. She does state that she does a lot of heavy lifting at work, which is her normal and routine job." (RX 1) Dr. Ghanayem reviewed the petitioner's medical records and found that the petitioner "has a history that she presented to me as bending over an [*sic*] putting on her sock for which she developed acute low back pain, which eventually progressed throughout the course of the day while she happened to be at work." (RX 1) Dr. Ghanayem stated that her treating records from

Dr. Soriano reflect the same history. Dr. Ghanayem also stated that the petitioner sustained an "acute" disc herniation at the L4-5 level according to the MRI scan which he reviewed. (RX 1) In support of his opinions, Dr. Ghanayem stated that:

> the fact that she had a progression of symptoms while at work does not constitute a work injury. She simply had an acute disc herniation from what she did at home while bending over to put her sock on her left foot and sustained a lumbar disc injury. While she does do lifting activities at work, it does not appear that she sustained an injury at work, given the history that I obtained from her, as well as the history that was generated in real time in the medical records. (RX 1)

Currently, the petitioner testified that her left leg pain had resolved, and that her back is better, however she does not sleep very well at night.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE C: DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the petitioner did not sustain an accident arising out of and in the course of her employment. In so finding, the arbitrator relies on the following facts:

There was no single incident of trauma occurring at work to which the petitioner can point to. Indeed, the petitioner has alleged that her low back pain developed over time, thus alleging a repetitive-trauma type injury to her lumbar spine. While it is undisputed that the petitioner does do heavy lifting at work, there are several other possibilities as to what has caused, accelerated or exacerbated the petitioner's lumbar spine condition, none of which have to do with her lifting requirements.

On the date of the alleged accident itself, November 6, 2011, there is no medical treatment or allegation of an injury on that day. Nor is there any statement made in the medical records, or even by the petitioner that the low back injury was causally related to her work duties. When the petitioner came to see Dr. Sieradzki the next day, on November 7, 2011, the only accident history provided was that the petitioner was having low back pain which was very similar to the year before, and that the petitioner herself related the pain to moving things around at home. (PX 1) Next, when the petitioner came to see Dr. Boswell on November 29, 2011, no accident history was provided, and the petitioner simply complained of left leg pain. (PX 2)

Next, when the petitioner came to see Dr. Soriano, while she did state that she lifts heavy weights at work, she indicated that the worst of the back pain began after she put her sock on a few weeks ago at home. (PX 3)

Next, when the petitioner came to see Dr. Ghanayem, she also indicated that her low back pain began when she put her socks on at home. (RX 1) Indeed, even the petitioner's testimony was clear in that she stated that while she did have some previous back pain, the sock incident was the trigger that severely aggravated her symptoms to the point where she sought medical treatment.

To Dr. Coe, the petitioner's own Section 12 examiner, the petitioner did not relate the history of moving things at home, or injuring herself while putting socks on at home. (PX 5) Dr. Coe even ignored those accident histories in the "history" section of his narrative report, dismissing them completely because the petitioner did not report same to him.

Even though it is undisputed that the petitioner did lift heavy weights at work, it is clear that the petitioner herself attributed her condition to incidents occurring at home when she sought medical care. While some medical providers indicate that Petitioner reported performing heavy lifing at work, none until late in the process report that she experienced any pain while doing so. The only pain generator reported in the early medical records is either Petitioner doing things around the house or pulling on her socks. As such, based on the preponderance of the credible evidence, the Arbitrator finds that the petitioner did not sustain an accident arising out of or in the course of her employment. 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tiyi McNair,

Petitioner,

vs. NO. 11WC 15234

15IWCC0804

Federal Express,

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, causal connection, temporary disability, permanent disability, medical expenses, prospective medical care, notice, penalties and attorney fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 3, 2014 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.

15IWCC0804

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: OCT 30 2015
SJM/sj
o-9/24/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

McNAIR, TIYI
Employee/Petitioner

Case# **11WC015234**

15IWCC0804

FEDERAL EXPRESS
Employer/Respondent

On 12/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0000 BRISKMAN BRISKMAN & GREENBERG
SUSAN FRANSEN
175 N CHICAGO ST
JOLIET, IL 60432

2912 HANSON & DONAHUE LLC
KURT HANSON
900 WARREN AVE SUITE 3
DOWNERS GROVE, IL 60515

15IWCC0804

STATE OF ILLINOIS)SS.

COUNTY OF Cook)

☐ Rate Adjustment Fund (§8(g))

☐ Second Injury Fund (§8(e)18)

☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

19(b)

Tiyi McNair

Employee/Petitioner

v.

Federal Express

Employer/Respondent

Case # 11 WC 15234

Consolidated cases: None

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **October 3, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

☐ 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, **03/23/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner **did 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 **$37,400.00**; the average weekly wage was **$720.00**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of $0 for TTD, **$0** for TPD, **$0** for maintenance, and **$6224.03** for other benefits, for a total credit of **$6,224.03**.

Respondent is entitled to a credit of $ **6224.03** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove an accident arising out of and in the course of Petitioner's employment, benefits are denied.

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

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

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

Ketki Steffen

Arbitrator Ketki Steffen

12/2/14

Date

DEC 3 - 2014

ICArbDec19(b)

11WC15234

STATEMENT OF FACTS

The Petitioner, Tiyi McNair, is a 44 year old female who has been employed as a courier for the Respondent, Federal Express, for the last 14 years. Her work duties involved delivering and picking up packages, some of which may weigh up to 75 pounds.

Petitioner testified that she was in good shape but had some prior low back pain for which she had been treated. She testified that the pain had mostly resolved but she occasional aches and pains.

On the day of the incident, March 23, 2011, Petition was working the evening shift. While driving away in a vehicle after making a delivery she experienced pain in her low back, radiating down her left leg. The Petitioner testified she had made a delivery of four 50 pound packages. Petitioner did not state that the back pain started while lifting or belivering any packages. She completed her regular shift on that date.

The next day Petitioner reported for medical treatment to her regular treating physician at the Hammond Clinic. The records reflect a March 24, 2011 office visit at 8 a.m., with a chief complaint of leg pain. Petitioner stated that she had a sudden onset of constant episodes of moderate right posterior upper and right posterior lower leg pain. She described a sharp pain radiating to the right lower leg and right foot. The records indicate that the Petitioner had stated that the pain started two days ago and were caused by frequent squatting, frequent kneeling, prolonged standing, prolonged sitting and overuse. The Petitioner complained that her pain got worse with ambulation and prolonged exertion, and reported that she worked as a carrier for Federal Express. The Petitioner was noted to have a past medical history of foot pain, lower back pain, sciatica and tingling. The Petitioner was diagnosed with lower back pain and sciatica. Conservative treatment was provided; with a recommendation the Petitioner obtain an MRI of the lumbar spine. (Res. Ex. 3)

Petitioner reported to work and provided a copy of her work disability slip to a day manager. There was no light duty work available.

The Petitioner continued treatment with the Hammond Clinic, and was subsequently referred to Dr. Gireesan and Dr. Chung for further treatment.

On April 13, 2001 Petitioner signed an Application for Adjustment of Claim and said claim was filed by Counsel on April 20, 2011. On October 3, 2014, post hearing, Petitioner filed an amended claim alleging a accident date of on or about 3/23/11 and indicating that the accident occurred when lifting and due to repetitive trauma and that said accident injured her person as a whole and caused herniated/bulging discs. (Resp. Ex. 17) The original application has an accident date of 3/24/11 and indicated that the accident occurred during lifting 60 pounds of boxes and caused a bulging disc.

Petitioner submitted her medical bills for her treatment through her group health insurance and applied for group disability benefits, which she received for her time off work until her return on June 21, 2011.

On March 30, 2011, Petitioner returned to Hammond Clinic and the medical records indicate a health maintenance visit with complains of back ache, lower back pain, foot pain (soft tissue) and Vitamin D deficiency. Petitioner was scheduled for an MRI of her lumbar spine, and she was instructed to follow-up with podiatry, for a possible foot surgery. (Res. Ex. 3)

An MRI of March 31, 2011 revealed a right lateral disc protrusion at the L4-L5 level, with mild disc bulging at the L5-S1 level. (Res. Ex. 3)

On April 4, 2011 the Petitioner returned to the Hammond Clinic with a complaint of back pain. The Petitioner was diagnosed with lower back pain and lumbar radiculopathy. She was given a referral for a physical therapy evaluation and for treatment for lumbar disc disease, with continuing work restrictions. (Res. Ex. 3)

The Petitioner was next seen by Dr. Gireesan on April 12, 2011, with an indication of a date of accident of March 23, 2011. She stated that she was lifting some boxes at work and started noticing increasing pain in her right leg and low back area. Dr. Gireesan diagnosed discogenic low back pain gradually L4-L5 level, with low back pain as well, as right lower extremity pain aggravated as a result of a work-related injury.

Light duty work was continued, and it was recommended the Petitioner obtain lumbar epidural injections. (Pet. Ex. 4) The Petitioner was then seen by Dr. Brian Chung on May 12, 2011. Petitioner complained of right lower extremity pain, and "reports onset of pain (mostly) in March without particular inciting event." Dr. Chung noted the Petitioner had degenerative disc disease at the L4-L5 and L5-S1 levels. Dr. Chung performed an epidural steroid injection at the L5-S1 level. (Pet. Ex. 7) A handwritten questionnaire in Dr. Chung's records indicates the Petitioner reported pain starting on March 23, 2011 while driving.

The Petitioner returned to Dr. Chung on May 26, 2011, reporting a 50% relief of her pain. Her injection was provided on that date. (Pet. Ex. 7)

The Petitioner testified that she in fact passed her required Department of Transportation physical allowing her to perform her normal work activities as a courier.

The Petitioner returned to the Hammond Clinic on June 3, 2011, with a chief complaint of back pain and knee pain, resulting from a vehicle accident on that date. Examination revealed complaints of upper back and knee pain. (Res. Ex. 3)

At arbitration, the Petitioner initially denied that she was involved in a car accident at or about that date.

The Petitioner returned to Dr. Gireesan on June 6, 2011, reporting that her pain was getting better and she wished to return to work. Dr. Gireesan provided the Petitioner with a release to return to work without restrictions effective June 21, 2011. (Pet. Ex. 4)

The Petitioner testified that after this doctor's visit, she did resume full duty work as a courier and thereafter did not seek any treatment for her low back until returning Dr. Gireesan on September 20, 2011, with complaints of back pain. The records of Dr. Gireesan indicate that the Petitioner was seen on September 20, 2011, complaining of pain to the low back area. She reported that epidural injections had helped her. She was diagnosed with discogenic low back pain, L4-L5 level, with right lower extremity pain, aggravated as a result of the work-related injury. The Petitioner wished to pursue physical therapy at that time, and to continue full duty work. (Pet. Ex. 4)

The Petitioner sustained a new accident at work on September 29, 2011, as a result of a motor vehicle accident. As a result of that accident, she sustained injury to her left knee. For that claimed work-related injury, the Petitioner completed paperwork for the filing of a worker's compensation claim through the Respondent, and thereafter received TTD and medical benefits for that claim. The Petitioner testified that she has also received a settlement for her left knee injury.

The medical records of Dr. Gireesan indicate that the Petitioner sustained injuries to her left leg and neck as a result of her accident of September 29, 2011. Petitioner denied that her neck was injured as part of the accident, and further indicated that her low back condition was not impacted in any way by this accident. The Petitioner received treatment for the left knee, including surgery, and physical therapy.

The medical records of Dr. Gireesan reflect the Petitioner also received physical therapy for the low back. When seen on November 22, 2011, primarily for her left knee and neck symptoms, the Petitioner reported that her "back pain is a lot better." At that time, her problems involved her neck and left knee. (Pet. Ex. 4)

The Petitioner was seen by Dr. Gireesan on December 27, 2011, and it was recorded that she had no pain in her back that day. Dr. Gireesan indicated the Petitioner could return to work when released for the knee condition, and that she should return for evaluation if she had back issues or neck issues. (Pet. Ex. 4)

The Petitioner testified that she returned to full duty work following the knee injury in January of 2012.

The Petitioner returned to see Dr. Gireesan on April 2, 2012, complaining of pain in the right lower back, without radiation to the right lower extremity. She reported that she returned to work in January and that the pain started back again "two weeks ago." (Pet. Ex. 4) Dr. Gireesan again diagnosed discogenic low back pain. The Petitioner was allowed to continue working full duty and wished to monitor her pain. (Pet. Ex. 4)

The Petitioner returned April 30, 2012, complaining of pain in the right lower back area, with the pain becoming worse after sitting for long periods of time. (Pet. Ex. 4) At that time, she was also complaining of pain in her left knee, and indicated that she was going to return for treatment with Dr. Bush-Joseph, who was treating her for that condition. (Pet. Ex. 4)

The Petitioner followed up with Dr. Gireesan on May 15, 2012, complaining of pain in the back area. Dr. Gireesan reviewed her prior MRI of the lumbar spine, and recommended that the Petitioner continue full duty work capacity. Dr. Gireesan gave the Petitioner the option of a lumbar fusion at the L4-L5, and possibly L5-S1 level. (Pet. Ex. 4)

The Petitioner was then seen for an independent medical evaluation with Dr. Avi Bernstein on June 28, 2012, at the request of the Respondent. By history, the Petitioner complained of a work-related injury occurring on March 23, 2011. She reported that she was doing lifting of heavy boxes and suffered a numbing sensation in the back of her right leg. She indicated that she underwent two epidural injections without improvement, but that her leg pain had definitely improved. She reported that she had since returned to work in her regular job. On that date, she still complained of low back pain, radiating to the right hip. She complained that her condition was gradually getting worse. Dr. Bernstein concluded that the Petitioner's low back pain was likely related to degenerative disc disease and not related to a work accident. The basis of his decision was a lack of documentation of injury in the initial records. Additionally, he noted that she had recovered for a period of time and returned to full duty. At that time, he disagreed with any recommendations for a spinal fusion. He found the Petitioner to have reached maximum medical improvement by that time. (Res. Ex. 2, Dep. Ex. 2)

The Petitioner followed up with Dr. Gireesan on September 11, 2012, complaining of fluctuating low back pain. She complained that the pain was worse after sitting for a long time. She also complained of increasing pain while driving. Dr. Gireesan continued to diagnose discogenic low back pain. At that time, the Petitioner indicated that she was not looking to undergo any surgery, and would continue to deal with her pain on a regular basis, managing it with over-the-counter medication. Dr. Gireesan indicated the Petitioner was not a candidate for a micro lumbar discectomy, but could consider a fusion if the pain became disabling. (Pet. Ex. 4)

Thereafter, the Petitioner did not seek additional treatment with Dr. Gireesan until May 8, 2013, complaining of increase in pain in the back over the past month. (Pet. Ex. 4)

The Petitioner followed up with Dr. Gireesan on June 11, 2013, complaining of pain in the right lower back area, made worse by prolonged sitting. Dr. Gireesan suggested the Petitioner undergo an MRI of the lumbar spine to determine if there was

any change in the Petitioner's original MRI to account for her complaints of increased low back pain. She was allowed to continue working full duty. (Pet. Ex. 4)

The Petitioner testified that she wanted to obtain the recommended MRI study, and also obtain a second opinion from another physician. The Petitioner testified that she has not returned to Dr. Gireesan for treatment since the last office visit in June of 2013.

Richard Oliverio testified on behalf of the Respondent. He has worked for the Respondent for 25 years, and is currently employed as a Station Manager. As of March 23, 2011, he was an Operations Manager, supervising 22 employees. Duties included supervising those employees as part of their business of delivering packages Mr. Oliverio testified that a work accident for the Petitioner was reported to him on May 11, 2011. Mr. Oliverio identified Respondent's Exhibit No. 1 as the Injury System Summary Screen that he input, reflecting a claimed injury for the Petitioner for a reported date of accident of March 24, 2011. (Res. Ex. 1) Mr. Oliverio indicated that in this case, he received disability notes for the Petitioner reflecting restrictions from working, but indicated that he thought it was from a non-work related injury, as no accident had been reported or input. He added that no injury statement was ever completed by the petitioner and that she was never sent to the company clinic for treatment.

The evidence deposition of Dr. Gireesan was taken on August 30, 2013. Dr. Gireesan indicated that he did not review any of the prior medical records of treatment from the Hammond Clinic. (Res. Ex. 8, p. 40) Dr. Gireesan testified that the Petitioner initially reported for treatment complaining of pain in the lower back area, with radiation to the right lower extremity, and indicated that she was lifting some boxes at work and that is when she first started experiencing pain in the low back and right lower extremity. (Pet. Ex. 8, p. 9) Dr. Gireesan testified that the Petitioner's findings on the MRI probably pre-existed an injury date, but that he felt that the condition was aggravated based upon the history of the pain starting after a work-related injury. (Pet. Ex. 8, pp. 15-16) Dr. Gireesan did not offer testimony regarding any repetitive trauma activities and causation with the Petitioner's low back condition. Dr. Gireesan agreed that the aggravation of a pre-existing condition can be temporary, especially if the condition subsides for a period of months. (Pet. Ex. 8, p. 48, 1)

The evidence deposition of Dr. Avi Bernstein was taken on March 21, 2014. Dr. Bernstein testified that as part of his examination, he reviewed the records of the Hammond Clinic from March 23, 2011 through June 31, 2011. Based on his examination and review of the records, Dr. Bernstein concluded that he could not attribute the Petitioner's low back condition with an alleged work injury. The basis for his opinion was that she did not describe the specific work injury or event to the treating doctors, even after seeing them on multiple occasions. Based on that early history, he could not associate her symptoms with a work accident. (Res. Ex. 2, p. 12) Dr. Bernstein also indicated that if a patient has an elimination of their symptoms and full functional ability, whatever condition they have may be considered as resolved, or maximum medical improvement. If the symptoms recurred, it may be attributed a

condition or a continuing degenerative change. (Res. Ex. 2, p. 14) Dr. Bernstein agreed with Dr. Gireesan that the findings on the March 31, 2011 MRI pre-existed any accident that may have occurred on March 23, 2011. (Res. Ex. 2, p. 14) Dr. Bernstein also indicated that typically low back pain resolved in three months, stemming from any aggravation, and that her symptoms and flare-ups in the future may be due to an underlying degenerative condition, but not due to the initial incident. (Res. Ex. 2, p. 16) Dr. Bernstein concluded that at the time of his examination, no further treatment was necessary as the Petitioner was functioning well, reportedly doing well, and a "benign examination." (Res. Ex. 2, p. 17)

ANALYSIS/FINDINGS OF LAW

In support of the Arbitrator's findings relating to C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? and D: What was the date of accident?, the Arbitrator finds as follows:

The Arbitrator finds that the Petitioner has failed to prove that she suffered an accident that arose out of and in the course of her employment with Respondent. Petitioner testified in court that she worked as a courier and on March 23, 2011 had made a delivery of 4 packages weighing 50 pounds. While driving in her vehicle, after the delivery, she felt pain in her low back, radiating down her left leg. There is no testimony of an incident or accident or an acute event while lifting the packages.

The initial treating records and the medical history (as provided by Petitioner) from Hammond Clinic do not reflect any history of a specific work injury or trauma in multiple office visits. Petitioner truthfully testified that she felt back pain and right leg pain while driving in her vehicle, but not when lifting any particular boxes or packages. Petitioner does not fill out work accident forms with Respondent regarding this incident although she provides them with a light duty work slip.

A claimant must prove by the preponderance of credible evidence that an injury arose out of and was in the course of employment in order to receive compensation under the Act. See, e.g. *Orsini v. Industrial Commission*, 117 Ill.2d 38, 44-45 (1987), *Parro v. Industrial Commission*, 260 Ill.App.3d 551 (1st Dist. 1993). "In the course of" refers to the time, place and circumstance under which the accident occurred, while "arising out of" refers to the origin or cause of the accident that gave rise to the injury. *Illinois Bell Telephone Co. v. Industrial Commission*, 131 Ill.2d 478, 483 (1989). It should be noted that the commission need not award compensation even if the claimant's version of relevant events is undisputed. *Smith v. Industrial Commission*, 98 Ill.3d 20 (1983).

In this case the Petitioner testified that the pain started while driving and not when lifting the boxes. A claimant's burden of proof requires more than describing an onset of symptoms. Petitioner's testimony that she had delivered four heavy boxes creates an inference that the lifting activity may have caused or contributed to the back pain. However, the Arbitrator cannot simply infer that something happened just because a medical state of ill-being exists. As the Appellate Court has noted:

> ...circumstantial evidence can only support an inference which is reasonable and probable, not merely possible. Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot reasonably be drawn.

First Cash Financial Services, v. Industrial Commission, 367 Ill.App.3d 102, 106 (1st Dist. 2006), internally citing *Mann v. Producer's Chemical Co.*, 356 Ill.App.3d 967 (2005), *Stojkovich v. Manadnock Building*, 281 Ill.App.3d 733 (1996), Carter v. Azaran, 332 Ill.App.3d 948 (2002), and *Wiegman v. Hitch-Inn Post of Libertyville*, 308 Ill.App.3d 789 (1999). That requirement has not been satisfied in this case, as it is well settled that the claimant's right to recover benefits cannot rest upon speculation or conjecture. See e.g. *County of Cook v. Industrial Commission*, 68 Ill.2d 24 (1977)

Petitioner's claim that her injury arose out of her work activities is based on such conjecture and speculation. This Arbitration finding is supported by the medical documentation of a prior work related back condition. Additionally, the findings of Dr. Bernstein, a board certified orthopedic surgeon, support the conclusion that Petitioner's condition did not arise out of her employment. Dr. Bernstein indicated a finding of no causation based upon his review of the initial treating medical records which failed to reflect a history of a work accident.

Petitioner has argued that her back injury was caused by repetitive trauma due her job duties. The Arbitrator finds no basis for an accidental occurrence based upon such a claim. It is noted that on April 13, 2001 Petitioner signed an Application for Adjustment of Claim and said claim was filed by Counsel on April 20, 2011. On October 3, 2014, post hearing, Petitioner filed an amended claim alleging a accident date of on or about 3/23/11 and indicating that the accident occurred when lifting and due to repetitive trauma and that said accident injured her person as a whole and caused herniated/bulging discs. (Resp. Ex. 17) The original application has an accident date of 3/24/11 and indicated that the accident occurred during lifting 60 pounds of boxes and caused a bulging disc.

As to the repetitive trauma claim, the Petitioner has provided no medical opinion supporting such causation. There is little or no testimony regarding the performance of repetitive work activities. Such a claim should have some progressive development of pain associated with the performance of her work activities. Petitioner's mere performance of the Petitioner's usual work activities which require driving to deliver and pick up parcels and boxes does not per-se form the basis for a repetitive trauma. Petitioner has a history of prior back pain that is unrelated to her work activities.

Respondent has argued that the Petitioner's failure to allege a specific date of accident should bar recovery. The Arbitrator notes that the testimony suggests a 3/23/11 date, the old application for adjustment of claim had a 3/24/11 date, the amended application suggests a date on or about 3/23/11 and the Petitioner's first report of the accident to Hammond Clinic on 3/24/11 indicated that she had radiating leg pain that started couple days ago. The Medical records would then indicate a possible occurrence date of 3/22/11 or earlier. There is conflict regarding the incident date throughout the record but the Arbitrator does not find this argument persuasive and rejects Respondent's argument that this warrants a denial of Petitioner's claim.

Regardless, considering the evidence adduced in its entirety, the Arbitrator finds that the Petitioner failed to demonstrate accidental injuries causing a state of ill-being within the meaning of the Act. Issues of notice, causation, Medical benefits, temporary disability benefits, and the Petitioner's request for penalties and fees are moot given the above findings.

Kelli Steffen — 12/2/14

Signature of Arbitrator — Date

STATE OF ILLINOIS)
) SS.
COUNTY OF McCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Elliott,

Petitioner,

vs.

NO. 13WC 18350

Mitsubishi Motors North America,

15IWCC0805

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, permanent disability, medical expenses, causal connection and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 30, 2015 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: OCT 30 2015
SJM/sj
o-10/15/15
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ELLIOTT, MICHAEL
Employee/Petitioner

Case# **13WC018350**

MITSUBISHI MOTORS NORTH AMERICA INC
Employer/Respondent

15IWCC0805

On 3/30/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

1694 HEYL ROYSTER VOELKER & ALLEN
VINCENT BOYLE
PO BOX 6199
PEORIA, IL 61601

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHAEL ELLIOTT
Employee/Petitioner

15IWCC0805

Case # 13 WC 18350

v.

Consolidated cases: _____

MITSUBISHI MOTORS NORTH AMERICA, 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 **GREGORY DOLLISON**, Arbitrator of the Commission, in the city of **BLOOMINGTON, ILLINOIS**, on **February 27, 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 15IWCC0805

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

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

On this date, Petitioner ***did 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 $**49,010.40**; the average weekly wage was $**942.51**.

On the date of accident, Petitioner was **51** 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.

ORDER

Having found that Petitioner failed to prove by a preponderance of the credible evidence that he sustained an accidental injury arising out of and in the course of his employment with Respondent on January 12, 2013, Petitioner's claim is hereby denied.

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

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

Signature of Arbitrator

3/26/15
Date

ICArbDec p. 2

MAR 30 2015

FINDING OF FACTS:

Petitioner filed an Application for Adjustment of Claim alleging injury to his right upper extremity as a result of working on the assembly line for Respondent, Mitsubishi Motors North America, Inc. He has alleged the date of accident as January 12, 2013. This was also Petitioner's last date of employment. Petitioner testified that as of this date, he had been employed by Mitsubishi for approximately 23 years as an assembly line worker.

Petitioner testified that on January 12, 2013, he was installing a washer bottle into a vehicle being assembled when he hit his right hand on a fender. He testified he hit his right ring finger and hyper-extended it, which caused immediate pain. Petitioner further testified he reported this injury to the Mitsubishi medical clinic that same day, but he did not receive any treatment. Petitioner provided that he informed the clinic that he was going to the hospital for treatment. Petitioner further provided that he did not report the alleged work injury to his supervisor nor did he fill out a First Report of Injury.

Respondent called Jennifer Vales to testify regarding the policies and procedures regarding work injuries at Mitsubishi. Ms. Vales testified that she is employed in an administrative capacity at the Mitsubishi medical clinic. She testified to her employment responsibilities and indicated she was familiar with the workers' compensation claim handling process as it relates to Mitsubishi. She testified that when an employee is injured, the employee will fill out paperwork either before coming to the clinic or while they are being treated at the clinic. This paperwork would include a Form 45. While Ms. Vales could not recall if she was working on January 12, 2013, she testified that it was standard policy for all visits to the clinic to be documented in an electronic file. She testified that even if an employee comes to the clinic for a Band-Aid or an ice pack, the visit is documented. She further testified that if an employee comes to the clinic and indicates they are seeking treatment elsewhere, this is documented in the employee's electronic file. Ms. Vales stated that after reviewing Petitioner's file, there was no documentation at the clinic to support Petitioner's claim he was injured on January 12, 2013 or that he ever reported the alleged injury to Respondent.

Petitioner testified that he was familiar with the process of reporting work injuries at Mitsubishi. He has filed workers' compensation claims with Mitsubishi in the past, including a prior back claim and left lower extremity claim which has since been settled. This injury occurred in 2010. Petitioner indicated during his testimony that he reported the injury regarding his right ring finger when he reported this 2010 injury. This caused some confusion during arbitration regarding the alleged accident date, but Petitioner clarified that he has hit his right ring finger in the past, similar to how he injured it on the alleged date of accident. He testified that he did not have any problems with it until the 2013 injury.

Petitioner testified that he treated at Advocate BroMenn Medical Center on January 12, 2013. Records submitted show Petitioner presented on this date with complaints of intermittent pain in the right ring finger at the PIP joint. The records indicate "He states that this has been present for awhile. He cannot cite any specific injury but states that he bumps it frequently doing his job at Mitsubishi." The record further indicate Petitioner had no numbing or tingling, and that he was seen by one of the family practice physicians two weeks prior to the visit. X-rays were taken and revealed a questionable old tiny avulsion fracture. Petitioner was diagnosed with a contusion and referred to Dr. Robert Seidl. (PX 2, RX 2)

On January 18, 2013, Petitioner presented to Dr. Robert Seidl's office at Orthopedic & Sports Enhancement Center. It appears from the records that Petitioner was seen by a Physician Assistant. Petitioner reported injury to his right ring finger "about two years ago while working at Mitsubishi…He does not report any new injury which preceded this or any change in symptoms." Petitioner reported he had been told he had a bone chip and that he continued to have pain over the course of the past several years. X-rays previously take were interpreted to show what appears to be chip on the anterior aspect of the PIP joint. Petitioner was assessed with pain to the right 4th PIP joint, possibly secondary to bone chip. The examiner advised Petitioner that he/she was not sure the symptoms were related to a bone chip in the finger. He/She wanted to review the x-ray images with Dr. Seidl or Dr. J. Anthony Dustman. Petitioner was prescribed topical Voltaran gel for symptom relief. (PX 1, RX 3)

Petitioner followed up with Dr. Dustman on February 5, 2013. Dr. Dustman confirmed a small bone chip, which was visible on the x-ray, but indicated surgery would not be helpful and could actually worsen Petitioner's condition. He recommended the use of a topical anti-inflammatory, referred Petitioner to an upper extremity specialist and released him from treatment. (PX 1, RX 3)

Petitioner was next seen by Dr. Ralph Richter of the Hand Surgery Associations of Indiana on March 1, 2013. He presented with complaints of right ring finger pain in the joint. A form contained in Dr. Richter's records show Petitioner reported that his "problem" began on January 12, 2013. Petitioner also indicated that he "…had a similar problem or previous injury to [the] area" on March 15, 2010. The doctor diagnosed right ring finger PIP joint sprain with volar plate avulsion. Petitioner was prescribed Motrin and released on a return-as-need basis. (PX 3, RX 1) Petitioner's testimony and the medical records show that Petitioner did not return for treatment with any other medical provider.

Petitioner testified that although he had hit his finger before, he "had no real problem" with his ring finger prior to the alleged date of accident. His current complaints consisted of continued pain, especially with gripping and cold weather.

With respect to (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:

An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. v. Industrial Commission,* 58 Ill.2d 226, 317 N.E.2d 515 (1974); *Warren v. Industrial Commission,* 61 Ill.2d 373, 335 N.E.2d 488 (1975). "Arising out of the employment" refers to the origin or cause of the alleged injury. The origin or cause of this injury is in dispute.

Petitioner has alleged a specific injury to his right ring finger occurring on January 12, 2013. Contrary to his testimony at arbitration, all the medical records submitted into evidence indicate this is a pre-existing condition and not related to any alleged work accident occurring on January 12, 2013. The medical records clearly show Petitioner reported an injury occurring sometime in 2010 and having ongoing pain complaints since that time. This is further evidenced by a lack of any report of injury to Respondent, and by Petitioner's own testimony during arbitration. Petitioner testified he had a similar injury in 2010 and indicated he reported the injury at that time. A claim for the right ring finger was never filed at that time. Further, any award or claim for compensation for said injury now would be time-barred pursuant to Section 6(d) of the Illinois Workers' Compensation Act.

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. Industrial Commission,* 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967); *Illinois Institute of Technology v. Industrial Commission,* 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill.Dec. 146 (1977). Based on Petitioner's testimony during arbitration, Ms. Vales' testimony during arbitration, and the medical records submitted into evidence, the Arbitrator finds Petitioner has failed to prove by a preponderance of evidence that he sustained an accident that arose out of and in the course of his employment with Respondent on January 12, 2013.

All remaining issues are rendered moot.